

TREATISE
OF THE
PLEAS OF THE CROWN;
OR,
A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT
SUBJECT, DIGESTED UNDER PROPER HEADS.

BY
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The Eighth Edition, in Two Volumes.

VOL. II.
OF COURTS OF CRIMINAL JURISDICTION AND THE
MODES OF PROCEEDING THEREIN.

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AN
ANALYSIS
OF
THE SECOND VOLUME
OF THE
Pleas of the Crown.

ALL courts of criminal jurisdiction are courts of record, ch. 1. sect. 14.
And derive their authority from the crown, ch. 1. sect. 1. &c.

The **PRINCIPAL COURTS** of this kind are,

1. The court of the lord high steward, ch. 2.
2. The court of king's bench, ch. 3.
3. The court of the constable and marshal, ch. 4.
4. The court of the justices of *oyer* and *terminer*, ch. 5.
5. The court of justices of *gaol-delivery*, ch. 6.
6. The court of the justices of *assize* and *nisi prius*, ch. 7.
7. The court of conservators of the peace, ch. 8.
8. The court of justices of the peace, ch. 8.
9. The court of sessions, ch. 8.
10. The court of the coroner, ch. 9.
11. The sheriff's tourn, ch. 10.
12. The court-leet, ch. 11.

The first thing to be done in order to the bringing of a criminal to justice is to *arrest* him.

ARRESTS are either without process from a court of record, or by virtue of such process.

And **FIRST**, arrests without such process, are either,

1. By private persons, or,
2. By public officers.

Arrests of this kind by private persons are either,

1. Such as are commanded and enjoined by law, ch. 12. sect. 1 to 8.
2. Such as are permitted by law, ch. 12. s. 8 to 18.
3. Such as are awarded by law, ch. 12. sect. 22. &c.

Arrests of this kind by public officers, are either,

1. By watchmen, ch. 13. sect. 1 to 7.
2. By constables, ch. 13. s. 7 to 12.
3. By bailiffs of towns, ch. 13. s. 12.
4. By justices of peace, which are either,
 1. By parol, ch. 13. s. 14.
 2. By warrant, ch. 13. s. 15. *to the end of the chapter.*

Persons arrested are either to be,

1. Bailed, ch. 15.
2. Committed, ch. 16.

Persons may be criminal, in preventing the bringing of offenders to public justice, several ways.

1. Before any arrest made.
2. After an arrest.

Persons may be so guilty before any arrest made.

1. By opposing an arrest, ch. 17. sect. 1.
2. By suffering a criminal to escape, ch. 17. sect. 2. 4.
3. By flying from an arrest, ch. 17. sect. 3. ch. 49. s. 14, 15, 16.

Persons may be so guilty after an arrest, either in respect of an arrest of themselves or of others.

Their offence in respect of an arrest of themselves, if without force, is called an *escape*, ch. 17. sect. 5.

If with force, it is called a *breach of prison*, ch. 18.

Their offence in respect of the arrest of others, is either,

1. Without force, or,
2. With force.

Such offences without force come under the notion of escapes, and are either.

1. By officers (ch. 19) or,
2. By private persons, ch. 20.

Such offences with force come under the notion of rescous, ch. 21.

SECONDLY, Arrests by process from a court of record may be made by virtue of two kinds of process.

1. Upon such as is awarded by the discretion of the court upon a bare suggestion, or the knowledge of the justices.
2. Upon such as is awarded on an *appeal, indictment, or information*.

Process of the first kind is generally called an *attachment*, ch. 22.

An ATTACHMENT lies either against,

1. The officers of the court, as,
 1. Sheriffs and bailiffs, ch. 22. sect. 2 to 6.
 2. Attornies, ch. 22. sect. 6 to 12.
 3. Other officers of the court, ch. 22. sect. 12.
 4. Jurors, ch. 22. sect. 14 to 25. or,
2. Against others, as,
 1. Inferior judges, ch. 22. sect. 25 to 30.
 2. Counsellors, ch. 22. sect. 30.
 3. Gaolers, ch. 22. sect. 31.
 4. Any other persons whatsoever, ch. 22. sect. 33.

Process on an *appeal, indictment, or information*, supposes such appeal, indictment, or information, to be first exhibited.

An APPEAL is either,

1. By an innocent person, which may either be writ or by bill, ch. 23.
2. By an offender confessing himself guilty, who is commonly called an Approver, ch. 23.

AN ANALYSIS OF PRINCIPAL MATTERS.

Process on an indictment or information supposes such indictment or information to be first exhibited.

INDICTMENTS (ch 25.) are of two kinds :

1. Such as are grounded on the common law, ch. 25. s. 55. to 99.
2. Such as are grounded on statute, ch. 25. sect. 99 to 118.

INFORMATIONS are of two kinds :

1. Such as are merely the suit of the king, ch. 26.
2. Such as are partly the suit of the king, and partly the suit of party, ch. 26. sect. 17.

Process on an indictment or information may be either considered,

1. In general, without any particular regard to process of out-lawry, ch. 27. sect. 1 to 113.
2. In particular, with regard to such process only, ch. 27. s. 113.

A criminal being brought into court is to be ARRAIGNED, or put upon his trial, the manner whereof may be considered,

1. As it relates to all criminals in general, ch. 28.
2. As it relates to principals and accessaries in particular, c. 29.

The party being arraigned, either,

1. Stands mute (ch. 30.) or,
2. Confesses, (ch. 31.) or,
3. Pleads.

Pleas are either,

1. Dilatory, or,
2. In chief.

The dilatory are either,

1. Declinatory, or
2. In abatement, ch. 34.

The declinatory are either,

1. Of the privilege of sanctuary, (ch. 32.) or,
2. Of the benefit of clergy, ch. 33.
3. Of transportation.

Pleas in chief are either,

1. In bar, or,
2. The general issue, ch. 38.

The principal pleas in bar are,

1. That of *autrefoits acquit*, ch. 35.
2. That of *autrefoits attain*, or,
3. That of *autrefoits convict*, ch. 36.
4. That of pardon, ch. 37.

The plea of "not guilty" is triable either,

1. By the country, or,
2. By the peers, (ch. 44.) or,
3. By battle, ch. 45.

In order for a trial by the country a jury must be returned,

1. From the proper county, ch. 40.
2. By proper process, ch. 41.
3. Before a proper court, ch. 42.

AN ANALYSIS OF PRINCIPAL MATTERS.

The Jurors being returned into court may in many cases be challenged.

Such **CHALLENGES** may be considered either,

1. Without any particular regard to aliens, or,
2. As they particularly relate to aliens, ch. 43. sect. 34. *to the end of the chapter.*

Those of the first kind are either,

1. Such as may be taken on the part of the king (ch. 43. sect. 2, 3.) or,
2. Such as may be taken on the part of the prisoner.

A challenge may be taken on the part of the prisoner, either,

1. Peremptory, (c. 43. sect. 5 to 10.) or,
2. For cause, c. 43. sect. 10 to 34.

The jury being sworn, are to be guided by their evidence, ch. 46.

Whereupon they must give some **VERDICT** either general or special, ch. 47.

JUDGMENTS in criminal cases are of two kinds,

1. Such as expressly sentence the party to the punishment proper for his crime.
2. Such as give no such express sentence.

Of judgments by such express sentence there are two kinds :

1. Such as are fixed and stated, and always the same for the same species of crimes, ch. 48. sect 2 to 14.
2. Such as are discretionary and variable according to the different circumstances of each case, ch. 48. sect 14 to 21.

Of judgments which give no such express sentence, there are also two kinds :

1. Outlawry, ch. 48. sect. 21, 22, 23.
2. Abjuration, ch. 48. sect. 24.

The most considerable consequences of an **ATTAINDER**, &c. are,

1. The forfeiture of lands and goods, ch. 49. sect. 1. to 42.
2. The loss of the wife's dower, ch. 49. s. 42 to 47.
3. The corruption of blood, ch. 49. sect. 47. *to the end of the chapter.*

Forfeitures of lands and goods are either,

1. By the common law (ch. 49. sect. 1 to 18.) or,
2. By statute, ch. 49. sect. 18 to 30.

Judgments may be avoided, either,

1. Without writ of error, (ch. 50. sect. 10 to 17.) or,
2. By writ of error.

They may be avoided by writ of error, either,

1. For faults apparent in the record, (ch. 50. sect. 1.) or,
2. For matters *dehors* the record, (ch. 50. sect. 2 to 10.)

The party condemned is either to be,

1. Reprieved, (ch. 51. sect. 8, 9.) or,
2. Executed, ch. 51. sect. 1 to 8.

ERRATA.

Page 22, line 21, for " present," read " preter."

Page 126, line 6 from the bottom, after the word " conspirators," insert " they were taken away."

Page 263. ch. 5. for " sufficient," read " insufficient."

A
TREATISE
OF
THE PLEAS OF THE CROWN.

BOOK II.

CHAP. I.

OF COURTS OF CRIMINAL JURISDICTION.

HAVING, in the first book, endeavoured to shew the nature of criminal offences, I am now to shew, in what manner the offenders are to be brought to punishment.

In order hereto, I shall consider the nature of the courts which have jurisdiction over such offences, and in what manner the offenders are to be proceeded against by such courts.

For the better understanding of the nature of such courts, I shall premise some considerations concerning them in general, and then consider the nature of the principal of them in particular.

As to the nature of such courts in general, I shall consider, What is requisite to the constitution of their authority, and what is incidental to all such courts in general.

Sect. 1. I shall take it for granted, That the king, being the supreme magistrate of the kingdom, and entrusted with the whole executive power of the law, no court whatsoever can have any such jurisdiction, unless it some way or other derive it from the crown.

S. P. C. 54, 55.
1 Roll. Ab.
361.

Sect. 2. Yet it seems that the king himself cannot sit in judgment upon any indictment, because he is one of the parties to the suit; and therefore where it is said in some of our ancient histories, that our kings have sometimes sat in person, with the justices, at the arraignment of great offenders, probably it ought not to be intended that they came as judges, but as spectators only, for the greater solemnity of the proceeding.

Dalt. c. 1.
S. P. C. 54.
4 Inst. 71.
2 R. 3, 11.
Speed, 521.
524.
1 R. Ab. 535.
12 Co. 64.
Dyer, 187.

(a) 4 Inst. 70,
71. 103.
8 H. 4. 13.
2 R. 3. 11.

(b) Madox, 5
to 17. and 56
to 85.
Dalt. 1.

(c) 28 Ass. 52.

(d) 4 Inst. 73.
1 Comm. 268.

6 H. 7. 4.
B. Pat. 53.
4 Inst. 125.
127.
6 Co. 11.
2 Hale, 105.
Skin. 273.
4 Term Rep.
111.

4 Inst. 87.
1 Sid. 338.
The king cannot
grant a mere
spiritual juris-
diction, as to
ordain, institute, &c. to a lay person, nor can he exercise them himself; but must administer those laws
by bishops, as he does the common law by judges. Cro. Eliz. 259. 314.

42 Ass. 12, 13.
4 Inst. 164.
B. Commiss. 15.
F. N. B. 110.
B. Indict. 22.
38. 12 Co. 31.

42 Ass. 5.
B. Commiss. 3.
15, 16.
2 Inst. 54. 478.
12 Co. 30, 31.
(a) See the case
of General War-
rants, 11 St. Trial.

(b) 4 Inst. 163.
245.
18 E. 3. 14.
(c) 2 Inst. 478.

Sect. 3. It is said by Sir Edward Coke (a), that the king has committed and distributed all his power of judicature to several courts of justice; and though it may be argued, with the highest probability, both from the nature of the thing, and the constant tenor of our ancient records and histories since the conquest (b), and also from the form of all process in the King's Bench and Chancery, which is always made returnable before the king himself (c), that in old time our kings in person often determined causes between party and party, proper for those courts; yet at this day, by the long, constant, and uninterrupted usage of many ages, our kings seem to have delegated their whole judicial power to the judges of their several courts (d), which, by the same immemorial usage, have gained a known and stated jurisdiction, regulated by certain and established rules, which our kings themselves cannot alter without an act of parliament.

Sect. 4. For it seems to be clearly agreed, that the king cannot give any addition of jurisdiction to an ancient court, but that all such courts must be holden in such manner, and proceed by such rules and in such cases only, as their known usage has limited and prescribed; and from hence it followeth, that as the court of King's Bench cannot be authorised to determine a mere real action between subject and subject, so neither can the court of Common Pleas to inquire of felony or treason.

Sect. 5. Nay, it is said by some, that the king is so far restrained by the ancient forms in all cases of this nature, that his grant of a judicial office for life, which has been accustomed to be granted only at will, is void.

Sect. 6. And the law is so jealous of any kind of innovation in a matter so highly concerning the safety of the subject, as not to endure any the least deviation from the old known stated forms, however immaterial it may seem; as will be more fully shewn in chapter the fifth, sect. 2.

Sect. 7. From the like reason it follows, that commissions to seize the goods and imprison the bodies of all persons who shall be notoriously suspected of felonies or trespasses, without any indictment or other legal process against them, are illegal and void (a).

Sect. 8. And it is said, that the king cannot grant any new commission whatsoever that is not warranted by ancient precedents, however necessary it may seem, and conducive to the public good; and therefore (b) commissions to assay weights and measures, being of a new invention, were condemned by parliament. And it is said by (c) Sir Edward Coke, that the king could not authorise persons to take care of rivers and the fishery therein, according to the method prescribed by the statute of Westminster the Second, c. 47. before the making of that statute.

Sect. 9. As all judges must derive their authority from the crown by some commission warranted by law, they must also exercise

exercise it in a legal manner, and hold their courts in their proper persons; for they cannot act by (a) deputy, nor any way transfer their power to another, as the (b) judges of ecclesiastical courts may.

Sect. 10. (c) But it seems, that regularly where there are divers judges of a court of record, the act of any one of them is effectual, especially if their (d) commission do not expressly require more.

Con. Dalis. 24. Hob. 70. 2 R. Ab. 673. Crom. 121. (d) 27 Ass. 23. 2 R. Abr. 677.

Sect. 11. It hath been (e) resolved, that by the common law all patents of the justices of either bench, barons of the exchequer, sheriffs, escheators, commissioners of oyer and terminer, gaol-delivery, and of the peace, are determined by the death of the king who made them. Also it seems (f) certain, that at the common law (before 1 Edw. 6. c. 7. set forth more at large ch. 6.) if one had been convicted of any offence before any such commissioners, and the king had died before judgment, no judgment at all could have been given, because the king was dead for whom the judgment was to have been given, and because the authority of the judges was determined. Also it is said, that at (g) common law a person attainted in the time of a former king, could not have been executed without a new warrant. Yet it hath been adjudged, that the authority of (h) a coroner or verderor ceases not by the demise of the king in whose reign they were chosen; and that the office of a (i) sheriff, in such places where he is chosen by a corporation having by its charter the inheritance of the office, does not determine by the demise of the king; from whence it seems also to follow, that no other corporation officer, who by the charter is invested with any judicial authority, loses it by such demise.

Sect. 12. And to prevent the disorders and other inconveniences which may happen upon the death of a king, from the want of persons armed with competent authority to execute the laws, before the successor can have time to appoint others, it was enacted by 7 and 8 Will. 3. c. 27. s. 21. "That no commission, either civil or military, shall cease, determine, or be void, by reason of the death and demise of his said majesty, or of any of his heirs or successors, kings or queens of this realm; but that every such commission shall be, continue, and remain in full force and virtue, for the space of six months next after any such death or demise, unless in the meantime superseded, determined, or made void by the next and immediate successor, to whom the imperial crown of this realm, according to the act of settlement in the said statute before-mentioned, is limited and appointed to go, remain, or descend."

Sect. 13. And by 1 Anne, st. 1. c. 8. s. 2. "No patent or grant of any office or employment, either civil or military, hereafter to be made, shall cease, determine, or be void, by reason of the death or demise of any king or queen of this realm; but every such patent or grant shall be, continue, and remain in full force for six months next after any such death or demise, unless in the meantime superseded, determined, or made void

(a) 1 R. Abr. 382.
6 Modern, 87.
9 E. 4. 30, 31.
B. Judg. 11.
(b) Latch. 7.
(c) B. Cor. 201.
14 H. 4. 34, 35.
23 Ass. 7.
39 H. 6. 41.
S. P. C. 53.
(e) Dalis. 15.
Benl. 79.
Dyer, 165.
1 And. 44.
4 E. 4. 44.
B. Judg. 32.
1 E. 5. 1.
Crom. Jur. 126.
(f) 7 Co. 31.
(g) 1 Ass. 8.
B. Cor. 66.
(h) Dalis. 15.
Dy. 165.
2 Inst. 175.
1 Lev. 120.
B. Cor. 201.
Commis. 19.
Crom. Jur. 126.
Qu. 4 E. 4. 44.
B. Officer, 25.
denied in
S. P. C. 49.
(i) 7 Co. 30.

L. Raym. 747.

" by the next immediate successor, to whom the crown is limited
 " and appointed to go, remain, or descend."

The proceedings on an information in the nature of *quo warranto* are not abated by the demise of the crown, *Stra.* 782.; but the king's writ of error in a *quare impedit*, abates by his death. *Stra.* 843.
 (b) Held to extend to a *scire facias*, brought for the repeal of letters patent. *Lucas*, 355.

Originally judges were appointed *durante bene placito*, 4 *Inst.* 75.

By 1 Anne, st. 1. c. 8. s. 5. " No commission of assize, oyer and terminer, general gaol-delivery, or of association, writ of admittance, writ of *si non omnes*, writ of assistance, or commission of the peace, shall be determined by the death of any king or queen of this realm; but every such commission and writ shall be and continue in full force for six months next ensuing, notwithstanding such demise, unless superseded and determined by the next successor: And also no original writ, (a) writ of *nisi prius*, commission, process, or proceedings whatsoever, in, or issuing out of, any court of equity, nor any process or proceedings upon any office or inquisition, nor any writ of *certiorari*, or *habeas corpus*, in any matter or cause, either criminal or civil, nor any writ of attachment or process for contempt, &c. shall be determined, abated, or discontinued, by the demise of any king or queen of this realm; but every such writ, &c. shall remain in full force, to be proceeded upon, as if such king or queen had lived."

† Also by 12 and 13 Will. 3. c. 2. (which limits the crown to the princess Sophia) it is enacted, " That after the said limitation shall take effect in the manner mentioned in the act, judges' commissions shall be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both houses of parliament it may be lawful to remove them."

† And for the purpose of rendering more effectual the provisions of the above statute, it is enacted by 1 Geo. 3. c. 23. " That the commissions of judges for the time being shall be, continue, and remain in full force, during their good behaviour, notwithstanding the demise of his majesty, or of any of his heirs and successors.—Provided always, that it may be lawful to remove any judge or judges upon the address of both houses of parliament."

As to what is incidental to all such courts in general, I shall only take notice of the following particulars:

Sect. 14. FIRST, That all courts of this kind must be courts of (b) record; for a court which is not of record, cannot impose any fine on an offender, nor award a *capias* against him, nor even hold plea of a common trespass *vi et armis*. From hence it clearly follows, that no proceedings of any court of criminal jurisdiction can be removed into a superior, but by writ of error, or *certiorari*; and that no averment can be taken against the truth of any thing recorded in any such court (c); and that all courts of common law that have power given them to fine and imprison, are thereby made courts of record.

(b) 2 *Inst.* 311.
Farres, 128.
Reg. 111.
F. N. B. 83.
 16. 239.
 1 *R. Abr.* 543.
Co. Lit. 117.
 2 *Lev.* 93.
 1 *Mod.* 215.
 3 *Lev.* 305.
 8 *Co.* 38.
 (c) *Salk.* 200.

Sect. 15. SECONDLY, That (d) all such courts may enjoin the people to keep silence under a pain, and impose reasonable fines, not only on such as shall be convicted before them of any crime on a formal prosecution, but also on all such as shall be guilty of any contempt in the face of the court, as by giving opprobrious language to the judge, or obstinately refusing to do their duty

(d) 11 *H. 6.* 12.
 1 *R. Abr.* 219.
 8 *Co.* 38.
 11 *Co.* 43.
C. Elis. 581.
 1 *Sid.* 145.
B. Leet, 12. 36.

duty as officers of the court; and it is said, that all such courts, except the court-leet, may also imprison all such offenders. Also it seems, (a) that even a court-leet is so far intrusted with the keeping of the peace within its own precinct, that the steward of it may, by recognizance, bind any person to the peace, who shall make an affray in his presence, sitting the court, or may commit him to ward, either for want of sureties, or by way of punishment, without demanding any sureties of him; in which case he may afterwards impose a fine according to his discretion; from whence it follows, *a fortiori*, that other superior courts of record have the like power.

(a) F. N. B. 82.
Dalt. c. 1.
Lamb. c. 3.
10 H. 6. 10.
Crom. 7.
11 Co. 43.
seems con.

Sect. 16. THIRDLY, That no judge of any such court is compellable to deliver his opinion before-hand, in relation to any question which may after come judicially before him.

1 H. 7. 26.
3 Inst. 29.

Sect. 17. That no such judge is any way punishable for a mere error of judgment, as hath been more fully shewn in the first book, chap. 17. sect. 6.

27 Ass. 23.
2 R. Ab. 77.
B. Indict. 17.
Crompt. 121, 122.
Salk. 201.

Sect. 18. It is questioned, whether all courts of record may not discharge any person arrested during his journeying to or from such courts, or necessary attendance there, by process from any other court: however, it seems to be agreed, that any such court may discharge a person who shall be so arrested in the face of it. (b)

Lamb. 403.
Qu. 1 Keb. 845.
1 Lev. 159.
1 Brown, 15.
Raym. 100.
B. Priv. 35.
Crom. 180.
Gilb. Cas. 308.

2 Stra. 987. 6 Mod. 66. 10 Mod. 333. 1 Bar. K. B. 251. Cooke's Bank. Laws, 291. 2 Black. 1113. 1 Black. 410. (b) But this privilege does not extend to capital crimes, and therefore a defendant may, on appearing on a recognizance, be arrested on a new warrant for treasonable practices, *Rex v. Kelly*, Stra. 530.

CHAP. II.

OF THE COURT OF THE HIGH STEWARD OF ENGLAND.

AND now I am to consider the nature of the principal courts of criminal jurisdiction in particular.

13 H. 8. 11.
Prynne on the
4 Institutes, 46.

FIRST, The court of the high steward of England.

SECONDLY, The court of king's bench.

THIRDLY, The court of the constable and marshal.

FOURTHLY, The court of the justices of *oyer and terminer*.

FIFTHLY, The court of the justices of gaol-delivery.

SIXTHLY, The court of the justices of assize and *nisi prius*.

SEVENTHLY, The court of conservators; justices of the peace; and the sessions.

EIGHTHLY, The court of the coroners.

NINTHLY, The sheriff's tourn.

TENTHLY, The court leet.

Sect.

4 Inst. 58, 59.
 Madox, 33.
 1 Comm. 269.
 4 Comyn. 259.
 Barr. 234.
 Kely. 56.
 Crom. of Courts,
 84.
 Fleta, l. 2. c. 2,
 3.
 2 Hale, 7.
 1 Hale, 350.
 Foster, 142.
 Lords Journ.
 12th May, 1679.
 Com. Journ.
 15th May, 1679.
 3 Inst. 28.
 13 Il. 8. 11.
 4 Inst. 59.
 S. P. C. 152.
 Post, ch. 44.

Sect. 1. The office of HIGH STEWARD OF ENGLAND was anciently hereditary, not having been granted to any one since the reign of King Henry the Fourth, but only *pro hac vice*, either for the trial of a peer on an indictment for a capital offence, or for the determination of the pretensions of those who claim to hold by grand serjeanty, to do certain honourable services to the king at his coronation.

It seems needless to make a particular inquiry concerning the authority of the court of this high officer, of which very little mention is made in our ancient records or law books; and therefore I shall content myself with remarking, in this place, in general, that anciently the duty of this office consisted in supervising and regulating, next under the king, the administration of justice, and all other affairs of the realm, whether civil or military, and that no one under the degree of nobility is capable of so honourable a post; and for the particular manner of executing this office in the trial of a peer, I shall refer the reader to the chapter concerning the Trial of Peers.(1)

CHAP. III.

OF THE COURT OF KING'S BENCH.

Ante, 2.
 Mad. 19. 21.
 135.
 2 Hale, 6.
 1 R. A. 94, 95.
 2 Inst. 24.
 Vide Introduction
 to Crompt.
 Pract. passim.
 3 Comyn. 41.
 4 Comm. 262.
 Reeves's Ills.
 E. L.
 Madox, 543.
 Co. Lit. 71.
 2 Inst. 21, 22.
 Dyer, 187.
 Crompt. C. 78.
 12 Co. 64.

THE whole jurisdiction which is now distributed among the several courts of Westminster-Hall, seems, in the first reigns after the conquest, to have been lodged in one court, commonly called The King's Court, wherein justice is said to have been administered sometimes by the king himself in person, and sometimes by the high justicier, who was an officer of very great authority, and used, in the king's absence beyond sea, to govern the realm as vice-roy.

Sect. 2. Out of this court the courts of Common Pleas and Exchequer seem to have been derived, some time before the making of the statute of Magna Charta; the former of which courts properly determines pleas merely civil, and the latter those relating to the revenue of the crown. After the erection of these courts, the supreme court seems, by degrees, to have obtained the name of The Court of King's Bench, and hath always retained

(1) There are two distinct and independent courts in which a lord high steward is occasionally appointed to preside. First, the court of the lord high steward. Secondly, the court of our lord the king in parliament. The first court is instituted, by commission, for the trial of peers indicted for treason, felony, or misprision thereof during the recess of parliament; in which the high steward sits as sole judge in matters of law: and the lords triors as judges in matters of fact. They cannot, therefore, interfere with him in regulating the modes of proceeding, nor ought he to intermix with them upon the decision of facts.—Foster, 233. 4 Comm. 260. The second court is the house of peers acting in its judicial capacity, founded in immemorial usage and the law and custom of parliament; and

all proceedings, whether upon a writ of error, impeachment, or indictment removed by *certiorari*, are in contemplation of law proceedings before the king. In the trial of a peer, indeed, for a capital offence, it hath been usual to appoint a lord high steward during the trial, and until judgment is given, for the sake of order, regularity, and dignity; but this appointment does not alter the nature and constitution of the court: and in this court every temporal peer hath a right to be present during every part of the proceeding, and to vote upon every question both of law and fact; the decision of which is guided by the majority, and in which decision the lord high steward mixes merely as a peer, and in no other right.—Foster, 141, 142, 143.

tained a supreme jurisdiction in all criminal matters, and also in certain personal causes, and is still supposed to have always the king himself in person sitting in it.

For the better understanding the nature of this court, I shall consider the following particulars:—FIRST, In what manner it corrects all kinds of misdemeanors of all persons in general. SECONDLY, How far it reforms inferior courts. THIRDLY, How far its presence suspends the power of all other courts. FOURTHLY, What rules are to be observed in the form of its proceedings.

Sect. 3. As to THE FIRST POINT, It is certain, that this court is intrusted with the highest jurisdiction, not only over all capital offences, but also all other misdemeanors whatsoever of a public nature, tending either to a breach of the peace, or to the oppression of the subject; or to the raising of faction, controversy, or debate; or to any manner of misgovernment: so that whatsoever crime is manifestly against the public good, it comes within the conusance of this court, though it do not directly injure any particular person; neither can any private subject, who has not forfeited his right to the protection of the law, suffer any kind of unlawful violence or gross injustice against his person, liberty, or possessions, from any person whatsoever, without a proper remedy from this court, not only for satisfaction of the private damage, but also for the exemplary punishment of the offender.

Sect. 4. Neither is it necessary in a prosecution of any such offence in this court, to shew a precedent of the like crime formerly punished here, agreeing with the present in all its circumstances; for this court being the *custos morum* of all the subjects of the realm, wherever it meets with an offence contrary to the first principles of common justice, and of dangerous consequence to the public, if not restrained, will adapt such a punishment to it as suitable to the heinousness of it.

Sect. 5. And so high a trust doth the law repose in the justice and integrity of this court, as generally to leave it to the discretion of its judges to inflict such fine and imprisonment, and even infamous punishment, on offenders, as the nature of the crime, considered in all its circumstances, shall require; neither doth it confine them to make use of their own prison, but leaves them at liberty to commit offenders to any prison in the kingdom which they shall think most proper, and doth not suffer any other court to remove or bail any persons condemned to imprisonment by them.

Sect. 6. Also this court hath such a sovereign jurisdiction in criminal matters, that it may proceed as well on indictments found before other courts, and removed into this by *certiorari*, as on indictments or informations originally commenced in it, whether the courts before whom such indictments were found be determined, or suspended, or still in *esse*, and whether the proceedings be grounded on the common law, or on some statute making a new law concerning an old offence, and appointing certain justices to execute it, as the statutes of forcible (a) entries, and the

2 Hale, c. 1. 13.
11 Co. 98.
Ray. 103.
1 Roll. 225.
4 Inst. 71.
1 Sid. 211.
4 Comm. 262.

1 Sid. 168.
3 Ruff. S. 133.

So they may direct their warrant to all the constables of England.
The King v. White, B. R. II. 37.

Moor, 666. 1 Sid. 145.

Dalis. 25.
Carth. 6.
2 Hale, 3.
1 Mod. 35.
44 E. 3. 31.
Crompt. Jur. 131.

(a) 9 Co. 113.
Book 1.

(a) C. Car. 465. the statute (a) of Philip and Mary against persons taking away females under the age of sixteen from their guardians, (b) &c. Neither doth a statute which appoints, that all crimes of a certain denomination shall be tried before certain judges, exclude the jurisdiction of this court, without express negative words; upon which ground it has been resolved, That (c) 33 Hen. 8. c. 12. which enacts, That all "treasons, &c. within the king's house" shall be determined before the lord steward of the king's house, " &c." does not restrain this court from proceeding against such offences. But where a statute creates a new offence, (d) which was not taken notice of by the common law, and erects a new jurisdiction for the punishment of it, and prescribes a certain method of proceeding, it seems questionable how far this court has an implied jurisdiction in such a case.

Sect. 7. But it is certain that the law has so high a regard to this court, that it will not suffer a record (e) regularly removed into it from an inferior one, to be remanded (f) after the term in which it came in (except in some few (g) special cases); yet if the justices perceive that there is any practice in endeavouring to remove any such record, or that the sole intention of such removal is the delay of justice, they may, on their discretion, refuse to receive such record, and may, before it is filed, remand it back again, for the expedition of justice; and upon this ground, (h) as I suppose, where one (who had pleaded not guilty to an appeal below, and at his trial had challenged so many of his jury that the inquest could not be taken for want of jurors, whereupon a new *distringas* was awarded) removed himself into the court of King's Bench, he was ordered to be remanded. Also by the construction of the statutes which impower the common-law courts of Westminster to grant a *nisi prius* (i) for the trial of issues joined in those courts, the justices of the King's Bench may grant such trial, as well in cases of treason and felony as in other common cases; because, for such trial, not the record itself is sent down, but only the transcript of it. (k)

Sect. 8. And by 6 Hen. 8. c. 6. it is recited, "That divers felons and murderers, upon feigned and untrue surnises, had oftentimes removed as well their bodies as their indictments, by writ and otherwise, before the king, in his bench, and could not by the order of the law be remitted and sent down to the justices of gaol-delivery, or of the peace, nor other justices, nor commissioners, to proceed upon them after the course of the common law:" and thereupon it is enacted, "That the justices of the King's Bench have full authority by their discretions, to remand and send down as well the bodies of all felons and murderers, brought or removed before the king, in his bench, as their indictments, into the counties where the same murders or felonies have been committed and done; and to command all justices of gaol-delivery, justices of peace, and all other justices and commissioners, and every of them, to proceed and determine upon all the aforesaid bodies and indictments so removed, after the course of the common law, in such manner as the same justices of gaol-delivery, justices of peace, and other commissioners, or any of them, might or should have done, if the said prisoners

Crom. Jur. 213.
2 Hale, 3, 4. 41.

"prisoners or indictments had never been brought into the said King's Bench."

Sect. 9. In the construction of this statute it seems to have been holden, That it shall not be extended by equity to High Treason. Ray. 367.

Sect. 10. As to THE SECOND POINT, viz. How far the court of King's Bench reforms inferior courts—There is no doubt but that this court, being the highest court of common law, hath not only power to reverse erroneous judgments given by inferior courts, but also to punish all inferior magistrates, and all officers of justice, for all wilful and corrupt abuses of their authority against the known, obvious, and common principles of natural justice, but not for mere mistakes, which an honest well-meaning man may innocently fall into. Sayer, 26. 217. 243. 267. 1 Salk. 396. Burr. 556. 785. 1162. Loft. 55. Rex v. Jackson. Term Rep. 653.

Sect. 11. As to THE THIRD POINT, viz. How far the presence of this court suspends the power of all other courts—It is certain, that this being the supreme (a) court of *oyer and terminer*, gaol-delivery, and *eyre*, doth so far suspend the power of all other justices of this kind, in the county wherein it sits, during the time of its sitting in it, (if such justices have notice (b) of its sitting there, and even without such notice, (c) as some say,) that all proceedings commenced before any such justices during such time are void. Yet it seems (d) that such justices may proceed upon indictments taken in a foreign county and removed before them, because the court of King's Bench have nothing to do with such indictments unless they be removed into it. Also there seems to be the same reason that such justices may proceed upon indictments taken before them of offences in the same county before the term; for it is said in Keilway, (e) that if an appeal be commenced before justices in *eyre*, and afterwards another appeal be brought in the King's Bench, it will be a good plea that another appeal is depending; which shews that the King's Bench ought not, without a *certiorari*, &c. to intermeddle in an appeal whereof another court is legally possessed before; and the reason seems to be the same as to indictments: and it is said in the same book, that if the King's Bench and justices in *eyre* are in one county, yet this shall not change the power of the justices in *eyre*; but that if the king will make process for any thing not commenced before the justices of *eyre*, as to such thing their power is ceased; by which it seems to be implied, that as to what was commenced before them, their power continues. However, it is certainly the safest way for any of the justices above-mentioned proceeding on any such indictment, to have a special commission for that purpose, and it is most advisable that such commission bear *teste* in the term. (a) Sum. 156. 2 Hale, c. 4. 9 Co. 118. 27 Ass. 1. 3 Inst. 27. 4 Inst. 73. (b) 21 H. 7. 29. B. Commis. 10. Port. 16. (c) Inst. 73. (d) 4 Inst. 73. Dy. 286. (e) Keilw. 152.

Sect. 12. But it is enacted by 25 Geo. 3. c. 18. "That when any session of *oyer and terminer* and gaol-delivery of Newgate, in the county of Middlesex, shall have been begun to be holden before the *essoin* day of any term, the same session shall and may be continued to be holden, and the business thereof finally concluded, notwithstanding the happening of such *essoin* day of any term, or the sitting of the said court of King's Bench at Westminster, The gaol delivery of Newgate shall not be suspended by the sitting of the King's Bench, &c.

" Westminster, or elsewhere in the said county of Middlesex;
 " and that all trials, judgments, proceedings, acts, deeds, matters,
 " and things whatsoever, and all proceedings, acts, deeds, matters,
 " and things, in pursuance of such judgments, had, made, and
 " done at such session, so continued to be holden after the essoin
 " day of any term, or the sitting of the said court of King's
 " Bench at Westminster, or elsewhere in the county of Middle-
 " sex, shall be good, valid, and effectual in law, and deemed, re-
 " puted, and taken to be so, to all intents and purposes whatso-
 " ever."

Sect. 13. And by the 32 Geo. 3. c. 48. " The justices of the
 " peace for the county of Middlesex are enabled to continue a
 " session of the peace, and of *oyer and terminer*, begun to be
 " holden before the essoin day of term and sitting of the King's
 " Bench at Westminster, notwithstanding the happening of such
 " essoin day, or the sitting of the said court of King's Bench at
 " Westminster, or elsewhere in the county of Middlesex."

Sect. 14. As to THE FOURTH POINT, *viz.* What rules are to be
 observed in the form of the proceedings of this court—It
 seemeth that all process upon writs of appeal, (a) and also all
 process upon indictments (b) removed hither by *certiorari*, from a
 foreign county, ought to be made returnable *coram nobis ubi-*
cunque fuerimus; but that all process upon bills (c) of appeal
 against one in *custodiâ mareschalli*, and perhaps also upon indict-
 ments (d) commenced in the King's Bench, ought to be return-
 able *coram nobis apud Westmonasterium*. Also it has been re-
 solved, (e) That where the court proceeds on an offence commit-
 ted in the same county wherein it sits, the process may be made
 returnable immediately; but that where it proceeds on an offence
 removed by *certiorari* from another, there must be fifteen days
 between the *teste* and return of every process. (1)

(a) Co. Ent. 57.
 58. 60.
 (b) Co. Ent.
 354, 355, 356.
 358.
 (c) Co. Ent. 52.
 58. 60.
 (d) Co. Ent.
 352, 353, 361.
 Con. Co. Ent.
 360. 363.
 (e) 9 Co. 118.
 Co. Lit. 134.
 1 Lev. 61.
 1 Sid. 72.
 2 R. Abr. 626.
 4, 5.
 2 Inst. 550, 568.

(1) The justices of this court are the sovereign
 judges of gaol-delivery and of *oyer and terminer*,
 9 Co. 118. and therefore, where proceedings are
 limited to justices of *oyer and terminer*, the court of
 King's Bench has an implied jurisdiction, 2 Hale,
 4. They are also conservators of the peace, 4 Inst.
 73. throughout the whole realm, 2 Rol. Abr. 558.
 and supreme coroners of all England, 4 Co. 57;
 and therefore, where the sheriff or coroners may re-
 ceive appeals by bill, this court may, *à fortiori*, do
 the same, 4 Inst. 73. 4 Co. 57. This court during
 the term, and any judge thereof during vacation,
 may admit persons committed for any crime to bail,
 according to their discretion, Skin. 683. Salk. 105.
 Strange, 911. 1 Com. Digest. 497. be it treason,
 murder, or any other offence, 2 Inst. 189. Latch.
 12. Vaughan, 157. Comb. 111. 298. 1 Com.
 Digest. 495. except persons committed by either

house of parliament during the sessions, Wilson,
 299. and persons committed for contempts by any
 of the king's supreme courts of justice, 4 Comm.
 300. Also where the body of an offender attainted
 in the country is removed by *habeas corpus*, and the
 record by *certiorari*, into this court, it may award
 execution, Cro. Con. 176. to be done by the mar-
 shal, 2 Hale, 5. or it may issue a mandate to the
 sheriff to perform it as the marshal's assistant,
 1 Hale, 464. And where persons put in feigned
 bail, so as not to be reached by 21 Jac. 1. this
 court may order all the parties concerned to be act
 in the pillory, Strange, 384. This court also has
 power to compel the production of examinations,
 papers, books, &c. and to do whatever may be ne-
 cessary to the attainment of justice, Strange, 384.
 954.

CHAP. IV.

OF THE COURT OF THE CONSTABLE AND
MARSHAL.

FOR the better understanding the nature of this court, it may not be improper to premise some general considerations concerning the ancient jurisdiction of those high officers before whom it is holden.

2 Com. Digest,
599.

Sect. 1. As to the office of High Constable of England, which anciently was hereditary, the same being esteemed of too high authority to be safely intrusted with any subject, but only *pro hac vice*, since the reign of King Henry the Eighth; and there being very little to be found in our ancient records and histories concerning the particular power or authority of this high office, our most learned antiquaries seem to be able to give us little more than their own conjectures concerning this matter. However, there is no doubt but that he was an officer of very great power both in war and peace; and indeed his very name imports no less; for the word "Constable" signifying in general a commander or officer, he who was called constable of England, or the king's constable, or sometimes, by the way of eminency, the constable, without any other addition, cannot but be thought to have been a person of the highest command and authority; and the statute of 13 Rich. 2. (which is at large set forth in the following part of this chapter,) restraining his jurisdiction to things touching war not determinable by the common law, in relation to which it requires him to proceed according to ancient usage, clearly supposes him to have an ancient established authority concerning these matters; and it seems to have been somewhat doubtful, before the making of the said statute, whether the constable and the marshal had not a general jurisdiction over all contracts whatsoever made beyond sea.

Dyer, 285.
4 Inst. 127.
Farresley, 125.
Spel. Gloss. 146.
Madox, 27, 28,
29.

48 E. 3. 3.
13 H. 4. 4, 5.

Sect. 2. Neither do there seem to be any greater footsteps in antiquity of the original institution of the office of the Lord Marshal, or of his power or authority; for anciently there were several officers of the king's household who were called marshals, as the marshals of his horses, of his birds, (a) and of his measures, who had certain salaries allotted them for the management or well-ordering of the things committed to their charge. And in the ancient records relating to those officers, there seems no more to be meant by having the marshalsy of a thing, than to have the oversight, or charge, or ordering of it: also, in our old records, there are some officers taken notice of by the name of marshals, who are mentioned only in general to have been servants of the king's household, without any further account of the nature of their office or duty in particular. However, we find that in the twenty-second year of King Edward the Third, the parliament granted fifteenths on divers conditions, one of which was, that there shall be no mareschalsy in England except the mareschalsy of the king, and of the guardian of England when the king shall be out of England. And it seems clear that there

(a) Madox, 30.

Madox, 30, 31.

Madox, 20. 30.
1 R. Ab. 527.

was

Madox, 31, 32,
33.

(a) Fleta, l. 2.

c. 4.

Co. Lit. 74.

(b) Madox, 33.

(c) 4 Inst. 123.

Cas. in Parl. 60.

(d) Fleta l. 2.

c. 3.

was one marshal superior to the rest, who was sometimes called the master-marshal, at other times the king's marshal, the marshal of England, or the earl-marshal, being an officer of very great authority both in war and peace, whose principal office in time of war (a) was to regulate the encampments of the army, and to assign to the troops their respective posts in the day of battle; and in the time of peace (b) to provide for the security of the king's person in his palace, to distribute the lodgings there, and to preserve peace and order in the king's household, and to be assistant to the constable in determining causes, and also to execute the orders (c) both of the court of the constable, wherein he himself sat as judge, and of the court of the high steward, (d) to which he seems to have been only an officer.

Madox, 29.

Sect. 3. But whatever might be the original institution of these officers, or the nature of their authority, it is certain their jurisdiction is at present declared, limited, and restrained, by certain acts of parliament, before the making whereof we have scarce any thing memorable on record concerning this matter.

Sect. 4. And FIRST by 8 Rich. 2. c. 5. "Because divers pleas concerning the common law, and which by the common law ought to be examined and discussed, are of late drawn before the constable and marshal of England, to the great damage and disquietness of the people:" it is agreed and ordained, "That all "pleas and suits touching the common law, and which ought to "be examined and discussed at the common law, shall not here- "after be drawn or holden by any means before the aforesaid "constable and marshal, but that the court of the same constable "and marshal shall have that which belongeth to the same court, "and that the common law shall be executed and used, and have "that which to it belongeth, and the same shall be executed and "used, as it was accustomed to be used in the time of King "Edward."

Co. Lit. 391.
4 Inst. 193.

Sect. 5. And it is further declared by 13 Rich. 2. c. 2. in the following words:—"Because that the commons do make a grievous complaint, that the court of the constable and marshal hath incroached to him, and daily doth incroach, contracts, covenants, trespasses, debt, and detinues, and many other actions pleadable at the common law, in great prejudice of the king, and of his courts, and to the great grievance and oppression of the people: our lord the king, willing to ordain a remedy against the prejudices and grievances aforesaid, hath declared in this parliament, by the advice and assent of the lords spiritual and temporal, the power and jurisdiction of the said constable, in the form that followeth:—"To the constable it pertaineth to have cogni- "zance of contracts touching deeds of arms and of war out of "the realm, and also of things that touch war within the realm "which cannot be determined nor discussed by the common law, "with other usages and customs to the same matters pertaining, "which other constables heretofore have duly and reasonably "used in their time; joining to the same, that every plaintiff shall "declare plainly his matter in his petition, before that any man "be sent for to answer thereunto. And if any will complain that "any plea be commenced before the constable and marshal that "might

" might be tried by the common law of the land, the same plaintiff shall have a privy seal of the king without difficulty, directed to the said constable and marshal, to surcease in that plea until it be discussed by the king's council, if that matter ought of right to pertain to that court, or otherwise to be tried by the common law of the realm of England, and also that they surcease in the mean time." 1 Show. 353.

Sect. 6. And it is further enacted by 1 Hen. 4. c. 14. as followeth:—" For many great inconveniences and mischiefs that often have happened by many appeals made within the realm of England before this time," it is ordained and established from henceforth, " That all the appeals to be made of things done within the realm, shall be tried and determined by the good laws of the realm, made and used in the time of the king's noble progenitors; and that all the appeals to be made of things done out of the realm, shall be tried and determined before the constable and marshal of England for the time being: and moreover, it is accorded and assented, that no appeal be from henceforth made, or in any wise pursued, in parliament in time to come."

For the better understanding of the construction of these statutes, and the nature of this court, I shall examine the following particulars:—

FIRST, How far the said court hath consuance of points of honour in general.

SECONDLY, Whether it can punish private persons for marshalling funerals.

THIRDLY, Whether it can be holden by a lord-marshal alone, without a constable.

FOURTHLY, Whether its power, as to appeals of treason, be superseded by 26 or 35 Hen. 8; or 5 and 6 Edw. 6. c. 11; or 1 and 2 Ph. and Mary, c. 10.

FIFTHLY, By what law, and in what manner it proceeds.

SIXTHLY, Whether it may be prohibited if it exceed its jurisdiction.

SEVENTHLY, Whether it can be holden by commission.

Sect. 7. As to THE FIRST POINT, It is observable, that the above-mentioned statute of 13 Rich.'2. c. 2. declares the jurisdiction of this court, in relation to things done within the realm, in these words, " To the constable pertaineth consuance, &c. of things that touch war within the realm, which cannot be determined nor discussed by the common law;"—from whence it seems to follow, that this court has nothing to do with a mere civil matter, no way relating to war; and therefore the proceedings of the court of the lord-marshal, in the time of King Charles the First, for bare scandalous words reflecting on the honour (a) or gentility of families, seem no way to be maintained. Yet it seems to be taken for granted in some books, (b) that disputes concerning (a) 7 Mod. 128.
Salk. 55.
2 Rushworth,
1055, 1056.
(b) Hob. 121.
1 Rol. 87.

(a) 2 Rushworth, 1055, 1056.

(b) Shower's Parl. Cas. 64, 65.

(c) 1 Rol. 87.

(d) 13 Hen. 4. 4, 5.

1 Lev. 230.
1 Sid. 353.
Shower, 353.
7 Mod. 128.

Cases in Parl. 58, &c.

concerning precedence, and points of honour, and satisfaction therein, are proper for this court. Neither do I find, that the proceedings therein against persons for falsely assuming the name and arms of honourable families, were censured or disallowed by the learned (a) members of the committee of the House of Commons, in the year 1639, who were appointed to inquire into the abuses of this court. And it seems to be admitted (b) in the argument of Oldis's case, that all matters of this nature are proper for this court: yet it seems to be a large interpretation to make these things relate to war, so as to come within the declaration above-mentioned; and the rule laid down in Roll's Reports, (c) that the marshal has power given him where the common law gives no remedy, seems no way maintainable from the statute; for it doth not say in general, "That to the constable pertaineth conusance of things which cannot be determined by the common law," but of "things of war, &c. which cannot be thereby determined:" (d) neither is it a conclusive argument, that a matter which is remediless by the common law, must have a remedy from some other law; yet inasmuch as by the preamble of the said statute, its chief intention appears to be to prevent incroachments on the common law, and such proceedings in matters whereof the common law hath no conusance, it cannot be said any way to incroach upon it. And inasmuch as the said statute is wholly declarative, and hath no negative words; and the constant practice, which is the best interpreter of laws, and the general opinion of lawyers, seem to countenance such proceedings; I shall not take upon me to determine how far they may be warrantable.

Sect. 8. As to THE SECOND POINT, viz. Whether this court can punish private persons for marshalling funerals. Though it should be granted, that the marshalling of public funerals belongs to the heralds, who are attendants on this court, and that no other persons without their licence can lawfully intermeddle therein; yet it does by no means follow, that the marshal has power to punish those who shall be guilty of any such incroachment; but the proper remedy seems to be by action on the case at common law, and not by a suit in this court, which by the above-mentioned statute of 8 and 13 Rich. 2. has cognizance only of such matters which cannot be determined nor discussed by the common law. And this seems to be the principal reason of Dr. Oldis's case, wherein a suit in the marshal's court against one Domville, for taking upon him, without license, to paint arms and escutcheons, and causing them to be fixed to hearses, and providing and lending palls for funerals, and painting arms for one who had no right to their use at the funeral, and marshalling several funerals, &c., was prohibited by the court of Exchequer, upon great deliberation, with the advice of the rest of the judges, and the judgment was afterwards confirmed by the House of Lords. (1)

Sect.

(1) In *Hill v. Ann*, Lord Holt said, "The ministers of this court would have the words of 13 Rich. 2. to mean coats of arms and escutcheons, matters which they very well understand; and if they find people assume arms to whom arms do

"not belong, or, at least, that those they assume do not belong to them, their way is to post them up; but by what law or justice they do this I cannot tell."—7 Mod. 128.

Sect. 9. As to THE THIRD POINT, viz. Whether this court can be holden by the lord-marshal alone, without the constable. It was strongly insisted in the arguments (a) made use of in Dr. Oldis's case, that the lord-marshal cannot hold this court without the constable; and this was also the opinion of the above-mentioned (b) learned committee of the House of Commons, in the year 1639. And it is certain, that all our ancient law-books (c) and reports (d) which speak of this court, speak of it either as the court of the constable and marshal, or of the constable only; (e) and it is observable, that the above-mentioned statute of 13 Rich. 2, which in the preamble speaks of this court as the court of the constable and marshal, in the body of the act mentions the constable only. And it is further remarkable, that wherever the constable is mentioned together with the marshal as judge of this court, he is always put before him; which seems to intimate, that he is looked upon as the principal judge of it: and it is agreed by all, (f) that the marshal cannot determine an appeal of death, or treason, without a constable. But, on the other side, it may be argued, that the reason why an appeal of a capital matter necessarily requires a constable as well as marshal, is, because the first of Henry the Fourth, which orders how such an appeal shall be brought, is express, "that it shall be tried and determined before the constable and marshal of England for the time being;" whereas the other statutes only provide against the incroachments of this court, and do not mention in what manner, or before whom, it shall be holden, but they seem to refer such questions to ancient usage; so that if, (g) before these statutes, the court was usually holden before the constable and marshal jointly and severally, (h) according to the common usage of other courts, which generally may be holden before one judge in the absence of the rest, it seems a reasonable construction of the said statutes to allow this court still to be so holden. Neither is it probable, that the lord-marshal, upon the extinguishment of the hereditary office of the constable, should from time to time, in the reigns (i) of King Henry the Eighth, Queen Elizabeth, and King James the First, hold this court by himself, without any constable, and also often be assisted therein by the judges of the common law, unless it were then well known that such his proceeding was warranted by the ancient and established usage of his court; and it is very extraordinary, that our judges and lawyers should generally (k) take it as a thing granted, that the marshal is at this day the proper judge of points of honour, &c. if it were imagined that he has no power to act without the concurrence of a constable.

Sect. 10. As to THE FOURTH POINT, viz. Whether the power of this court as to the appeals of treason, be superseded by the statutes of 26 Hen. 8. c. 13. the 35 Hen. 8. c. 2. the 5 and 6 Edw. 6. c. 11. or the 1 and 2 Ph. and Mary, c. 10. by the said statutes of Henry the Eighth and Edward the Sixth, "All treasons, &c. done out of this realm shall be inquired, heard, and determined, before the King's Bench, or before commissioners, &c. as if they had been done in the same shire wherein they shall be inquired of, &c." And by the statute of Philip and Mary, "All trials for any treason shall be only according to the due

(a) Cases in Parl. 65, 66. s. Far. 127, 128. Vide Harg. Co. Lit. p. 75. note (1).
(b) 2 Rush. 1056.
(c) S. P. C. 63. Crom. Jur. 82. 2 Inst. 51. 4 Inst. 123. Co. Lit. 261. 891.
(d) 13 H. 4. 46. 37 H. 3. 5. 48 E. 3. 3. 37 H. 6. 20, 21.
(e) 30 H. 6. 6. 13 H. 4. 5.
(f) 1 Inst. 74. Rushw. 107. 112, &c. Cases in Parl. 61. 1 Lev. 230. Hutton, 3.

(g) Cases in Parl. 60, 61.
(h) See Ch. 1. s. 10.

(i) Cases in Parl. 60, 61. Far. 126. 4 Inst. 126. 4 Comm. 264.

(k) Hob. 121. 1 Roll. 87. 2 Lev. 134. Shower, 354. 1 Sid. 353. 1 Lev. 230.

2 Hale, 163.

Cases in Par. 62.
Rushw. 107.
4 Inst. 124.

“due order and course of the common law.” Yet it hath been adjudged, That none of these statutes take away the jurisdiction of this court in relation to such treason : for the said statutes of Henry the Eighth and Edward the Sixth being wholly in the affirmative, and it being their chief intention to supply a defect in the common law, which had provided no method for the trial of such offences by jury, they shall not without express words be construed to take away the authority of an ancient court confirmed by parliament ; and therefore the abovementioned expression, “That all such treason shall be tried by the King’s Bench, &c.” shall be taken to purport no more than that “the King’s Bench, &c.” shall have authority to try them ; and as to the 1 and 2 Philip and Mary, the plain import thereof seems to be, to restore the ancient manner of trial by the course of the common law to all treasons within its jurisdiction, which had been much altered by some statutes in the former reigns ; and this is fully satisfied by abolishing all innovations in the proceedings at common law, and has no relation to cases no way within its consuance.

Rushw. 107.
Dyer, 131.
3 Inst. 24.
4 Inst. 124.

Sect. 11. As to the FIFTH POINT, viz. By what law and in what manner this court proceeds. There is no doubt but that it ought to follow its own customs and usages so far as they go, and in cases omitted, the rules of the (a) civil law. And because this is not a court of common law, a (b) condemnation in it for a capital offence causes neither forfeiture of lands nor corruption of blood ; neither can an error in its proceedings be remedied by writ of error, but only by appeal to the king : and yet the judges of the common law take notice of the jurisdiction of this court, and give credit to a certificate of its judges, for the trial of an (c) issue concerning its proceedings ; (d) for the civil law is as much the law of the land in such cases wherein it has been always used, as the common law is in others.

(a) 4 Inst. 125.
2 Inst. 51.
1 Inst. 261.
37 H. 6. 3. 20.
(b) 4 Inst. 125.
Rushw. 107.
113, &c.
Cases in Par. 62.
2 Inst. 51.
(c) 4 Inst. 125.
341.
Cases in Par. 62.
(d) 30 H. 6. 6.
37 H. 6. 3. 20.
b. 21.

Hutton, 3.

Sect. 12. It is questioned, Whether the king hath any remedy in this court against an offender by way of indictment or information by the attorney-general.

Sect. 13. As to the SIXTH POINT, viz. Whether this court may be prohibited, if it exceed its jurisdiction. It is expressly resolved in Oldis’s case, That the said court, being holden before the lord marshal only, may be prohibited by the courts of common law, if it exceed its jurisdiction ; and it is strongly insisted on in the argument of that case, That the court of the constable and marshal may also be prohibited : but there having been no court holden before a constable and marshal for these many years, and there seeming to be small likelihood of its being revived, I shall refer the reader for the further examination of this matter to the learned Sir Bartholomew Shower’s report of the said case. (2)

Cases in Par.
61. 66.

Sect. 14. As to the SEVENTH POINT, viz. Whether the said court

(3) Lord Holt doubted, it is said, whether there could be any such court as a Court of Honour. This was in the case of *Chambers v. Sir J. Jennings*, being a libel in the court of honour, for using these words, viz. “you a knight, you pitiful inconsider-

able fellow ;” upon a motion for a prohibition, and a search into precedents, none could be found of such a suit for words, and a prohibition was granted ; Holt further saying, that a prohibition would lie to a pretended court. (Salk. 535.)

court can be holden by commission. It seems to be the better opinion of the court in Parker's case, That during the lunacy of an earl marshal, it may well be holden before commissioners deputed to exercise his office; and it seems hard to say, That such commissions, founded on the plain necessity of the case, and intended to prevent a failure of justice as to cases of which no other court hath conusance, are against the purview of the PETITION OF RIGHT, made in the third year of the reign of king Charles the first; which, complaining that commissions had been granted for the trial of certain capital offences and other outrages by the martial law, under pretence whereof divers of the king's subjects had been put to death, prays, "that from thenceforth no commissions of like nature might issue forth to be executed as aforesaid."

1 Lev. 230.
1 Sid. 353.

CHAP. V.

OF THE COURT OF THE JUSTICES OF OYER AND TERMINER.

FOR better understanding of the nature of the courts of the justices of oyer and terminer and gaol-delivery, I shall premise some considerations concerning them in general, and then consider the nature of each of them in particular. 4 Comm. 266.

Sect. 1. But in the first place, it may not be improper to remark, That the prerogative authorizing those or any other justices, is inseparably united to the crown, not only by the common law but also by statute. To which purpose it is enacted by 27 Hen. 8. c. 24. "That no person or persons, of what estate, degree, or condition soever they be, shall have any power or authority to make any justices of oyer, justices of assize, justices of peace, or justices of gaol-delivery; but that all such officers and ministers shall be made by letters patent under the king's great seal, in the name and by the authority of the king's highness in all shires, counties palatine, Wales, &c. or any other his dominions, &c. any grants, usages, allowance, or act of parliament to the contrary notwithstanding."

Lamb. B. 1.
5 Co. Lit. 114.
1 Lev. 219.
Bac. El. of Law,
15, 16.

As to what belongs to justices of oyer and terminer, and gaol-delivery in general, I shall examine—

FIRST, By what kind of instruments they must be constituted.

SECONDLY, How their authority may be suspended, revived, or determined.

THIRDLY, How far the precise letter of their commissions must be observed by such justices.

FOURTHLY, What form is to be observed in the adjournment of such commissions.

FIFTHLY, How far the power given by them may be extended by other commissions to other justices, or committed to fewer than were appointed by the former.

SIXTHLY, Whether such justices can sit in one county to try in another.

SEVENTHLY, Where their records are to be kept after they are determined.

EIGHTHLY, Whether the same justices at the same time may execute both commissions.

As to the **FIRST POINT**, viz. By what kind of instrument such justices must be constituted.

(a) L. Quinto
Ed. 4. 13. 27.
42 Ass. 12, 13.
B. Ass. 384.
Commiss. 16,
18.
Indict. 22. 38,
39.
Finch, 247.
(b) 4 Inst. 164.
(c) Summary
161.
1 Hale, 23.

Sect. 2. It seems to be laid down as a general rule in some of the old books, That though a justice may be discharged by writ under **THE GREAT SEAL**, yet that he cannot be made a justice by such writ, but only by (a) commission. And it seems to be holden, both by (b) Sir Edward Coke and Sir (c) Matthew Hale, If any such justices have their authority by writ, though made in the same form and words that a legal commission ought to have, yet their proceedings are void; and yet it seems, that nothing more is meant by these expressions, if strictly examined, than that all such justices must derive their authority from such instruments as are of a known, stated, and allowed form, warranted by ancient precedents; and it is only a dispute of words whether such instruments are to be called writs or commissions; for if you take the import of the word writ from (d) Finch's definition of it, who says, That "it is a Latin letter of the king's, from his higher courts of record, in parchment, sealed with his seal, and tested by him," it seemeth that the most approved forms of commissions of oyer and terminer, &c. may well enough come under the general notion of writs, which by the last mentioned (e) author are divided into writs original and commissional. And accordingly we find, That commissions of oyer and terminer, association, and *si non omnes*, granted upon special occasions, are called writs both by the (f) Register, and also by (g) Fitzherbert, who yet seems not to approve of this general notion of the word writ, and says, That these commissions should not properly be called writs. Also it is said by Sir Edward Coke in his comment upon the statute of Westminster the second, (h) which mentions the writ of oyer and terminer, that commissions were anciently granted by writ; by which he seems to imply, That they are otherwise granted at this day; but he doth not tell us the distinction between a writ and a commission; neither can I find that the modern precedents differ from the old ones; but on the contrary, that it hath always been agreed, that it is the safest way to follow the old ones. But I must confess, that I cannot find a certain instance from any book of authority, wherein general commissions of oyer and terminer are called writs. However, as to the resolutions of the judges in the book of assizes, which are but briefly and obscurely reported, and yet seem to be the chief foundation of what is said in the later books relating to this matter, the authority thereof seems to amount to no more than the two following points:

First,

(d) Finch, 237.
Theob. Dig. of
Writs, 1, 2.

(e) Finch, 12.
318.
Theob. 2.

(f) Regi. 123,
124.
(g) F.N.B. 110,
111.
Crom. Jur. 131.

(h) ch. 32.

Vide infra, sect.
34.
42 Ass. pl. 12,
13.

First, That justices appointed by commission to hear and determine certain offences, cannot receive an additional power by writ directing them to inquire of other offences ; and this seems to be the sense of (a) Staunford and (b) Fitzherbert in relation to this matter.

(a) S.P.C. 94.
(b) Indict. 7.
B. Commiss.
16. 18.

Indict. 22. 38, 39. 12 Co. 31.

Secondly, (c), That writs empowering persons to inquire of offences, without authorizing them also to determine them, are illegal, except in such cases wherein they are allowed by ancient usage, as were (d) writs of this kind to sheriffs before the statute of 28 Edw. 3. c. 9.

(c) 12 Co. 31.

(d) Reg. 121.
S. P. C. 84.

And therefore where it is generally said in some (e) books, That commissions have been directed to certain persons to inquire of certain offences, in order to have them afterwards tried before other justices, it seems that it ought to be understood, That such commissions were in the common form of commissions of oyer and terminer, though they be spoken of only as commissions of inquiry. As to the resolution of the long (f) quinto of Edward the fourth, which is the other principal authority concerning this matter, the import thereof seems to be no more than this, that a person cannot legally be associated to justices of assize by a writ directed to such justices, reciting a commission of association to such person, and commanding the justices to receive him, unless there be also produced a commission of association directed to such person, for that the king cannot make a justice by such writ directed to others ; by which it seems to be implied, that by a proper writ he may do it. And it is certain, That the commission of association directed to the party himself, is called a writ both by the (g) Register, (h) by Fitzherbert and by (i) Finch, and also by (k) Sir Edward Coke, as well as the writ of admittance directed to the other justices. However, it seems clearly to be agreed by all these books, that the best rule of judging of the validity of any such commissions is their conformity to known and ancient precedents ; and this seems to be the best reason of the resolution in Anderson, wherein it is adjudged, that a commission to a corporation appointing some of its principal members to be justices of gaol delivery, together with those whom the kings should appoint, from time to time, is void ; for such an authority, depending on the precarious appointment of other justices, is not agreeable to the known forms of such commissions. The other reason given in that book for such newly appointed justices not joining with the former, because their authority commences at several times, seems not conclusive ; for the authority of justices appointed by writ of association is of a subsequent commencement from that of the justices in the first commission ; and yet it is certain, that such may act jointly together, as will more fully appear in the following chapter.

(e) 1 And. 106.
Vide Plow. 390.

(f) Fol. 111.
112. 29. 137.
138.

(g) Regi. 124.
(h) F.N.B. 111.
(i) Finch, 318.
(k) 4 Inst. 107.

1 Vol. p. 296.
Popham, 16.

2 Hale, 24, 25.

As to the SECOND POINT, viz. How the authority of such justices may be suspended, revived, or determined.

Sect. 3. There is no doubt but that their power is wholly suspended by the court of King's Bench sitting in the same county
c 2 for

(a) See ante ch. 3. s. 10. for which they are commissioned during the time of such sitting, especially if they have notice thereof, as hath been before shewn(a); and it seems that their jurisdiction is revived of course, when the said court no longer sits there, without any writ of *procedendo*, &c. Their authority (b) may be also suspended by a writ of *supersedeas*, which is grantable on proof that their commission was unduly granted; in which case their power may be restored by a writ of *procedendo*, without any new commission. But a commission once determined cannot be revived by any writ of *procedendo*, nor the justices authorized anew without another commission.

4 Inst. 163.

Sect. 4. Such commissions may be determined expressly or impliedly. Expressly, by an absolute repeal or countermand from the king. Impliedly, several ways.

Ch. 1. s. 11, 12, 13.

Sect. 5. First, By the demise of the king by whom they were granted. But this mischief is in a great measure obviated by late statutes, as hath been more fully shewn.

B. Commis. 4. 22.

Sect. 6. Secondly, According to some opinions, by the justice's acceptance of any new name of dignity, as that of duke, knight, serjeant, &c. But this is remedied by 1 Edw. 6. c. 7. which enacts, "That if any person, being in any of the king's commissions whatsoever, shall fortune to be made or created duke, archbishop, marquess, earl, viscount, baron, bishop, knight, justice of the one bench or of the other, or serjeant at law, or sheriff, yet that notwithstanding he shall remain commissioner," &c. But it hath been questioned, whether the dignity of a baronet, which has been created since that statute, be within the equity of it.

Cro. Car. 104.
Lit. Rep. 81.

Croin. Jur. 125.
b.
Summary, 161.
4 Inst. 165.
B. Commis. 12.
Dalis. 24, 25.
Dyer, 203.
4 Inst. 165.
1 Leon. 270.
10 Ed. 4. 7.

Sect. 7. Thirdly, by holding a session without adjourning it, if the commission have no time limited for its continuance; as where it is appointed *pro hac vice* only: but if it be granted for a certain time, or *quamdiu nobis placuerit*, it does not necessarily require any adjournment; and therefore, if the court holden by virtue of such commission break up without any adjournment, or upon a void one, as being made without the consent of the majority of the commissioners, yet it may be holden again on a new summons.

Sect. 8. Fourthly, By granting a new commission to other persons of the same nature with the former, though but for part of the district for which the former was granted, as some say. And whether (a) such new commission be for a certain time, or *pro hac vice* only, yet the former commissions shall remain (b) in force, so far as they are consistent with the latter; and therefore it seems certain that a commission of the peace is not determined, as to its authority relating to the peace, by a new commission to hear and determine felonies. But it hath been (c) holden, that it is determined as to its authority relating to felonies; but this seems justly questionable, not only as being contrary to common practice, but also because justices of peace, as such, seem to have authority by 34 Edw. 3. to hear and determine felonies, without any special clause in their commission for that purpose, as will more fully be shewn in chapter the eighth. But it seems certain

(a) Brooke, Commission, pl. 7.

(b) Ibid. 8. 24.

(c) Ibid. 8.

tain that a commission of (d) gaol-delivery shall not be determined by a new commission of oyer and terminer, because they are of different natures. (e) Also it seems to be clear, not only from 2 and 3 Ph. and Mary, c. 18. set forth more at large section twelfth, but also in cases not within the statute, that a commission of the peace for a certain town determines not the authority of the corporation having a grant from the king that the mayor and his successors shall be justices of the peace within its limits, because such a grant is irrevocable. (f) Also it seems certain, that no new commission doth determine an old one, unless the former commissioners have notice of it.

(d) Brooke, Commis. 24.

(e) Ibid. 3.

(f) Summary, 163.

1 Hale, 499.

2 Hale, 25.

4 Inst. 165.

34 Ass. 8.

B. Commis. 6.

14.

Sect. 9. Such notice may be given expressly or impliedly. Expressly, by (g) shewing the new commission to the former commissioners, which certainly determines the power of all those to whom it is shewn. Impliedly, two manner of ways.

(g) Summary, 162.

4 Inst. 165.

Keilw. 116.

Crom. Jur. 125.

Sect. 10. First, By (a) holding a session by force of the new commission, which seems to be agreed to be a matter so notorious, that the first justices shall be presumed to have notice of it.

(a) 34 Ass. 8, b. Commis. 14.

Moor, 186.

Sect. 11. Secondly, According to the general opinion, by proclaiming the new commission in the county.

2 Hale, 25.

Dyer, 355.

4 Inst. 165.

B. Commis. 6. Keilw. 116.

Sect. 12. As the authority of the justices appointed by any former commission is determined by a grant of a new one in the manner abovementioned, so likewise were all proceedings before such justices discontinued at the common law. To remedy which inconvenience it was enacted by 1 Edw. 6. c. 7. s. 6. "That no manner of process or suit made, sued, or had before any justice of assize, gaol-delivery, oyer and terminer, justices of the peace, or other of the king's commissioners, shall in any wise be discontinued by the making and publishing of any new commission or association, or by altering the names of the justices of assize, gaol-delivery, oyer and terminer, justices of peace, or other the king's commissioners, but that the new justices of assize, gaol delivery, and of the peace, and other commissioners, may proceed in every behalf as if the old commissions, justices, and commissioners had still remained and continued not altered."

Process shall not discontinue upon supersession of the commission under which it was made.

1 Sid. 348.

2 Keb. 292.

B. Cor. 178.

Sect. 13. And it is further enacted by 2 and 3 Ph. and Mary, c. 18. "That all commissions granted to any city or town corporate, not being a county in itself, for the keeping of their peace and delivery of the prisoners remaining in the gaol of any such city or town-corporate, shall stand, remain, and be good and available and effectual in the law, to all intents, constructions and purposes; the granting of any like commission of peace or gaol-delivery to any commissioner or commissioners for the conservation of the peace, or delivery of the prisoners remaining in the gaol of any shire, lathe, rape, riding, or wapentake, within the realm of England, bearing date after the said commission or commissions granted as is aforesaid to any such city or

Commissions of the peace and gaol-delivery for a county shall not vacate such commissions to a city within the county, not being a county in itself.

“ or town corporate, not being, as aforesaid, a county in itself, to
“ the contrary notwithstanding.”

12 Ass. 21.
Crom. Jur. 126.
L. Quinto, E. 4.
133.

As to the THIRD POINT, viz. How far the precise letter of such commissions must be observed by the justices.

Dalia. 25.
3 Inst. 31.
2 Hale, 24.
Summary, 160.
B. Commis. 18.
Kelynge, 57.

Sect. 14. It is said to be agreed, That if a commission of oyer and terminer, &c. be awarded to certain persons to inquire at such a place, they can neither open their commission at another, nor adjourn it thither, or give judgment there; and that if they do, all their proceedings shall be esteemed as *coram non judice*. Yet it is agreed, that justices appointed by commission *pro hac vice*, may adjourn their commission from one day to another, though there be no words in their commission to such purpose; for nothing can be more reasonable, than to intend that a general commission authorizing persons to do a thing, does implicitly allow them convenient time for doing of it.

As to the FOURTH POINT, viz. What form is to be observed in the adjournment of such commissions.

Sect. 6 and 13.

Sect. 15. Having already, in the foregoing part of this chapter, incidentally treated of the principal questions relating to this matter, I shall only take notice in this place, that it seems most

(a) Raym. 115.

proper (a) to enter all such adjournments in the present tense; yet it is said, that the entry of them in the present tense, is made

(b) 1 Sid. 348.
2 Keb. 284.
292.

good by the multitude of precedents (b): however, it is said, that this court will never intend that there was an adjournment, if no entry at all were made of it.

As to the FIFTH POINT, viz. How far the power given by such commissioners may be extended by new ones to other justices, or committed by fewer than were appointed by the former.

2 Hale, 23.

Sect. 16. It is certain, that new commissioners of this kind may be added to the former by a writ or commission of association, which, setting forth the purport of the former commission, declares the king's pleasure to associate to the persons appointed by the first, those to whom such new writ or commission is directed, provided that such new justices attend at the times and places appointed by the former; and it is usual to direct another writ to the former justices, commanding them to admit such new justices as their associates, with the proviso above-mentioned; and the writ to the persons so associated is always patent, and that to the other justices to admit them is close. But it hath been (c) resolved, that the first justices are not bound by such writ to admit the persons named in it as their associates, unless they produce such patent of association as is above-mentioned directed to themselves, as hath been more fully shewn in the first section of this chapter. And it hath been (d) questioned, whether a special commission of association, relating only to a particular cause, can associate the persons named in it to justices appointed by a general commission. Also it hath been holden, That the king can grant but one patent of association to one commission.

Reg. 124.
F. N. B. 111.
Finch, 318, 319.
Sum. 159, 162.
4 Inst. 165.

(c) L. Quinto,
E. 4. 137.

(d) L. Quinto,
E. 4. 111, 112.
130, 131.
F. Assize, 17.
3 H. 62. 10.

Sect. 17. If any justices have sat by virtue of a commission,
and

and taken divers indictments, and awarded process thereon, and they shall all, or some of them, die, the king may grant a new commission to those who are living only, or to others, commanding them to continue the proceedings begun, and to proceed upon such process, and to hear and determine all the offences in the former commission: and thereupon the king shall send a writ unto the executors of the justices who are dead, to send the rolls, records, and processes touching the premises, before the new commissioners, &c.

Reg. 128.
F. N. B. 111.
113, 114.

Sect. 18. After a writ of association, it is usual to make out a writ of *si non omnes*, directed both to the first justices, and also to those who are so associated to them; which, reciting the purport of the two former commissions, commands the justices, that if all of them cannot conveniently be present, such a number of them may proceed, &c.

Reg. 124.
F. N. B. 111.
2 Hale, 23.

As to the SIXTH POINT, *viz.* Whether such justices may sit in one county, to try offences in another.

Sect. 19. It seems agreed, that regularly all offences are to be inquired of, heard, and determined in the county wherein they were committed, and that the king cannot authorize the taking of them in another. Yet it was adjudged in the case of the City of Gloucester, that if the king grant to a city the privilege of being a county of itself, distinct from the county within which it lies, with a salvo or reservation, that the justices of oyer and terminer, &c. for the county at large may still sit in such city, such reservation makes the city still remain part of the county for such purpose, and consequently that an indictment found within such city, of an offence in the county at large, is good. (a) Also it is certain, That, by a special custom, indictments of offences within a county may be taken in a place out of it; as they are in fact taken both for Middlesex and London at the Sessions-hall at Newgate, which stands in London; for it shall be intended, that at the original division of London from Middlesex there was a special provision made for this purpose. Also it is certain, that the king may grant a special commission of oyer and terminer to sit in one county for hearing and determining offences, whereof indictments have been found in another: but it is agreed, that the trial must be by the jurors of the proper county.

2 Hale, 21, 22.
3 Inst. 27.
Sum. 162, 163.
Dyer, 286.
Pop. 16, 17.
1 And. 291,
292.
Douglas, 793.
796.

(a) Rex and
Gough, Trin.
21 Geo. 3.
Doug. 760.
Rayn. 193.
Vaugh. 140.
Wood, 619.

Cro. Eliz. 137.
Post. 22. 220.
Plow. 390.
Quare; vide
Douglas, 796.

As to the SEVENTH POINT, *viz.* Where the records of such justices are to be kept after they are determined.

2 Hale, 31. 36.
14 H. 7. 15.

Sect. 20. It is enacted by 9 Edw. 3. c. 5. "That justices of assize, gaol-delivery, and of oyer and terminer, shall send all their records and processes determined and put in execution to the exchequer at Michaelmas, every year once, to be delivered there; and the treasurer and chamberlains which for the time shall be, having a sight of the commissions of such justices, shall receive the same records and processes of the said justices under their seals, and keep them in the treasury, as the manner is, so that the justices always do first take out the estreats of the said records and processes against them, to send to the exchequer as they were wont before."

9 H. 7. 9.
B. Commiss.
17. 24.
Crom. Jur.
126. b.
2 Hale, 34.
166.
Summary, 160.
F. Cor. 47.
9 H. 7. 9.

As to the EIGHTH POINT, viz. Whether the same justices at the same time may execute both the commission of oyer and terminer, and also that of gaol-delivery.

Sect. 21. It seems certain at this day, that the same persons being authorized by both these commissions, may proceed by virtue of the one in those cases wherein they have no jurisdiction by the other, and execute both at the same time, and make up their records accordingly. But this doth not seem to have been clearly agreed in former times.

AND now I am to consider the nature of each of the above-mentioned commissions in particular; and first of that of oyer and terminer, concerning which I shall endeavour to shew, FIRST, Its several kinds. SECONDLY, To what cases the jurisdiction given by it doth extend. THIRDLY, To whom, and on what occasions it is grantable.

As to the FIRST POINT. Commissions of oyer and terminer and gaol-delivery are of two kinds: General and Special.

4 Inst. 162, 163.
Crom. Jur. 131.
Plow. 384.
2 Inst. 419.
2 Hale, 22, 23.

Sect. 22. At this day the common form of such a general commission is, to authorize the persons to whom it is directed, or three or four of them, of which number either such or such particular persons among them are specially appointed to be, to inquire by the oaths of lawful men, and by other means, of all treasons, felonies, and misdemeanors, being specially mentioned, and of all others, in such and such counties, and to hear and determine the same at certain days and places to be appointed by them, &c. For which purpose the king acquaints them, that he hath sent a writ to the sheriffs of such counties, commanding them to return a jury before them, at such days and places as shall be notified by them, in order to make inquiries of such offences, &c.

Reg. 123.

34 Ass. 8.
42 Ass. 5.
2 Inst. 419.

Sect. 23. It is observable, that the above-mentioned commission makes no mention of the suit of the party; but it seems to have been anciently the most common form of such commission to direct the justices to hear and determine offences, as well at the suit of the party as of the king.

2 Hale, 10 to 22.

Of special commissions of oyer and terminer, there are many precedents in our ancient law-books; as,

Reg. 123.
F. N. B. 110.

Sect. 24. First, For the inquiring and determining of some particularly enormous violence done to the party at whose complaint the commission is sued.

Reg. 125, 127.
F. N. B. 112,
113.

Sect. 25. Secondly, For inquiring and determining of trespasses done to the possessions of a bishopric while the temporalities were in the king's hands.

Reg. 126.
F. N. B. 112.

Sect. 26. Thirdly, For inquiring and determining of injuries offered to merchants, &c. under pretence that their ships were wrecked.

Reg. 126.
F. N. B. 112.

Sect. 27. Fourthly, For inquiring and determining of oppressions of under-sheriffs and bailiffs and other officers; after which the

the king may send a writ to the high-sheriff, commanding him, as far as in him lies, to remove such persons from their offices till such inquiries be made.

Sect. 28. Fifthly, For inquiring into the want of reparations of sea-walls, ditches, gutters, sewers, bridges, &c.

Reg. 127, 128.
4 Burn, 196.
F. N. B. 113.
1 Bac. Ab. 654.

Sect. 29. Sixthly, For hearing and determining the right and title of certain persons claiming an office, &c. Yet we find in Dyer, that the defendant sued before such commissioners demurred to the jurisdiction of the court; and it seems not to be clearly settled there whether such commission be good.

Crom. Jur. 132.
Dyer, 175.

Sect. 30. It is observable, that some of these special commissions are mentioned to be granted at the complaint of the particular persons supposed to be aggrieved; others at the complaint of divers persons in general, without naming them, and others without any complaint at all.

2 Inst. 419.
Reg. 123, 125.
127.

Sect. 31. Also there are precedents of other commissions of like nature granted on particular occasions; but such special commissions having been of late much disused, I shall refer the reader for a more exact knowledge of them to *The Register and Fitzherbert's Natura Brevium*.

As to the SECOND POINT, *viz.* To what cases the jurisdiction given by the commission of oyer and terminer doth extend.

Sect. 32. It is generally said, that the justices have no power from it to proceed against any persons, but those who are indicted before themselves; because the words of it are, that they shall "inquire, hear, and determine;" by which it seems to be implied, that they must *inquire* of an offence before they proceed to *hear* and *determine* it: But this reasoning, depending wholly on the wording of general commissions, which are made in such form, doth by no means prove that a special commission of oyer and terminer, reciting an indictment of a particular person, and authorizing the justices to send for and proceed upon it to try the offender, is not good: and accordingly we find, that the attainder of Dudley, afterwards Earl of Leicester, by virtue of such a commission, was not objected against on this account, in the arguments concerning it, reported in Plowden's Commentaries.

B. Commiss.
24.
4 Inst. 164.
Summary, 161.
12 Co. 32.
2 Hale, 21, 27.
Skin. 32.

Sect. 33. It seems to be (a) agreed, that where a statute prohibits a thing, and doth not appoint in what court it shall be punished, the offender may be indicted before justices of oyer and terminer, because the king hath a prerogative of suing in what court he will. But it hath been (b) adjudged, that if such statute appoint that the offence shall be determined in any of the king's courts of record, it can be proceeded against only in one of the courts of Westminster-hall; because those being the highest courts of record, shall be intended to be only spoken of *secundum excellentiam*; and if the act should be taken literally to intend any court of record whatsoever, the sheriff's tourn, court leet; and pie-powders, and all other inferior courts of record, would be within the purview of it: and it is farther reasonable

Crom. Jur. 131,
132.
Plow. 385,
386, &c.

(a) Dy. 236.
Crom. Jur. 382.
4 Inst. 164.

(b) Dy. 236.
6 Co. 19, 30.
C. Jac. 538.
Cro. El. 737.
C. Car. 146.
Salk. 176.

4 Inst. 164,
165.
Summary, 161.
2 Hale, 29, 30.
contra.

F. Essoin, 173.

Dy. 236.

to construe the statute to extend to the said courts of Westminster only, because the king's attorney always attends there, whose office it is, if the defendant plead a special plea, to make a replication; yet both Sir Edward Coke and Sir Matthew Hale seem to be of opinion, that on a statute so worded, the prosecution may be in any court of oyer and terminer. And indeed, seeing the above-mentioned limitation of such suits to courts of record is no more than the law would have implied if it had not been expressed, it is agreed, that if it had not been expressed the suit might be in any court of oyer and terminer, it may be reasonably argued, that it may be brought in any such court notwithstanding such limitation, according to the common maxim, *quod expressio eorum quæ tacitè insunt nihil operatur*; especially considering that the court holden before justices of oyer, &c. is a court of record of a very high nature, and much regarded by the law. As to the objection, that the construction contended for would extend such suits to all inferior courts of record, it may be answered, that it would only extend them to such courts of a general jurisdiction wherein suits of like nature may properly be brought, and not to courts of a limited authority, instituted for special purposes, and confined either to offences at the common law, as the court-leet and the sheriff's tourn are, or to contracts of a special nature, as the court of pie-powders is. As to the objection, that it is most reasonable to construe the statute to intend only such courts wherein the king's attorney attends, the same may be said in relation to prosecutions on statutes which mention no court at all wherein they shall be brought; and yet it seems to be certain, that such prosecutions may be brought in any court of oyer and terminer. Neither do I find any reason assigned, why the king's prerogative, of choosing in what court he will commence a suit, should be restrained without express words in this case, where courts are mentioned in general, more than in the others, where they are not mentioned at all. Besides it ought to be considered, that if such prosecutions are to be confined to the courts of Westminster, no offence against any such statute in any county but that wherein the King's Bench sits, could be indicted at all; for it is certain, that no offence can be inquired of out of the county wherein it was committed. Also since 21 Jac. 1. c. 4. set forth more at large in the chapter concerning Informations, which restrains all prosecutions whatsoever on penal statutes to their proper counties (as the construction of the said statutes is now settled), if suits on such statutes could be brought only in Westminster-hall, no offences out of Middlesex could be prosecuted at all.

As to the THIRD POINT, viz. To what persons, and on what occasions, commissions of oyer and terminer are grantable.

Sect. 34. It is enacted by the statute of Westminster the Second, c. 29. "that a writ of trespass (*ad audiendum et terminandum*) from henceforth shall not be granted before any justices, except justices of either bench, and justices in eyre, "unless it be for a heinous trespass, where it is necessary to "provide speedy remedy, and our lord the king of his special "grace hath thought it good to be granted."

Sect.

Sect. 35. And it is further enacted by 2 Edw. 3. c. 2. "that oyers and terminers shall not be granted but before justices of the one bench or the other, or the justices errants, and that for great hurt or horrible trespasses, and of the king's special grace, after the form of the statute above-mentioned."

Sect. 36. Also it is enacted by 34 Edw. 3. c. 1. "that writs of oyer and terminer be granted according to the statute thereof made, and that the justices which shall be thereto assigned, be named by the court and not by the party."

Sect. 37. It may perhaps be argued from the general words of these statutes, that no commission of oyer and terminer ought to be granted to any, but such justices as therein mentioned, and on such special occasions. And Sir Edward Coke, in his comment on the said statute of Westminster the Second, does not shew whether all such commissions in general are meant to be restrained by it, or such only as are of a particular nature; yet if the intention of the said statutes be fully examined, it seems reasonable to confine the purview of them to special commissions of oyer and terminer, granted at the complaint of particular persons, upon some great injury suggested to have been done to them; not only for that such special commissions, for redressing of a particular grievance at the suit of the party, seem to come more properly and generally under the notion of writs, than general commissions issued by the king as the common dispenser of justice to his people, without any particular application from, or regard to, any particular person; but also because there may be a mischief to the subject from such special commissions, which cannot be feared from general ones; for the party who sues out such a special commission, may thereupon take out a writ to the sheriff, commanding him to arrest the goods supposed to be taken wrongfully away, and to keep them in safe custody till some order be made concerning them by the justices assigned to determine the matter, which may be very inconvenient to the person complained of. Neither can it be imagined, that the statute intended to restrain general commissions to enormous trespasses, which could not but hinder the due execution of justice, which requires the punishment of all kinds of misdemeanors, of which such commissioners are the usual and proper judges. But it is reasonable indeed, that such special commissions should not be granted but upon urgent occasions; and accordingly we find precedents for the superseding of them, where the king has been informed, that he was imposed upon in granting them on a suggestion that the injury complained of was of a heinous nature, where in truth it was but a slight inconsiderable trespass.

For other particulars concerning the proceedings of justices of oyer and terminer, see the chapter concerning Approver, and the chapter concerning Process against the Jury.

2 Inst. 418.

Thel. Dig. 1, 2.
Ante, s. 1.
2 Inst. 419.

Reg. 126. 177.
2 Inst. 419.
F. N. B. 112.

Reg. 124, 125.
12 Ass. 21.

CHAP. VI.

OF THE COURT OF GOAL DELIVERY.

4 Comm. 267. **FOR** the better understanding of the nature of the commission of Gaol-delivery, I shall consider,

FIRST, What ought to be the form of it.

SECONDLY, What jurisdiction the justices authorized by it have by the common law.

THIRDLY, What by statute.

FOURTHLY, In what place they ought to hold their sessions.

Ch. 1.

Ch. 5.

4 Inst. 168.

Crom. Jur. 125.

2 Hale, 32.

For the form of the commission of gaol-delivery, vide Appendix to 4th Commentary, sect. 1.

Sect. 1. As to the **FIRST POINT.** Having already shewn that all judicial commissions must be agreeable to ancient precedents, I shall only shew in this place, the purport of the most usual commission of gaol-delivery, which is a patent in nature of a letter from the king to certain persons, appointing them his justices, or two or three of them, of which number either such or such a particular person among them is specially required to be, and authorizing them to deliver his gaol, at such a place, of the prisoners in it; for which purpose it commands them to meet at such place, at the time which they themselves shall appoint, and informs them, that for the same purpose the king hath commanded his sheriff of the same county to bring all the prisoners of the gaol, and their attachments, before them, at such day to be appointed by them.

As to the **SECOND POINT, viz.** What jurisdiction justices of gaol-delivery have by the common law.

Sum. 158.

2 Hale, 32, 33.

4 Inst. 168,

169.

11 Cor. 179.

12 Co. 32.

Sect. 2. It seems to be clear, that they may by common law proceed upon any indictment of felony or trespass, found before other justices, against any person in the prison mentioned in their commission, and not determined; and therefore these words in the statute of 4 Edw. 3. c. 2. "that the justices assigned to deliver the gaols shall have power to deliver the same gaols of those that shall be indicted before justices of the peace," seem only to be in affirmance of the common law. And herein the authority of these justices differs from that of justices of oyer and terminer; who regularly can proceed only against persons indicted before themselves, as hath been more fully shewn in the precedent chapter, section 32.

(a) Cro. Eliz.

90. 179.

B. Commiss. 24.

1 And. 111.

F. Cor. 47.

(b) 1 And.

111, 112.

Sum. 158.

2 Hale, 34.

4 Inst. 168.

Sect. 3. But it is said in some (a) books, that justices of gaol-delivery, as such, have no power to take any indictment. But the common opinion, that they have such power, seems much more agreeable to reason; for (b) surely it cannot but be implied in their commission to deliver prisons of their prisoners, that they must have authority to make such deliverance by due course of law, which cannot be without a proclamation if there be no prosecution, or a proper trial if there be one, in order to which there

there must be an accusation of record, without which the prisoner cannot be arraigned or tried.

Sect. 4. Also it hath been (a) holden, that justices of gaol-delivery, as such, have no power to deliver the gaol of persons committed for high-treason, perhaps for this reason, because this being a crime of so high a nature, and against the king himself, shall not be included in the general words of a commission, nor tried without the king's special direction. And this opinion seems to be much favoured by the preamble of the statute of 3 Hen. 5. c. 7. wherein it is recited, "That the punishment of counterfeiting money (which is a species of treason) pertaineth not to any judges of the realm, but to the king's justices before himself, or to special commissioners thereto assigned;" and thereupon it is enacted, "That justices of assize shall have power by the king's commission to hear and determine the offence above-mentioned." Yet the contrary opinion is not only warranted by very great (b) authorities, but also it seems more agreeable to reason; for since the words of the commission are general, and include all prisoners alike without any exception, why should those who are accused of treason be construed to be out of the meaning of them more than others? especially considering, that the greater the crime is for which a man is imprisoned, the greater hardship it is for him to lie under the terror of a prosecution for it, without being admitted to an opportunity of clearing his innocence; and the statute of 1 Edw. 6. c. 7. which authorizes subsequent commissioners of gaol-delivery to give judgment of death against such as were found guilty before other commissioners of gaol-delivery, of treason, &c. and reprieved before judgment, clearly supposes such justices to have power in treason as well as in other cases.

(a) S. P. C. 183.
2 Roll. 12.
Crom. Jur. 28.
F. Cor. 47.
1 And. 111.

(b) 4 Inst. 169.
Sum. 159.
2 Hale, 35.
1 And. 112.
Part sect. 4.

Sect. 5. It seems clear, from the words of the commission, that these justices have nothing to do with any persons not in custody of the prison mentioned in it, except in some special cases; for if part only of those who were accomplices to the same felony be in such prison, and other part of them out of it; such justices, for the necessity of the case, may receive an appeal against those who are out of the prison, as well as those who are in it, which appeal, after the trial of such prisoners, shall be removed into the King's Bench, and process shall issue from thence against the rest. But if those out of prison should be omitted in such appeal, they could never be put into any other, because there can be but one appeal for one felony. Also it is said both by (c) Staunford and (d) Hale, that such justices may receive an appeal by bill against one let to bail. But I cannot find any authority in the (e) books cited by them for that purpose, to warrant this opinion (1); for although it be true, that the court of King's Bench may receive an appeal by bill, against one for whom bail is filed, as being *in custodia marescalli*, yet this seems to depend on the particular usage of that court. And I do

F. Cor. 77.

9 H. 4. 1.
4 Co. 47.
S. P. C. 61.

(c) S. P. C. 64,
65. 159, 160.
(d) Sum. 179.
Dyer, 201.
Qu. 4 Inst. 169.
(e) 32 H. 6. 4.
39 H. 6. 27.
9 H. 4. 2.
13 H. 4. 10.

(1) It is said, 2 Hale, 35. that justices of gaol-delivery may receive an appeal by bill against a person being in custody; and take an indictment

against one admitted to bail, for which 21 Hen. 7. 35. a. 9 Edw. 4. 2. a. 39 Hen. 6. 27. b. are cited as authorities.

21 H. 7. 33.
F. Mainp. 12,
13.
Dyce, 99.
B. App. 11. 19.
51, 123.
Hale, 35.

do not find it said in any book, that those who are bailed by any other court, are looked upon as prisoners in the prison belonging to such court, but only in the custody of their sureties, who may detain them wherever they please. However, it seems to be agreed by all the books above-mentioned, that such justices have no more to do with one let to mainprize, than if he were at large, because such person can in no sense be said to be a prisoner, since it is not in the power of his sureties to detain him in their custody, as will be more fully shewn in the chapter concerning Bail.

4 Inst. 167.
F. Cor. 47.
Sum. 158.
2 Hale, 34.

Sect. 6. It seems clear, that such justices have not only power to discharge such prisoners as upon their trial shall be acquitted, but also all such against whom, upon proclamation made, no evidence shall appear to indict them; which neither justices of peace, nor justices of oyer and terminer can do. (2)

15 H. 7. 5.
4 Inst. 169.
Sum. 158.
2 Hale, 35.

Sect. 7. Also there seems to be no doubt, but that the justices of gaol-delivery may award execution against such prisoners as have been outlawed for felony before justices of peace.

Dyer, 205.
Sum. 160.
2 Hale, 35.

Sect. 8. Also notwithstanding the commission of justices of gaol-delivery be in strictness determined after the end of their session, yet it seems to be settled at this day, that they have power either to order the execution or reprieve of the persons who have been condemned before them.

Con. Crom.
Jur. 126.
Quare, S.P.C.
132. 77.
25 E. 3. 39.

Sect. 9. Also it is said by some, that justices of gaol-delivery may by the common law punish those who unduly bail prisoners, as being guilty of a negligent escape; but it seems needless strictly to examine this matter, since they have certainly such power by statute, as will be more fully shewn in the following part of this chapter.

As to the THIRD POINT, viz. What jurisdiction justices of gaol-delivery have by statute, I shall consider the same—First, In relation to appellees. Secondly, To irregular bailment of prisoners. Thirdly, To sheriffs, &c. refusing to receive prisoners. Fourthly, To persons convicted before former justices. Fifthly, To offences created by statute.

2 Hale, 36.

Sect. 10. To the first particular, it is enacted by 28 Edw. 1. "That they may award process into a foreign county against those who shall be appealed before them by an approver;" as shall be more fully shewed in the chapter concerning Approvers.

Sect. 11. As to the second particular, viz. The power of such justices in relation to the bailment of prisoners, it is enacted by 27 Edw. 1. c. 3. commonly called the statute *de finibus*, "That justices of assize shall deliver the gaols of counties where they take assizes, &c. and inquire if sheriffs, or any other, have let out by replevin prisoners not repleviable, or have offended in any thing contrary to the form of the statute of Westminster
" the

(2) By 14 Geo. 3. c. 20. he shall pay no fee for such discharge, but the gaoler shall receive 13s. 4d. from the county.

“ the first, c. 15. and whom they shall find guilty, they shall
 “ chasten and punish in all things according to the form of the
 “ statute aforesaid.”

Sect. 12. But this statute mentioning only justices of assize, it may perhaps be questioned, whether it is to be extended by equity to justices of gaol-delivery by special commission, not being justices of assize. F. N. B. 251.
Sum. 158.
4 Inst. 169.

Sect. 13. However, it is enacted by 4 Edw. 3. c. 2. “ That
 “ justices assigned to deliver gaols shall have power to inquire
 “ of sheriffs, gaolers, and others in whose ward persons indicted
 “ before wardens of the peace shall be, if they make deliverance,
 “ or let to mainprize any so indicted which be not mainpernable,
 “ and to punish the said sheriffs, gaolers, and others, if they do
 “ any thing against this act.”

Sect. 14. It is observable, that this statute saith only in general, that such justices shall have power to punish the offenders therein mentioned, without saying, that they shall punish them according to the form of the statute of Westminster the first, as the above-mentioned statute *de finibus* does; yet it is said, that they may punish them according to the form of the said statute of Westminster, as much as if it had been expressed. S. P. C. 77.

Sect. 15. Also it is enacted by 1 and 2 Ph. and Mary, c. 13.
 “ That if any justice of the peace of the *quorum*, or coroner,
 “ shall offend against the purview of the said statute, either as to
 “ bailing prisoners, or taking their examinations, or the informa-
 “ tion of those that bring them before them, or not putting the
 “ same in writ, or not certifying them to the next gaol-delivery,
 “ or not putting in writing the evidence given to a jury on a
 “ coroner’s inquest of murder or manslaughter, or not binding
 “ over material witnesses against persons accused of felony, to
 “ give evidence at the next general gaol-delivery, or not certifying
 “ such evidence and also such recognizances, &c. the justices of
 “ gaol-delivery of the place where such offence shall be commit-
 “ ted, upon due proof thereof by examination before them, shall
 “ for every such offence set such fine as they shall think meet,
 “ &c.” 3 Buls. 113.

Sect. 16. As to the third particular, *viz.* The power of such justices in relation to sheriffs, &c. refusing to receive prisoners, it is enacted by 4 Edw. 3. c. 10. “ That justices of gaol-delivery
 “ shall punish sheriffs and gaolers refusing to take felons into
 “ their custody from constables and townships without being
 “ paid for such receipt.” .

Sect. 17. As to the fourth particular, *viz.* The power of such justices in relation to persons convicted before former justices, it is enacted by 1 Edw. 6. c. 7. “ That where any person or
 “ persons shall be found guilty of any treason or felony, for the
 “ which judgment of death should or may ensue, and shall be
 “ reprieved to prison without judgment at that time given against
 “ him, her, or them so found guilty, those persons that at any
 “ time hereafter shall by the king’s letters patent be assigned
 “ justices to deliver the gaol where any such person or persons
 “ found 4 Inst. 691.
Vide also their
power as to
transportation,
1 vol. &c.

“ found guilty shall remain, shall have full power and authority
 “ to give judgment of death against such person so found guilty,
 “ and reprieved, as the same justices (before whom such person
 “ or persons was or were found guilty) might have done, if their
 “ commission of gaol-delivery had remained and continued in full
 “ force and strength.”

12 Co. 33.
 B. Oy. and Ter.

Sect. 18. It hath been holden that this statute extends not to convictions before justices of oyer and terminer, not only because convictions before justices of gaol-delivery only are mentioned, but because the proceedings before justices of oyer and terminer, after the oyer determined, ought to remain in the king's bench, and the records before the justices of gaol-delivery with the *custos rotulorum*.

Dalison, 20.

Sect. 19. Also it seemeth, that since the statute speaks only of persons reprieved before judgment, it gives subsequent commissioners no manner of power over persons condemned by former justices; and therefore it hath been holden, that if a person condemned by former justices, plead a pardon before their successors, they have no power to allow it, but that the record ought to be removed by *certiorari* into the king's bench, and the prisoner also by habeas corpus, and that there the pardon shall be allowed or disallowed. And from the same reason it seems to follow that subsequent justices have no (a) power from this statute to award the execution of persons condemned by former justices and reprieved by them. But if judgment had not been given by the former justices, there is no doubt but that the subsequent ones might by force of this statute have allowed the pardon, or given judgment, and awarded execution, &c. as the first might have done. (b) Also it hath been adjudged, that not only such subsequent justices as are authorized by the same king, by whom the former were commissioned, but also that the justices of the next king may have the like power by virtue of this statute.

Quære, Dyer,
 165.

(a) 2 Hale, 35.
 contra.

(b) See the statutes 6 Geo. 1. c. 23. and 8 Geo. 3. c. 15. post. ch. 33. title Transportation. 7 Co. 31.
 Dalison, 20.

Sect. 20. As to the fifth particular, *viz.* The jurisdiction of justices of gaol-delivery in relation to offences created by statute. By 33 Hen. 8. c. 9. s. 20. they may punish those who keep unlawful gaming-houses, or use unlawful games. By 5 Eliz. c. 9. s. 9. they have jurisdiction over perjury and subornation of perjury against the form of that statute. By 8 Eliz. c. 3. they may punish those who transport sheep alive. By 23 Eliz. c. 1. s. 9. they may inquire of, hear, and determine offences against that statute in not coming to church; and generally they have the like power in other statutes creating new offences, which it would be too tedious particularly to set down in this place.

Vide 19 Geo. 3. c. 74. s. 70.
 Post, c. 7. s. 20.

Sect. 21. As to the FOURTH GENERAL POINT of this chapter, *viz.* In what place justices of gaol-delivery ought to hold their sessions, it is enacted by 6 Rich. 2. c. 5. “ that justices assigned to “ take assizes and deliver gaols, shall hold their sessions in the “ principal and chief towns of every of the counties where the “ shire courts of the same counties were then holden, or hereafter “ should be holden.” For other matters relating to these justices, see chapter 7. concerning Justices of Assize and Nisi Prius, and the chapter concerning Process.

CHAP. VII.

OF THE COURT OF ASSIZE AND NISI PRIUS.

THE power of justices of assize, whether as such, or as justices of nisi prius, in relation to criminal matters, depending wholly on statute, I shall only take notice of the principal branches of their jurisdiction of this kind, given them by several acts of parliament; and for more particular inquiries concerning their authority in other cases, and the nature, extent, and end of their commission, shall refer the reader to Sir Edward Coke, and to Mr. Crompton. (a)

4 Inst. 158.
Co. Lit. 153.
Crompt. 304.
3 Comm. 60.
Douglas, 195.

(a) 4 Inst. 158.
12 Co. 32.
2 Crompt. Jur.
Courts, fo. 204.

The most considerable parts of their jurisdiction in criminal matters, proper to be considered in this place, are such as relate, 1. To the delivery of gaols. 2. To counterfeiters of money. 3. To appellees. 4. To conspirators, maintainers, and other offenders of the like nature. 5. To offences of sheriffs, gaolers, and other officers. 6. To capital offences tried by writ of nisi prius. 7. To the counties for which such justices of assize may be commissioned.

Sect. 2. As to the FIRST PARTICULAR, it is enacted by 27 Edw. 1. c. 3. commonly called the statute *de finibus*, "that justices assigned to take assizes, in every county where they do take assizes, as they be appointed incontinent after the assizes taken in the shires, shall remain both together if they be lay; and if one of them be a clerk, then one of the most discrete knights of the shire, being associate to him as a layman by the king's writ, shall deliver the gaols of the shires, as well within liberties as without, of all manner of prisoners, after the form of the gaol deliveries of those shires beforetimes used. And the same justices shall inquire then, if sheriffs or any other have let out by replevin persons nor repleviable, &c."

Sect. 3. Also it is recited by 2 Edw. 3. c. 2. "that offenders had been greatly encouraged, because the justices of gaol-delivery and of oyer and terminer had been procured by great men against the form of the said statute of 27 Edw. 1." and thereupon it is enacted, "that such justices shall not be made against the form of the said statute."

Sect. 4. It seems to have been the most general opinion in the construction of the abovementioned statute of 27 Edw. 1. that the purview of it extends only to cases of felony; and that is farther confirmed by the recital of the statute of 3 Hen. 5. set forth more at large in the following part of this chapter, by which it is declared, "that no judges but those of the king's bench, or special commissioners, have power to punish counterfeiters of money." Also it is argued, that the purview of the said statute of 3 Hen. 5. empowering justices of assize, having the king's commission for such purpose, to hear and determine the offences of such persons, would be vain and to no purpose, if such justices, as such, had power over such offences before, by virtue of the said former statute.

S. P. C. 57.
Raym. 375.
12 Co. 32.

S. P. C. 57, 58.

Infam. sect. 9.

Supra, c. 6. s. 4.

tute. And yet perhaps the contrary opinion is the more plausible; for since the said statute is intended for the greater expedition of justice, and the words of it expressly extend to all manner of prisoners, why should they be restrained by a violent interpretation, inconsistent with the natural and obvious sense of them? And since justices of gaol-delivery, armed only with a general commission to deliver gaols of the prisoners in them are, according to the better opinion at this day, authorised to deliver such gaols of persons accused of treason, as well as of others committed for crimes of an inferior nature, why should not the said statute, the intent whereof is to give justices of assize like power with justices of gaol delivery, be construed to give them as large a power? And as to the arguments drawn from the opinion of the makers of the above mentioned statute of 3 Hen. 5. it may be answered, that perhaps the purport of the said recital may amount to no more than this, that no other judges but those therein mentioned would venture to take upon them a power to try such offences, because it was not clearly settled that they had authority to do it.

Summary, 161.
2 Hale, 40. 403.
S. P. C. 57.
Crom. Jur. 126.
Dyer, 99.
Vide upon this point, 2 Hale, 403.

Sect. 5. It seems to be the general opinion, That justices of assize, as such, by force of the said statute of the twenty-seventh of Edward the first, may deliver gaols without any special commission for that purpose; and this seems to be the most agreeable to the purview of the said statute, if such justices be laymen; for seeing the act provides only, that if one of them be a clerk, then one of the knights of the county being associate by writ to him that is a layman, shall deliver the gaols; and makes no mention of any such writ where both are laymen; but only says in general, "that in such case they shall remain both together;" it seems to imply that laymen, being justices of assize, shall have such power of course.

See the precedent chap. sect. 4, and the 15th sect. of this chapter.

Sect. 6. As to the SECOND PARTICULAR, viz. The power of these justices in relation to counterfeiters of money, it is recited by the statute of 3 Hen. 5. c. 7. "that counterfeiting, clipping, washing, and other falsity of money, had then of late abounded, for that the punishment of the same pertaineth not to any judges of the realm, but to the king's justices before himself, or special commissioners thereto assigned, &c." and thereupon it is enacted, "that the king's justices assigned to take assizes in all the counties of England, shall have power, by the king's commissions, to hear and determine in their sessions, as well of the counterfeiting and of the bringing such false money into the realm, as of clipping, washing, and every other falsity of the said money."

S. P. C. 58.
Summary, 164.

Sect. 7. It seems clear from the manifest purport of this statute that justices of assize can claim no power from it over any of the offences therein mentioned, without a special commission for such purpose; but this statute being wholly in the affirmative, and no way intended to abridge but enlarge the jurisdiction of such justices; it seems clear, that if they had authority as justices of gaol-delivery by virtue of the abovementioned statute *de finibus*, without any special commission to deliver persons in prison for such crimes (which question is more fully handled in the precedent

dent part of this chapter), they may still lawfully proceed upon the said statute in the same manner as before.

Sect. 8. As to the THIRD PARTICULAR, viz. The power of justices of assize in relation to appellees, it is enacted by the 28 Edw. 1. commonly called the statute *de appellatis*, "that such justices may award process into any foreign county against persons appealed by approvers, and proceed against them, &c." Supra, sect. 4.
Crom. Jur. 126.

Sect. 9. It is made a doubt in Dyer's Reports, by what warrant justices of assize hold plea of an appeal of robbery; and it is there holden, that they do it by virtue of the commission of gaol-delivery. But it seems, that it ought not to be intended to be the meaning of this report, that justices of assize have no jurisdiction as to an appeal of robbery, without an express commission of gaol-delivery; for since justices of assize, as such, have power by the abovementioned statute *de finibus* to deliver gaols of all manner of prisoners, after the form of the gaol-deliveries of the shires wherein they sit, why should they not, by force of those general words, deliver such gaols of persons proceeded against by way of appeal commenced before them, as well as of those proceeded against by way of indictment, as it seems to be taken for granted in other books that they may? and therefore it seems to be reasonable to take the abovementioned report of Dyer in this sense, that justices of assize may hold plea of appeals of robbery by the commission of gaol-delivery, given them implicitly by the said statute *de finibus*, in respect whereof they seem to have all the power of justices of gaol delivery, whether given them by the common law or by statute, as fully appears from what immediately follows the abovementioned passage in the said report, wherein it is said, that "the statute of 3 Hen. 7. c. 1. gives justices of assize the power by express words as to appeals of death;" but it is certain, that the said statute of Henry the seventh does not expressly mention justices of assize, but saith only, "that the wife, &c. may commence an appeal before the sheriff and coroners, or before the king in his bench, or justices of gaol-delivery;" and yet it is holden in the said report, that this statute expressly extends to justices of assize; from which it seems manifestly to follow, that such justices are taken to be included under the general notion of justices of gaol-delivery. Dyer, 99.
Pl. 62.
12 Co. 32.
Stamf. 159.
Co. Lit. 263.

22 Ed. 4. 19.
a B. appeal, 113.
4 Inst. 159.

Sect. 10. As to the FOURTH PARTICULAR, viz. The power of justices of assize in relation to conspirators, maintainers, and other offenders of the like nature, it is enacted by 28 Edw. 1. c. 10. commonly called *Articuli super chartas*, "that justices assigned to take assizes, when they come into the county to do their office, shall upon every plaint made unto them of conspirators, false informers, and evil procurers of dozens, assises, inquests and juries, award inquest thereupon without writ, and shall do right to the plaintiffs without delay."

And by 4 Edw. 3. c. 11. it is further enacted, "that the justices of assize, whensoever they come to hold their sessions or to take inquest upon nisi prius, shall inquire, hear, and determine, as well at the suit of the king as at the suit of the party, of maintainers, bearers, conspirators, &c."

And the like is ordained by 20 Edw. 3. c. 6. by which it is enacted,

acted, "that such justices shall have commissions to inquire of
"maintainers and common embraceors, &c."

Register, 188.

Sect. 11. Also by 5 Edw. 3. c. 10. it is enacted, "that the justices before whom any assize, inquest, or jury shall pass, may inquire and determine the offence of any juror in taking money of either party, &c."

Sect. 12. But by 38 Edw. 3. c. 12. it is ordained, "that no justice, &c. inquire of offences of the said offence, but only at the suit of the party, or of other, &c."

Sect. 13. And by 32 Hen. 8. c. 9. it is further enacted, "that the justices of assize of every circuit within this realm, and elsewhere within the king's dominions, shall in every county within their circuits, twice in the year cause open proclamation to be made, as well of the said statute as of all others made against unlawful maintenance, champerty, embracery, &c."

Sect. 14. As to the FIFTH PARTICULAR, viz. The power of justices of assize in relation to the offences of sheriffs, gaolers, and other officers, it is enacted by 20 Edw. 3. c. 6. "that justices of assize shall have commissions sufficient to inquire of sheriffs, escheators, bailiffs of franchises and their ministers, and of the gifts which they take to execute their office, &c."

Sect. 15. Also by 23 Hen. 6. c. 10. it is enacted, "that justices of assize in their sessions shall have power to inquire, hear, and determine of offence without special commission, of and upon all sheriffs, under-sheriffs, clerks, bailiffs, gaolers, coroners, stewards, bailiffs of franchises, or any other officer or minister doing contrary to the said statute, as by extorting money for the omitting of an arrest, or shewing ease or favour to those who shall be arrested, or by admitting persons to bail, or denying them the benefit of it, contrary to the form of the said statute."

Sect. 16. Also, by 1 Hen. 8. c. 7. it is enacted, "that justices of assize and of the peace shall have authority to inquire of and determine, as well by examination as by presentment, the default of coroners, in not taking an inquest without fee or reward, on the view of the body of any person slain by misadventure."

1 Hale, 350.
2 Hale, 403.
Raym. 67.

Sect. 17. As to the SIXTH PARTICULAR, viz. The power of justices of assize in relation to capital offences tried by writ of nisi prius, it is enacted by 14 Hen. 6. c. 1. "that the justices before whom inquisitions, inquests, and juries, shall be taken by the king's writ of nisi prius, shall have power in all cases of felony and treason to give their judgments as well where a man is acquitted of felony or of treason, as where he is heretofore attainted, the day and place where the said inquisitions, inquests, and juries be so taken, and then from thenceforth to award execution to be made by force of the same judgments."

29 Ed. 4. 19. a.
2 Hale, 41. 403.

Sect. 18. In the construction of this statute it hath been holden, that if the plaintiff in appeal be nonsuited before justices of nisi prius, they have no power to arraign the defendant at the suit

suit of the king on the declaration in the appeal, as justices before whom an appeal is originally commenced may do. And the reason of this construction seem to be this, because the statute only mentioning that justices of nisi prius shall give judgment where the defendant is acquitted or attainted, leaves their jurisdiction upon a nonsuit as it was before. But it seems certain, that on the acquittal of an appellee such justices have power to inquire of the abettors, and also of the sufficiency of the plaintiff to answer the damages; for since the statute of Westminster the second, ch. 12. gives such power to the justices before whom an appeal shall be heard and determined; and now by force of 14 Hen. 6. it may be heard and determined before justices of nisi prius, it seems necessarily to follow, that justices of nisi prius shall have such power since the same statute of 14 Hen. 6. And from the same reasoning it seems also to follow, that such justices may give judgment for the damages; but constant experience hath overruled it to the contrary.

Dyer, 120.
Crom. Jur. 212.
4 Inst. 160.
22 Ed. 4. 19.
10 Ed. 4. 14.
2 Inst. 386.
Bro. Nisi Prius,
27.
2 Hale, 32.

As to THE SEVENTH PARTICULAR, viz. For what counties justices of assize may be commissioned.

Sect. 19. It is enacted by 8 Rich. 2. c. 2. "that no man of law shall be from thenceforth justice of assize, or of the common deliverance of gaols, in his own county."

Sect. 20. Also it is enacted by 33 Hen. 8. c. 24. "that no justice, nor other man learned in the laws of this realm, shall use nor exercise the office of justice of assize within any county where the said justice was born, or doth inhabit, on pain of one hundred pounds, &c. Provided that the said act shall not extend to any person who shall be clerk of assizes, and associate to any justice of assize, nor to any mayor, sheriff, recorder, steward, bailiff, sewer, or other officer being born or dwelling within any city, borough or town within this realm of England, &c. nor to justices of either bench for taking, hearing, or determining assizes in the one bench or the other, nor to the justice, justice-clerk or clerks, of assizes in the duchy and county-palatine of Lancaster."

+ *Sect. 21.* These two acts of Richard the Second and Henry the Eighth are explained and amended by 21 Geo. 2. c. 27. by which it is enacted, "that the justices of either bench, the barons of the exchequer, or any other persons learned in the law, who shall be appointed justices of oyer and terminer or gaol-delivery in any county in England, may use and exercise the said offices of oyer and terminer and gaol-delivery in such county, notwithstanding they or any of them shall have been born and do inhabit within any such county, without incurring the penalty of one hundred pounds imposed by 33 Hen. 8."

4 Comm. 268.

+ *Sect. 22.* And by 19 Geo. 3. c. 74. s. 70. it is further enacted, "that wherever the courts of assize, nisi prius, oyer and terminer, or gaol-delivery, for any county at large in England, shall be held in or near any city or town that is also a county of itself, and at the same time with the like or any of the like courts for the said city or town, the lodgings of the judge or judges

“judges shall be construed and taken to be situate both within
 “the county at large, and also within the county of such city or
 “town, for the purpose of transacting the business of the assizes
 “for such county at large, and for the county of such city or
 “town, during the time such judges shall continue therein for
 “the execution of their several commissions.”

CHAP. VIII.

OF THE COURT OF CONSERVATOR OF THE PEACE.

St. Tr. 317.

CONSERVATORS OF THE PEACE, by the common law, were of two sorts, **FIRST**: Those who, in respect of their offices, had power to keep the peace, but were not simply called by the name of “conservators of the peace,” but by the name of such offices, **SECONDLY**, Those who were constituted for this purpose only, and were simply called by the name of conservators or wardens of the peace.

(a) Lamb. b. 1. c. 3.
Dalt. c. 1.

Sect. 1. Of the first sort, **THE KING** (a) is certainly the principal, from whom all authority of this kind was originally derived, and who still continues to have the same in his own person. Yet it is said, (b) that he cannot take a recognizance for the keeping of the peace, because it is a rule in law, that no one can take any recognizance, who is not either a justice of record, or by commission. Also it seems certain, that (c) no duke, earl, or baron, as such, have any greater authority to keep the peace than mere private persons.

(b) B. Recog. 14. 19.
Dalt. c. 1.

(c) Lamb. b. 1. c. 3.

(d) Dalt. c. 1.
Lamb. b. 1. c. 3.
Crom. 6.
1 Leon. 70. 71.

Sect. 2. The (d) lord chancellor or lord keeper of **THE GREAT SEAL**, the lord high steward of England, the lord marshal, and lord high constable of England, and every justice of the king's bench, and, as some say, the lord treasurer, have, as incident to their offices, a general authority to keep the peace throughout all the realm, and to award process for the surety of the peace, and to take recognizance for it. And the master of the rolls hath also the like power, either as incident to his office, or at least by prescription. †But neither privy counsellors nor secretaries of state are conservators of the peace.

2 Wils. 289.

10 H. 6. 7.
Lamb. b. 1. c. 3.

Sect. 3. Also every court of record, as such, hath power to keep the peace within its own precinct, as hath been more fully shewn ch. 1. sect. 15. And the justices of gaol-delivery may take surety of the peace from a prisoner before them, who was committed for not finding such surety.

(e) Lamb. b. 1. c. 3.
12 H. 7. 17.
B. Peace. 13.
C. Car. 26.
(f) Recog. 5.
F. N. B. 81, 82.
Dalt. c. 11.

Sect. 4. Also every **SHERIFF** is a principal (e) conservator of the peace within his county, and may without doubt, *ex officio*, award process of the peace, and take surety for it. And it seems the better (f) opinion, that the security so taken by him is by the common law looked on as a recognizance or matter of record,

cord, and not as a common obligation or matter *in pais* only; for that it is taken by him by virtue of the king's commission, by which he is entrusted with the custody of the county, and consequently has by it an implied power of keeping the peace within such county; and it is a general (a) rule, that whatsoever is done by virtue of the king's commission ought to be taken as a matter of record.

Lamb. b. 1.
c. 15.
Qu. B. Recog.
5. 14. 16. 18.
(a) See the
books above
cited.
9 E. 4. 30, 31.

Sect. 5. Also every (b) CORONER is another principal conservator of the peace within the county of which he is coroner, and may certainly bind any person to the peace who makes an affray in the presence. But it seems the better opinion, that he hath no authority to grant process for the peace; and it seems clear, that the security taken by him for the keeping of the peace (except only where it is taken by him as a judge of his own court for an affray done in such court), is not to be looked on as a recognizance, but as an obligation; because it is not taken by one who acts as a judge of record, or by the king's commission, as all (c) recognizances ought to be.

(b) Crom. 6.
Lamb. b. 1. c. 3.

Sect. 6. Also every high and petit CONSTABLE are by the common law conservators of the peace within their several limits, and may take such order for the keeping of the same, as hath been more fully shewn book 1. chap. 63. sect. 13, 14, &c.

(c) See the
Book cited S.
1 Letter b. and
S. 4 Letter f.
Crom. 6.

SECONDLY, Conservators of the peace by the common law, who were constituted for that purpose only, and were simply called by the name of conservators or keepers of the peace, were of two kinds—Ordinary, and Extraordinary.

1 Comm. 34. 9.
4 St. Tr. 562.
11 St. Tr. 319.

Those of the first kind were either by tenure, or by election, or by prescription.

Sect. 7. CONSERVATORS OF THE PEACE by tenure, were those who held lands of the king by this service, among others, of being conservators of the peace within such a district.

Co. Lit. 106.
Lamb. b. 1. c. 3.
12.

Sect. 8. CONSERVATORS OF THE PEACE by election were those who were chosen to such office in pursuance of the king's writ to such purpose (as all sheriffs anciently were, and as all coroners still are) by the freeholders of a county in the county court, after which election it was usual for the king to send another writ to the persons so chosen, commanding them diligently to attend their said office till they should receive a command from the king to the contrary.

49 Hen. 3.
2 Inst. 174.

Sect. 9. CONSERVATORS OF THE PEACE by prescription were those who claimed such power from an immemorial usage in themselves and their predecessors or ancestors, or those whose estate they had in certain lands, to exercise the like power, which wholly depended upon such usage, both as to its extent, and the manner in which it was to be exercised.

B. Peace, 18.
Prescrip. 79.
22 Ed. 4. 35.
Lamb. b. 1. c. 3.

Sect. 10. It is (d) questioned indeed by some, whether any such power can be claimed by usage? Yet if the power of holding pleas, and even courts of record, which are of so high a nature, and imply a power of keeping the peace within their own precincts,

(d) 21 Ed. 4. 67.
Bro. Peace, 18.
3 Bac. Ab. 286.
4 Leo. 149.

(a) Co. Lit. 114. D. S. 1. c. 7. precincts, may be claimed by usage, as it seems to be (a) certain that they may, it seems strange that the bare authority of keeping the peace in a certain district may not as well be claimed by such usage.

(b) Dalt. b. 1. Crom. 6. Sect. 11. It (b) seems, that the power of such conservators of the peace, whether by tenure, election, or prescription, was no greater than that of constables at this day, unless it were enlarged by some special grant or prescription.

Lamb. b. 1. c. 3. Sect. 12. The EXTRAORDINARY CONSERVATORS OF THE PEACE were persons specially commissioned, in times of imminent danger either from rebels or foreign invaders, to take care of and defend such a particular district committed to their charge, and to preserve the peace within the limits of it; and these had power to command the sheriff with his whole posse to aid and assist them.

Of the Court of Justices of the Peace.

27 Hen. 8. c. 4. Dalton, 3. 4 Com. Dig. 8vo. edit. 524. † JUSTICES OF THE PEACE are of three sorts. FIRST, By act of parliament, as the Bishop of Ely and his successors; the Archbishop of York; and the Bishop of Durham. SECONDLY, By charter or grant, made by the king under the great seal; as the mayors and chief officers in corporate towns. And THIRDLY, By commission.

For the better understanding whereof I shall consider,

1. In what manner justices of the peace have been ordained by the several statutes.

2. How they are to be commissioned in pursuance of those statutes.

3. In what manner they are to be qualified.

4. In what manner justices of the peace shall take the oaths of office.

5. Who are incapable of acting as justices of the peace.

6. What statutes concerning the peace may be executed by such justices.

7. How far the justices of peace for a county may act out of it, or within the liberty.

8. What commissions of this kind require a special suit to the king for granting them.

9. How far such justices have power to proceed on indictments not taken before themselves.

10. By what name they are to be described.

11. What authority they have in relation to felonies.

12. What authority they have in relation to treason, *præmunire*, and misprision of treason.

13. What authority they have in relation to inferior offences.

14. In

14. In what cases they may act, although they are interested.
15. How far they are empowered to administer oaths.
16. How far they may act though not of the quorum.
17. How far they are protected in the discharge of their duty.
18. How far they may award costs.

I. In what manner justices of the peace have been ordained.

Sect. 1. The first statute is 2 Edw. 3. c. 16. which is in the following words :—" For the better keeping and maintenance of the peace, the king willeth that in every county, good men and lawful, which be no maintainers of evil, or barrators in the country, shall be assigned to keep the peace."

Lamb. 20.
4 Comm. 179.
Salk. 406.
4 St. Tr. 562.
2 Hale, 44.

Sect. 2. And it is further enacted by 4 Edw. 2. c. 2. " that there shall be assigned good and lawful men in every county to keep the peace ; and at the time of the assignments mention shall be made, that such as shall be indicted or taken by the said keepers of the peace, shall not be let to mainprise by the sheriffs, nor by none other ministers, if they be not mainpernable by the law ; nor that such as shall be indicted, shall not be delivered but at the common law. And the justices assigned to deliver the gaols shall have power to deliver the same gaols of those that shall be indicted before the keepers of the peace ; and that the said keepers shall send their indictments before the justices, &c."

Sect. 3. By 18 Edw. 3. c. 2. " Two or three of the best reputation in the counties shall be assigned keepers of the peace by the king's commission. And at what time need shall be, the same, with other wise and learned in the law, shall be assigned by the king's commission to hear and determine felonies and trespasses done against the peace in the same counties, and to inflict punishment reasonably according to the law and reason, and the manner of the deed."

2 Roll. Ab. 95.
Infra, 32.

Sect. 4. By 34 Edw. 3. c. 1. " In every county of England shall be assigned, for the keeping of the peace, one lord, and with him three or four of the most worthy in the county, with some learned in the law ; and they shall have power to restrain the offenders, rioters, and all other barrators ; and to pursue, arrest, take, and chastise them according to their trespass or offence ; and to cause them to be imprisoned and duly punished according to the laws and customs of the realm, and according to that which to them shall seem best to do by their discretion and good advisement ; and also to inform them, and to inquire of all those who have been pillors and robbers in the parts beyond the sea, and be now come again, and go wandering, and will not labour as they were wont in times past ; and to take and arrest all those that they may find by indictment, or by suspicion, and to put them in prison ; and to take of all them that be not of good fame, where they shall be found, sufficient surety and mainprise of their good behaviour towards the king and his people, and the other duly to punish, to the intent that

10 St. Tr. 92.
App.

" the

" the people be not by such rioters or rebels troubled nor endamaged, nor the peace blemished, nor merchants nor others passing by the highways of the realm disturbed, nor put in the peril which may happen of such offenders; and also to hear and determine at the king's suit, all manner of felonies and trespasses done in the same county, according to the laws and customs aforesaid."

12 Rich. 2. 2.
13 Rich. 27.

Sect. 5. By 17 Rich. 2. c. 10. " In every commission of the peace through the realm, where need shall be, two men of law of the same county where such commission shall be made, shall be assigned to go and proceed to the deliverance of thieves and felons, as often as they shall think it expedient."

Sect. 6. And by 2 Hen. 5. st. 1. c. 4. " The justices of peace in every shire named of the *quorum* (except lords and justices of either bench, and the chief baron, and serjeants at law, and the king's attorney for the time that they shall be occupied in the king's service) shall be resident in the same shire."

(a) The power of chancery extends only to putting them in, but has no right to punish them afterwards for misbehaviour; the redress is to move the King's Bench for an information, and afterwards the complainants may apply to chancery to turn them out of the commission. 2 Atk. 2. 4 St. Tr. 705.

Sect. 7. Also by 2 Hen. 5. st. 2. c. 1. " Justices of peace shall be made in the counties of England, of most sufficient persons dwelling in the same counties, by the advice of the chancellor, (a) and of the king's council, without taking other persons dwelling in foreign counties to execute such office, except the lords and the justices of assizes to be named by the king and his council; and except all the king's chief stewards of the lands and seigniories of the duchy of Lancaster, in the north parts, and in the south, for the time being."

Sect. 8. Also there are many other statutes concerning the power of justices of the peace, all of which it would be endless to enumerate; therefore I have only taken notice of those which concern their authority in general; and for those which concern the particular branches of it, I shall refer the reader to the books which treat principally of this subject.

II. How justices of peace are to be commissioned in pursuance of the above statutes.

2 Hale, 42, 43.
4 Inst. 171.
Lamb. b. 1. c. 9.
3 Burn. 7.
Dalt. 5.

It is observable that the commission of the peace hath often been altered in several reigns, and that the present form of it was settled by the judges about the thirty-third year of Queen Elizabeth, and is in substance as followeth:

For the precedent of a modern commission of the peace, vide 3 Burn's Justice, 7.

Sect. 9. Beginning with a salutation from the king to the several persons named in it, it afterwards assigns them, and every one of them, jointly and severally, the king's justices, to keep the peace in such a county; and to cause to be kept all statutes made for the good of the peace and quiet government of the people, as well within liberties as without; and to punish all those who shall offend against any of the said statutes; and to cause all those to come before them, or some of them, who shall threaten any of the people as to their persons, or the burning of their houses, in order to compel them to find surety for the peace of good behaviour;

havours; and if they shall refuse to find such surety, to cause them to be kept safely in prison till they shall find it.

Sect. 10. Then it goes on and assigns them, and every two or more of them, (of which number either such or such a particular person among them is specially required to be,) justices, to inquire by the oath of good and lawful men of the same county, of all felonies, witchcrafts, inchantments, sorceries, magic art, trespasses, forestallers, regrators, ingrossers, and extortions whatsoever, and of all other offences of which justices of the peace may lawfully inquire; also of all those who shall go or ride armed, &c. or in companies, to the disturbance of the peace; and also of all inn-holders and others who shall offend in the abuse of weights or measures, or selling of victuals, &c.; and also of all sheriffs, bailiffs, stewards, constables, gaolers, and other officers, who shall be faulty in the execution of their offices; and to inspect all indictments taken before them, or any of them, or other former justices of the peace for the same county; and to make and continue process against all the persons so indicted, till they shall be taken, or render themselves, or be outlawed; and to hear and determine all the felonies and other offences aforesaid: provided, that if a case of difficulty shall arise, they shall not proceed to give judgment, except in the presence of some justice of one of the benches or of assize.

Vide Dalton,
c. 6.
3 Burn, 9.
2 Hale, 46.

Sect. 11. And then it commands them to make inquiries of the premises, and to hear and determine the same at certain days and places, which they, or any such two or more of them, shall appoint.

Sect. 12. And then it goes on and commands the sheriff of the county to return before them at certain days and places, to be made known to him by them, such and so many lawful men of his bailiwick, by whom the truth of the premises may be best known and inquired.

Sect. 13. And then concludes by assigning some one of them keeper of the rolls of the peace in the same county, and commanding him to cause to be brought before himself and his fellows, at the said days and places, the writs, precepts, processes, and indictments aforesaid.

III. In what manner justices of the peace are to be qualified.

Sect. 14. By the 5 Geo. 2. c. 18. and 18 Geo. 2. c. 20. " No
" person shall be capable of being a justice of the peace, or of
" acting as such, for any county, riding, or division within Eng-
" land or Wales, who shall not have, either in law or equity, to
" and for his own use and benefit, in possession, a freehold,
" copyhold, or customary estate for life, or for some greater
" estate, or an estate for some long term of years, determinable
" upon one or more life or lives, or for a certain term originally
" created for twenty-one years, or more, in lands, tenements, or
" hereditaments, lying or being in England or Wales, of the clear
" yearly value of one hundred pounds, over and above what will
" satisfy and discharge all incumbrances that affect the same, and
" over and above all rents and charges payable out of, or in re-
" spect of the same; or who shall not be seised of, or intitled
" unto in law or equity, to and for his own use and benefit, the
" immediate

Oath.

“ immediate reversion or remainder of and in lands, tenements,
 “ hereditaments, lying or being as aforesaid, which are leased for
 “ one, two, or three lives, or for any term of years determinable
 “ upon the death of one, two, or three lives, upon reserved rents,
 “ and which are of the clear yearly value of three hundred
 “ pounds; and who shall not, before he takes upon himself to act
 “ as justice of the peace, at some general or quarter-sessions for
 “ the county, riding, or division for which he does, or shall intend
 “ to act, first take and subscribe the oath following:—‘ I *A. B.* do
 “ swear, that I truly and *bona fide* have such an estate, in law or
 “ equity, to and for my own use and benefit, consisting of
 “ *(specifying the nature of such estate, whether messuage,*
 “ *lund, rent, tithe, office, benefice, or what else)* as doth qualify me
 “ to act as a justice of the peace for the county, riding, or divi-
 “ sion, of _____, according to the true intent and meaning
 “ of an act of parliament made in the eighteenth year of the reign
 “ of his majesty King George the Second, intituled, an act to
 “ amend and render more effectual an act passed in the fifth year
 “ of his present majesty’s reign, intituled, an act for the further
 “ qualification of justices of the peace; and that the same *(except*
 “ *where it consists of an office, benefice, or ecclesiastical preferment,*
 “ *which it shall be sufficient to ascertain by their known and usual*
 “ *names)* is lying or being, or issuing out of lands, tenements,
 “ or hereditaments, being within the parish, township, or precinct
 “ of _____, or in the several parishes, townships, or precincts
 “ of _____, in the county of _____, or in the several
 “ counties of _____ *(as the case may be.)*’

Oath to be re-
corded.

“ Which oath, so taken and subscribed as aforesaid, shall be kept
 “ by the clerk of the peace of the said county, riding, or division
 “ for the time being, among the records of the sessions for the
 “ said county, riding, or division.”

Copy of oath to
be given for 2s.

Sect. 15. By 18 Geo. 2. c. 20. s. 2. “ Every such clerk of the
 “ peace shall, upon demand for that purpose made, forthwith de-
 “ liver a true and attested copy of the said oath in writing, to any
 “ person, paying for the same the sum of two shillings and no
 “ more; which being proved to be a true copy of such oath, to be
 “ kept amongst the records as aforesaid, shall be admitted to be
 “ given in evidence upon any issue, in any action, suit, or infor-
 “ mation, to be brought upon this act.”

and admitted in
evidence.

Sect. 16. By 18 Geo. 2. c. 20. s. 3. “ From and after the said
 “ twenty-fifth day of March, any person who shall act as a justice
 “ of the peace for any county, riding, or division, within that part
 “ of Great Britain called England, or the principality of Wales,
 “ without having taken and subscribed the said oath as afore-
 “ said, or without being qualified according to the true intent
 “ and meaning of this act, shall, for every such offence, forfeit
 “ the sum of one hundred pounds; one moiety to the use of the
 “ poor of the parish in which he most usually resides, and the
 “ other moiety to the use of such person or persons who shall
 “ sue for the same, to be recovered, together with full costs of
 “ suit, by action of debt, bill, plaint, or information, in any of his
 “ majesty’s courts of record at Westminster, in which no essoin,
 “ protection, wager of law, or more than one imparlance, shall be
 “ allowed;

Penalty of
£100.

" allowed; and in every such action, suit, or information, the
 " proof of his qualification shall lie on such person against whom
 " the same is brought." Proof of qualifi-
cation on the
defendant.

IV. In what manner justices of the peace are to take the oaths of office.

Sect. 29. On renewing the commission of the peace, which generally happens when any person is newly brought into the office, a writ of *dedimus potestatem* issues out of the court of chancery, directed to some ancient justice, or other person, authorising them to take the oath of the person who is newly inserted in the commission, which is usually in a schedule annexed, and to certify the same unto the court of Chancery on the day mentioned in the writ; unto which oath of office are usually annexed the oaths of allegiance and supremacy.

Sect. 30. The form of the oath of office is as follows:—" Ye
 " shall swear, that as justice of the peace for the county of _____,
 " in all articles in the king's commission to you directed, you
 " shall do equal right to the poor and to the rich, after your cun-
 " ning, wit and power, and after the laws and customs of the
 " realm and statutes thereof made: and ye shall not be of coun-
 " sel of any quarrel hanging before you: and that ye hold your
 " sessions after the form of the statutes thereof made: and the
 " issues, fines, and amerciaments that shall happen to be made,
 " and all forfeitures which shall fall before you, ye shall cause to
 " be entered without any concealment or embezzling, and truly
 " send them to the king's exchequer. Ye shall not let for gift or
 " other cause, but well and truly ye shall do your office of justice
 " of the peace in that behalf: and that you take nothing for your
 " office of justice of the peace to be done, but of the king, and
 " fees accustomed, and costs limited by statute. And ye shall
 " not direct, nor cause to be directed, any warrant (by you to be
 " made) to the parties, but ye shall direct them to the bailiff of
 " the said county, or other the king's officers, or ministers, or
 " other indifferent persons, to do execution thereof. So help
 " you God."

† *Sect. 31.* By 1 Geo. 3. c. 13. " All persons who are justices
 " of the peace at the time of any demise of the crown, and shall
 " afterwards be appointed justices of the peace by any commis-
 " sion granted by the succeeding sovereign, who shall take the
 " oaths of office of a justice of the peace before the clerk of the
 " peace, or his deputy, for the respective county or place for
 " which he shall act, or intend to act, and who shall have taken
 " and subscribed at some general or quarter-session of the peace,
 " the oath directed by 18 Geo. 2. c. 20. shall and may act as a
 " justice of the peace for such county or place, without being
 " obliged to take and subscribe again the said oath, and without
 " incurring any penalty or forfeiture for the not taking and sub-
 " scribing thereof."

† *Sect. 32.* And by 1 Geo. 3. c. 13. s. 2. " And no person
 " who hath taken the oaths usually taken by a justice of the peace
 " under a writ or commission of *dedimus potestatem*, shall be
 " obliged to have any other *dedimus potestatem* from the clerk of
 " the crown, to authorise any person or persons, therein to be
 " named," The oaths to be
only once taken.

" named, to administer again to any such justice, on any new
 " commission of the peace, the oaths usually annexed to such
 " *dedimus*, and taken by a justice of the peace: but the clerk of
 " the peace, or his deputy, shall, on any new commission being
 " issued, prepare a parchment roll, with the oaths usually taken
 " under the *dedimus potestatem* annexed to and ingrossed on such
 " roll, and shall administer, without fee, the oaths in such roll
 " specified, to every such justice of the peace within the respec-
 " tive counties or places for which he shall act or intend to act,
 " who shall desire to take the same; and every justice, after
 " taking the oaths contained in the said roll, shall subscribe his
 " name on the same; and the roll, with the oaths so taken and
 " subscribed, shall be kept by the respective clerks of the peace
 " of the respective counties or places among the records of the
 " sessions."

Sect. 33. Some doubts having arisen upon the meaning of
 this act, it is declared by 7 Geo. 3. c. 9. " That all persons ap-
 " pointed justices of the peace by any commission or commis-
 " sions granted by his present majesty, who have taken and sub-
 " scribed, or shall take and subscribe the oaths mentioned in the
 " 1 Geo. 3. c. 13; and all persons who shall be appointed jus-
 " tices of the peace by any commission or commissions which
 " shall be granted after his majesty's demise, by any of his suc-
 " cessors, kings and queens of this realm, and shall have, after
 " the issuing of the first commission, whereby such person shall
 " be appointed justice of peace, in the reign of any such king or
 " queen, taken and subscribed the said oaths, shall not be obliged
 " during the reign of his present majesty, or during any future
 " reign, in which such oaths shall have been so taken and sub-
 " scribed as aforesaid, to take and subscribe the same oaths for,
 " or by reason of such person being again appointed justice of
 " the peace by any subsequent commission or commissions
 " which shall be granted during any such reign; and shall not
 " incur any penalty or forfeiture for the not taking or subscribing
 " the said oaths." (2)

V. Who are incapable of acting as justices of the peace.

Dalton, c. 3.

18 H. 6. 11.
 Crom. 121.
 Dalt. c. 3.

† Sect. 34. It is said that if a justice of the peace be created a
 duke, archbishop, marquis, earl, viscount, baron, bishop, knight,
 judge, or serjeant at law, yet this will not take away his authority
 as justice of the peace; but if he be made coroner, this, by some
 opinions, is a discharge of his authority of justice. By 1 Mary,
 ses. 2. c. 8. " No person having or using the office of a sheriff of
 " any county, shall use or exercise the office of a justice of peace,
 " by force of any commission or otherwise, in any county where
 " he shall be sheriff, during the time only that he shall exercise
 " the said office or sheriffwick: and all acts done by such sheriff
 " by authority of any commission of the peace, during the time
 " abovesaid, shall be void."

† Sect. 35. By 5 Geo. 2. c. 18. " No attorney, solicitor, or
 " proctor,

(2) In general there is an indemnifying clause in
 some act of every session of parliament, provided
 the justices qualify according to the injunctions of

the 10 Geo. 2. within the time which in such act is
 usually limited.

"proctor, in any court whatsoever, shall be capable to be a justice of the peace, within any county of England or Wales, during the time he shall practise in such character."

† Sect. 36. It is also enacted by 9 Geo. 3. c. 30. s. 5. "That it shall and may be lawful to and for the treasurer, comptroller, surveyor, clerk of the acts, or any commissioner of the navy for the time being, from time to time, in all places whatsoever, to do, perform, exercise, and execute the office and duty of a justice or justices of the peace to all intents and purposes whatsoever, in causing any person or persons who shall be charged with counterfeiting, or procuring to be counterfeited, any letter of attorney, bill, ticket, certificate, assignment, last will, or other power or authority; or with uttering or publishing the same as true, in order to receive any wages, pay, or other allowance, due to any officer, seaman, or other person, in the service of his majesty; or with taking or procuring false oaths to be taken for any of the purposes aforesaid; or to obtain the probate of any writ or letter of administration in order to receive such wages, pay, or other allowance; or with stealing or embezzling any naval stores (a) the property of the king, to be apprehended, committed, and prosecuted for the same."

For the acts relating to naval stores, vide b. 1. c. 19. tit. Larceny.

sessions has jurisdiction over this offence, and may inflict a penalty of £200, and imprisonment, &c. upon the offender.

(a) By 17 Geo. 2. c. 40. s. 10. the quarter-

VI. What statutes concerning the peace may be executed by such justices.

† Sect. 37. It seems certain, that by virtue of the said commission they may execute all statutes whatsoever made for the better keeping of the peace, and consequently those of Winchester and Westminster, and all others concerning the peace, made before the reign of Edward the Third, in whose time justices of peace were first instituted; for all those statutes were expressly mentioned in the ancient commissions of the peace, and have always been undoubtedly taken to be included in the general words of the present commission; and yet none of the statutes which ordain the office of justices of peace, say any thing concerning the execution of the said former statutes, so that the power of justices of peace, in relation to those statutes, seems entirely to depend on the king's commission, and yet hath always been unquestionably allowed. From whence it appears, that regularly the king, by his commission, may authorise whom he pleases to execute an act of parliament.

Lamb. b. 1. c. 9. Dult. c. 5. Crom. 7, 8.

† Sect. 38. Justices of peace cannot execute a statute in the case of a new-created offence, unless authority be given to them for such purpose in express words.

Rex v. James, 2 Stra. 1256. 1 Salk. 680.

† Sect. 39. They cannot therefore proceed upon the statute of usury, (a) or upon the 1 and 2 Philip and Mary, c. 11. for using more looms than one, (b) or 1 and 2 Philip and Mary, c. 7. for selling wares in a corporation, (c) or upon the 2 and 3 Edw. 6. c. 4. (d) nor upon the 5 Eliz. c. 14. for forging a false deed. (e)

(a) 1 Salk. 680. (b) 4 Mod. 379. (c) 5 Mod. 149. (d) 4 Mod. 51. (e) Cro. Eliz. 87. Sed vide Cro. Eliz. 601.

VII. How justices of peace for a county may act out of it, or within a liberty.

† Sect. 44. It is said that they have no coercive power when out

C. Car. 211, 212. 2 Hale, 51. C. Car. 248.

out of the county; and therefore that an order of bastardy, or an order for payment of labourers' wages, made by them out of the county, is not binding. Yet it is said, that recognizances and informations voluntarily taken before them in any place are good.

† *Sect. 45.* And for the greater ease of justices of the peace for any county of this realm, it is enacted by 9 Geo. 1. c. 7. s. 3. "That if any such justice of the peace shall happen to dwell in any city, or other precinct, that is a county of itself, situate within the county at large, for which he shall be appointed justice of peace, although not within the same county, it shall and may be lawful for any such justice of peace to grant warrants, take examinations, and make orders for any matters which any one or more justice or justices of the peace may act in at his own dwelling-house, although such dwelling-house be out of the county where he is authorised to act as a justice of peace, and in some city, or other precinct, adjoining, that is a county of itself; and that all such warrants, orders, and other act or acts of any justice of the peace, and the act or acts of any constable, tithingman, headborough, overseer of the poor, surveyor of the highways, or other officer, in obedience to any such warrant or order, shall be as valid, good, and effectual in the law, although it happen to be out of the limits of the proper precinct or authority:—Provided that nothing in this act shall empower justices for counties at large to hold their general quarter-sessions in the cities or towns which are counties of themselves, nor to empower justices of peace, sheriffs, bailiffs, constables, headboroughs, tythingmen, borough-holders, or any other peace-officers of the counties at large, to act or intermeddle in any matters or things arising within cities or towns which are counties of themselves, but that all such actings and doings shall be of the same force as if this act had not been made."

† *Sect. 46.* And by 28 Geo. 3. c. 49. to remove all doubts respecting the construction of the above statute, it is enacted, "That it shall be lawful for any justice acting for any county at large, to act as such at any place within any city, town, or precinct, being a county of itself, and situated within, surrounded by, or adjoining to, any such county at large. But the same shall not extend to give power to the justices for any county at large, not being justices for such city, town, or precinct, or any constable or other officer acting under them, to act or intermeddle in any matter or thing arising within any such city, town, or precinct, in any manner whatsoever."

Vide 2 & 3 P.
and M. c. 18.
2 Hale, 47, 48.
Lamb. h. i. c. 9.
Con. Crom. 8.
20 H. 7. 6, 7, 8.

Sect. 47. And it is to be observed, that the justices of peace for a county have, by their commission, an express authority as well within liberties as without; from whence it seems clearly to follow, that they may execute their office within a town which has a special commission of the peace for its own limits, unless such commission have a clause, that no other justices, except those named in it, shall any way concern themselves in the keeping of the peace within the liberties of such town; and it may be questioned, whether such a special clause in such a commission do absolutely make void the act of any county-justice within such town, since the commission for the county seems as fully to give those

those named in it a jurisdiction over all such towns within the precinct of it, as such commission for a town doth exclude them; and the justices for the county seem to be under no necessity of informing themselves of the contents of a commission which they have nothing to do with; yet if they have express notice given them of such a restraining clause, and proceed to act within such town in defiance of it, they may perhaps be punishable for their contempt of the king's prohibition; and yet perhaps it may be questioned whether their acts be void, for the reasons above-mentioned. Keb. 559.

† *Sect. 48.* It has been resolved, that if (a) the crown grant to any city to have justices of its own within itself, excluding the county justices from intermeddling in the ordinary business of a justice of the peace, that in such case the act of the county justices will be void, and not be considered only as a breach of the franchise; and that where they are generally named, as in the 12 Car. 2. c. 23. which gives the jurisdiction in excise matters "to justices of the peace residing near the place where the forfeiture shall be made, or offence committed," they have concurrent jurisdiction as their locality may chance to be. (a) Talbot v. Hubble, Stra. 1154. See also Rex v. Morgan, Cald. 156.

† *Sect. 49.* So also it has been resolved, (b) that a charter granting jurisdiction to borough magistrates over a district not within the borough, does not exclude the county justices from having a concurrent jurisdiction without express words in the charter. Therefore, although by charter the mayor and some of the aldermen of London have jurisdiction in Southwark, yet as the charter contains no *non intromittent* clause as to the justices of the county of Surrey, the latter have a concurrent jurisdiction with the former. (c) (b) Blankley v. Winstanley, 3 Term. Rep. 279.
(c) Rex v. Sainsbury, 4 T. Rep. 451.

† *Sect. 50.* But doubts and questions have arisen touching the commitment of offenders by justices of the peace of liberties and corporations, to the houses of correction of counties, ridings, or divisions, in which such liberties and corporations are situate, though the inhabitants of such liberties and corporations contribute to the maintenance and support of such houses of correction; it is enacted by 15 Geo. 2. c. 24. "That in all cases where any person liable by law to be committed to the house of correction, shall be apprehended within any liberty, city, or town corporate, whose inhabitants are contributing to the support and maintenance of the house or houses of correction in the county, riding, or division, in which such liberty, city, or town corporate, is situate; it shall and may be lawful for the justices of the peace of such liberty, city, or town corporate, to commit such person to the house of correction of the county, riding, or division, in which such liberty, city, or town corporate, is situate, and such persons so committed shall be dealt with, &c. to all intents and purposes as if committed by the county, &c."

† It also frequently happened that persons against whom warrants were granted by the justices of the peace for the several counties within this kingdom, escaped into other counties or places out of the jurisdiction of the justices of the peace granting

Person is to be taken in the plural as well as the singular number.

such warrants, and thereby avoided being punished for the offences wherewith they were charged. It is therefore enacted by 24 Geo. 2. c. 55. "That in case any person, against whom a warrant shall be issued by *any* justice of the peace for *any* county or place within this kingdom, shall escape, go into, reside, or be in any other county or place out of the jurisdiction of the justice granting such warrant as aforesaid, it shall and may be lawful for any justice of the peace of the county or place where such person shall escape, go into, reside, or be, and such justice is hereby required, upon proof being made upon oath of the hand-writing of the justice granting such warrant, to indorse his name on such warrant, which shall be a sufficient authority to the person bringing such warrant, and to all other persons to whom such warrant was originally directed, to execute such warrant in such other county or place out of the jurisdiction of the justice granting such warrant as aforesaid, and to apprehend and carry such offender before the justice who indorsed such warrant, or some other justice of such other county or place where such warrant was indorsed, in case the offence, for which the offender shall be so apprehended in such other county or place as aforesaid, shall be bailable in law, and such offender shall be ready and willing to give bail for his appearance at the next assizes or general gaol-delivery, or next general quarter-sessions of the peace to be held in and for the county or place where the offence was committed, in the same manner as the justices of the peace of the proper county or place should or might have done in such proper county or place; and the justice of such other county or place so taking bail as aforesaid, shall deliver the recognizance, together with the examination or confession of such offender, and all other proceedings relating thereto, to the constable, tithingman, or other person or persons so apprehending such offender as aforesaid, who are hereby required to receive the same, and to deliver them over to the clerk of the assizes, or clerk of the peace of the county or place where such offender is required to appear by virtue of such recognizance; and on default so to deliver over the same, the person neglecting shall forfeit £10. And in case the offence for which such offender shall be apprehended and taken in any other county or place shall not be bailable in law; or such offender shall not give bail to appear as aforesaid to the satisfaction of the justice before whom such offender shall be brought in such other county or place; then, and in that case, the person apprehending such offender shall carry and convey such offender before one of the justices of the peace for the proper county or place where such offence was committed, there to be dealt with according to law.—No prosecution shall be brought against the justice for or by reason of his indorsing such warrant. But the justice who originally granted the warrant, may be prosecuted in the same manner as he might have been if this act had not been made."

Justices may act for two adjoining counties,

† Sect. 51. By 28 Geo. 3. c. 49. reciting that the administration of justice was frequently obstructed for want of resident justices

justices of the peace, it is enacted, " That any justice of the peace acting as such for any two or more counties, being adjoining counties, may act as a justice of the peace in all matters and things whatsoever concerning, or in any wise relating to any or either of the said counties; and that all acts of such justice of the peace, and the acts of any constable, or other officer in obedience thereto, shall be as valid, good, and effectual in the law, to all intents and purposes whatsoever, as if such acts of the said justices had been done in the county to which such acts more particularly relate; and all constables and other officers of the said county or counties to which such act or acts relate, are hereby authorised and required to obey the warrants, orders, directions, act and acts of such justice or justices so granted, given and done, and to do and perform their several offices and duties, under the pains and penalties to which any constable or other officer may be liable for a neglect of duty: Provided always, that such justice or justices be personally resident in one of the said counties at the time of doing such act or acts: Provided also, that the warrants, orders, or directions, so to be given and granted, be directed and given in the first instance to the constable or other officer of the county to which the same more particularly relate."

if they reside in either, at the time of acting.

† Sect. 52. By 28 Geo. 3. c. 49. s. 2. it is enacted, " That, from and after the passing of this act, it shall and may be lawful for any constable, tythingman, headborough, or other peace officer, or any other person or persons apprehending or taking into custody any person or persons offending against law, and whom they lawfully may and ought to apprehend and take into custody by virtue of his or their office or offices, or otherwise howsoever, to convey and take the person or persons so apprehended or taken into custody as aforesaid, to any justice or justices of the peace acting for the said county, and resident in such adjoining county as aforesaid; and the said constables, tythingmen, headboroughs, and other peace-officers, and all and every other person or persons, are hereby authorised, empowered, and required, in all such cases, so to act in all things as if the said justice or justices of the peace was or were resident within the said county to which they respectively belong; and all and every person or persons obstructing or hindering the said constables, tythingmen, headboroughs, or other peace-officers, in the execution of their respective offices, in the said county or counties adjoining as aforesaid, shall be, and are hereby made liable to the same pains and penalties for such obstruction and hinderance of the said officers in the execution of their respective offices, as if the same had been committed in the county for which the said constables, tythingmen, headboroughs, or other peace-officers, were appointed to act."

Constables, &c. may carry offenders before justices acting for the county, and resident in the adjacent county, &c.

VIII. What commissions of this kind require a special suit to the king for granting of them.

Sect. 53. It seems agreed, that notwithstanding all such commissions must be in the king's name, as hath been more fully shewn chapter the fifth, section the first, yet there is not any need

Lamb. b. 1. c. 5. B. Commis. 5. Dalt. c. 3.

1 Lev. 219.
Roll. 135.
Ld. Raym.
1030.

3 Burn, 8.
(a) But see 1
Ann. c. 8. s. 2.

need of a special suit or application to, or warrant from the king, for the granting of them; for this is only requisite for such as are of a particular nature, as constituting the mayor of such a town, and his successors, perpetual justices of the peace within their liberties, &c. which commissions are neither revocable by the king, nor determinable by his death, as the commission for the peace is, (a) which is made of course by the lord chancellor, according to his discretion.

IX. How far justices of peace have power to proceed on indictments not taken before themselves.

Crom. 2, 9.
2 Hale, 46.
3 Burn, 22.

Sect. 54. It is certain, that subsequent justices of peace may proceed upon indictments taken before their predecessors; but this seems chiefly to depend upon 11 Hen. 6. c. 6. which, reciting the inconvenience that pleas and processes upon indictments before justices of the peace had often been discontinued by making of new commissions of the peace, to the great loss of the king, &c. ordains, "That such pleas, suits, and processes before justices of the peace, shall not be discontinued by new commissions of the peace, but stand in force; and that the new justices, after that they have the records of the same pleas and processes before them, may continue, and finally hear and determine the same, &c." And this is further confirmed by 1 Edw. 6. c. 7. s. 6. But it is certain that they cannot proceed on an indictment taken before a coroner, or justices of *oyer and terminer*, or gaol-delivery, nor deliver persons suspected by proclamation. But by 1 Edw. 4. c. 2. they are enabled to proceed on indictments taken before the sheriff at his tourn.

Crom. 9.
Sum. 166.

X. By what name such justices are to be described.

2 R. Abr. 95.

Sect. 55. It is observable, that they are expressly commissioned by the name of "justices of peace;" and in no part of their commission are called by the name of "keepers of the peace;" yet inasmuch as by 18 Edw. 3. c. 2. which is one of the first statutes made concerning their institution, they are expressly called "keepers of the peace;" and the principal end of their office is for the keeping of the peace; and their usual description in *certioraris* is by the name of "keepers of the peace;" it hath been adjudged, that the caption of an indictment (whereof justices of peace have cognisance), *coram A. B. et C. D. custodibus pacis et justiciariis domini regis* in such a place, is good, without expressly naming them justices of peace. Also it hath been resolved, that the description of justices of peace by the name of *justiciarii domini regis ad pacem conservandam*, &c. is good, without saying *ad pacem domini regis*, for that it is necessarily implied. (6)

The King and
Hawkins, Mich.
3 Geo. 1.

Justices may act
though not of
the *quorum*.

† *Sect. 56.* And it is recited by 26 Geo. 2. c. 17. "That whereas authority is given by many acts of parliament to two or more justices of the peace, whereof one or more are to be of the *quorum*, and that divers acts, orders, adjudications, warrants, confirmations

(6) Also by the words "our peace," when the king dies the surety of the peace is discharged, for

the party is not bound to keep the peace of the succeeding sovereign. Cramp. 124.

confirmations of indentures, and other instruments done, made, and executed by two or more justices of the peace, without expressing that they are, or that one of them is of the *quorum*, have been and may be for that reason only, impeached, set aside, and vacated;" it is therefore enacted, "That no act, order, adjudication, warrant, indenture of apprenticeship, or other instrument already made, done, or executed, or hereafter to be made, done, or executed by two or more justices of the peace, which doth not express that one or more of the justices is or are of the *quorum*, shall be impeached, set aside, or vacated for that defect only."

XI. What authority justices of peace have in relation to felonies.

Sect. 57. It is observable, that such of the said justices as are of the *quorum* only are expressly authorised to inquire of, and hear and determine felonies and trespasses, and that the above-mentioned statute of 18 Edw. 3. after it hath ordained, "That some persons shall be assigned keepers of the peace by the king's commission," saith in another distinct clause, "That at what time need shall be, the same shall be assigned by the king's commissions to hear and determine felonies and trespasses, &c." From whence it is inferred, that justices of peace have no power to hear and determine (a) felonies, unless they be authorised so to do by the express words of their commission. And this opinion is further confirmed by the authority of the year books of (b) 2 Rich. 3. pl. 9. a. b. and 12 Hen. 7. pl. 25. a. wherein it is adjudged, that a *certiorari* to remove certain indictments taken before justices of peace was not good, because it named them only "justice of peace," without adding that they were "also assigned to hear and determine felonies," &c. Yet it seems, that it may probably be argued for the contrary opinion, that the statute of 34 Edw. 3. c. 1. is express, "that the persons assigned for the keeping of the peace shall have power (among other things) to hear and determine felonies and trespasses," &c. And this seems to be the principal ground of the resolution in the case of *Barnes v. Constantine* (c), wherein it is adjudged, that the setting forth of an indictment in a declaration as taken before "justices of peace being also assigned to hear and determine felonies," &c. was well justified upon *oyer* of the record, wherein it was taken before "justices of peace," without adding, that they were "assigned to hear and determine felonies," &c. And as to the authority of Staunford and Hale, it may be answered, that their opinion is expressly grounded on the wording of the statute of 18 Edw. 3. and it does not appear that they considered the purport of 34 Edw. 3. As to the authority of 2 Rich. 3. pl. 9. it may be answered, that the *certiorari* therein mentioned was for the removal of an indictment for counterfeiting coin, and that the power of justices of peace to take such an indictment depends wholly upon the statute of 3 Hen. 5. c. 7. whereby it is enacted, "That the justices of peace throughout the realm shall have power by the king's commissions to inquire of the said offence." And as to what is said in 12 Hen. 7. c. 25. it may be

Com. Dig. 45.

(a) *Crom.* 120.
S. P. C. 53, 50.
 96.
Sum. 165, 207.
 2 *Hale*, 13, 41.
 (b) *B. Indict.*
 32, 30.
Co. Lat. 391.

(c) *Co. Jac.* 32.
Yelv. 46.
 2 *Roll.* 151.
Dyer, 69.

be answered, that the *certiorari* therein mentioned was to remove certain indictments, but it doth not appear from the book what those indictments were; so that it is possible they might be of a special nature, not within the general purview of 34 Edw. 3. c. 1. *Sed quare*.

Summary, 165.

2 Hale, 44.

9 Co. 118.

C. Eliz. 87. 601.

697.

2 R. Abr. 96.

Sect. 58. However it is certain, that such a clause in the commission of justices "to hear and determine felonies, &c." gives them no jurisdiction over an offence which by statute is specially appointed to be determined by justices of oyer and terminer, because "such justices" shall be intended to mean such justices of oyer and terminer only which properly and usually are so called, and not those who are distinctly known by another name. And from hence it follows, that justices of the peace have no power to take an indictment upon this statute of 5 Eliz. c. 14. concerning forgery; nor on the 2 and 3 Edw. 6. c. 24. against accessaries in one county to felonies in another; nor on any other statute which specially limits the jurisdiction of determining any other felony to other justices of a particular denomination. Yet inasmuch as all felonies include in them a breach of the peace, and the 2 and 3 Philip and Mary, c. 10. which directs justices of peace to take the examinations of all such persons as shall be committed by them for felony, seems to suppose them to have a general power of committing all persons accused of any kind of felony, and the general practice has always been agreeable hereto, it is said, that justices of the peace may take the examination of persons brought before them for any kind of felony, and commit them to prison; and also take the information of the prosecutors upon oath, and bind them over to prosecute, and commit those who shall refuse to be so bound, if it appear that they can give material evidence. Also, inasmuch as the said statute of 2 and 3 Philip and Mary, c. 10. and also 1 and 2 Philip and Mary, c. 13. direct justices of peace, in cases of "homicide and other felonies," to take the examination of the offenders, and information of others, and to certify the same to the justices of gaol-delivery, it hath been generally thought advisable for justices of peace to proceed no farther in relation to any felonies though within their commission, except only petit larcenies. (7)

Sira. 1206.

Kely. 1.

Dalt. c. 20.

2 Hale, 44.

Summary, 169.

2 Hale, 46.

Strange, 818.

1 Hale, 414.

says they may take an inquisition of self murder if the body cannot be found.

XII. What authority justices of the peace have in relation to TREASON, *præmunire*, and misprision of treason.

4 Com. D. 44.

Comb. 405.

Lamb. 226.

(a) Dalt. c. 90.

218. 460.

Sect. 59. It seems to be agreed, that notwithstanding none of these offences are within the letter of their commission, yet inasmuch as they are against the peace of the king, and of the realm, any justice of the peace may, either upon his own knowledge, or the complaint of others, cause any person to be apprehended for any such offence. And it is the opinion both of Dalton (a) and Sir

(7) Justices of the peace in England may commit an offender against the Irish law for felony in order to be transmitted to Ireland to be tried, the offence being committed there. Strange, 818. Barnard, K. B. 225. Fitzgibb. 111. 14. Viner Abr. 569. pl. 7. But a justice cannot take a person from the custody of the king's bench, and send

him to the county gaol, but he may, by his warrant, charge him criminally, where he is in custody. Strange, 818. Two justices may take a recognizance for the appearance of one charged with felony on the high seas at the sessions of admiralty, and the recognizance may be estreated into the exchequer. Parker, 261.

Sir Matthew Hale (b), that such justice may take the examination of the person so apprehended, and the information of all those who can give material evidence against him, and put the same in writing; and also bind over such who are able to give any such evidence to the king's bench, or gaol delivery; and certify his proceedings to the same court to which he shall bind over such informers. And this opinion seems to be agreeable to constant practice, especially since the statutes of 1 and 2 Philip and Mary, c. 13, and 2 and 3 Philip and Mary, c. 10. which, directing justices of peace to proceed in this manner against persons brought before them for felony, seem to give them a discretionary power of proceeding in like manner against persons accused of the above-mentioned offences.

Summary, 168.
(b) 2 Hale, 44.
1 Hale, 580.

Sect. 60. Also by 3 Hen. 5. c. 7. "Justices of peace shall have power by the king's commissions to inquire of counterfeiting, clipping, washing, and other falsity of money of the land, and thereupon to make process by *capias* only, against those who before them shall be thereof indicted."

Sect. 61. And by 5 Eliz. c. 1. s. 3. "Justices of peace may inquire of the offence of maintaining the pope's power, and shall certify every presentment made before them of any such offence, into the king's bench, within forty days after it shall be made, &c."

Sect. 62. And by 23 Edw. 1. s. 8. "They may inquire of all offences against that act, or against the acts of the first, fifth, or thirteenth years of the said queen's reign, touching acknowledging of the king's supreme government in causes ecclesiastical, or other matters touching the service of God, or coming to church, or establishment of true religion in this realm, within one year and a day after every such offence committed."

1 Leon. 339.

XIII. What authority justices of the peace have in relation to inferior offences.

Sect. 63. It would be endless to enumerate all the offences within their jurisdiction, concerning which there have been such great numbers of statutes; and therefore I shall content myself in this place with observing, that by the abovementioned statutes of 34 Edw. 3. c. 1, and also by the express words of their commission, they are empowered to hear and determine all trespasses, which is a word of a very general extent, and in a large sense not only comprehends all inferior offences, which are properly and directly against the peace, as assaults and batteries, and such like, but also all others which are so only by construction, as all breaches of the law in general are (a) said to be.

Vide, 3 Burn's Justice, 17. and 4 Com. Dig. title Justice of the peace, in which all these inferior offences are treated of at large and successively.

(a) 6 Mod. 126.

Sect. 64. Yet it hath been of late settled, that justices of peace have no jurisdiction over (b) forgery or perjury at the common law; the principal reason of which resolution, as I apprehend, was, that inasmuch as the chief end of the institution of the office of these justices was for the preservation of the peace against personal wrongs and open violence; and the word "trespass," in its most proper and natural sense, is taken for such kind of injuries;

(b) Salk. 406.
Crom. 120.
Lamb. b.1. c.12.
2 Stra. 1069.
Bayer, 278.
6 Mod. 379.

(a) 1 Lev. 139.
1 Sid. 271.
2 Wils. 160.
1 Keb. 559. 772.
788. 931.
2 Keb. 138.
Con. C.
Jac. 421.
Tr. 13 Ann.
(b) Larch. 173.
Poph. 208.

juries; it shall be understood in that sense only in the said statute and commission, or at the most to extend to such other offences only as have a direct and immediate tendency to cause such breaches of the peace; (a) as libels, and such like, which on this account have been adjudged indictable before justices of peace: And for this reason principally, as I apprehend, the court of king's bench in the case of one Pitt, since the abovementioned resolution concerning perjury and forgery, refused to quash an indictment found at a session of the peace for a libel, but ordered the defendant to demur to it, if he thought fit. (b) And upon the like reason perhaps the former opinion, that one may be indicted before justices of peace for being a common night-walker and haunter of bawdy-houses, may not be thought to contradict the abovementioned resolution.

C. Jac. 32.
Yelv. 46.
Con. 2. Roll.
151.

Sect. 65. Justices of peace by virtue of the abovementioned statute of 34 Edw. 3. c. 1. seem to have a jurisdiction over *bar-rators*, and such like offenders, whether they be mentioned in their commission or not.

King and Log-
guin, 3 Burn, 17.
Crompton, B.

Sect. 66. And it seems clear that justices of the peace have jurisdiction of all inferior crimes within their commission, whether such crimes be mentioned in any statute concerning them or not; for that all such crimes are either directly, or at least by consequence and judgment of law, against the peace; and upon this ground principally, as I apprehend, it was lately resolved, that they may take an indictment of extortion.

Rex v. James,
2 Stra. 1256.
2 Salk. 680.

† *Sect. 67.* But in new-created offences, justices of the peace have no jurisdiction without express words.

XIV. In what cases justices of the peace may act although interested.

(c) 1 Salk. 596.
607.

† *Sect. 68.* The general rule of law certainly is, that justices of the peace ought not to execute their office in their own case (c); and even in cases where such proceeding seems indispensably necessary, as in being publicly assaulted or personally abused, or their authority otherwise contemned while in the execution of their duty, yet if another justice be present, his assistance should be required to punish the offender. (d)

(d) Stra. 240.

(e) Rex v. Great
Chart, Burr. S.
C. 194.
Stra. 1173.

† *Sect. 69.* And by the common law, if an order of removal were made by two justices, and one of them was an inhabitant of the parish from which the pauper was removed, such order was illegal and bad, on the ground that the justice who was an inhabitant was interested, as being liable to the poor's rate. (e) But now the statute 16 Geo. 2. c. 18. reciting that "doubts had arisen whether, according to the laws and statutes now in force, justices of the peace may lawfully act in any case relating to parishes or places to the rates and taxes of which such justices respectively are rated or chargeable;" enacts, "That it shall and "may be lawful to and for all and every justice or justices of the "peace for the county, riding, city, liberty, franchise, borough, or "town corporate, within their respective jurisdictions, to make, "do, and execute all and every act or acts, matter or matters, "thing or things, appertaining to their office as justice or justices

" of

" of the peace, so far as the same relates to the laws for the relief, settlement, and maintenance of poor persons ; for passing and punishing vagrants ; for repair of the highways ; or to any other laws concerning parochial taxes, levies, or rates ; notwithstanding any such justice or justices of the peace is or are rated to or chargeable with the taxes, levies, or rates within any such parish, township, or place affected by any such act or acts of such justice or justices as aforesaid."—But this act shall not authorise any justice for any county or riding at large to act in the determination of any appeal to the quarter-sessions for any such county or riding from any order, matter or thing, relating to any such parish, township, or place, where such justice or justices is or are so charged, taxed, or chargeable as aforesaid.

† *Sect. 70.* And on this statute it has been determined, that on an appeal to the sessions against an order of removal, those justices who are rated to the relief of the poor in either of the contending parishes have no right to vote. Rex v. Yarpole,
4 Term. Rep. 71.

XVI. How far justices of the peace may act though not of the quorum.

† *Sect. 72.* By 7 Geo. 3. c. 21. it is enacted, " That all acts, orders, adjudications, warrants, indentures of apprenticeship, or other instruments which shall be made, done, or executed, by virtue of any act or acts of parliament made or to be made by two or more justices of the peace qualified to act within such cities, boroughs, towns corporate, franchises and liberties, as have only one justice of the peace of the quorum qualified to act within the same, though neither of the said justices are of the quorum, shall be valid and effectual in law, as if one of the said justices had been of the quorum."

XVII. How far justices of the peace are protected in the discharge of their duty.

† *Sect. 73.* JUSTICES OF THE PEACE are strongly protected by the law in the just execution of their office ; and therefore all slanderous words spoken of them in the discharge of their duty, as " you are a rascal, a villain, and a liar," are actionable (a), but they must be spoken of them in the execution of their duty. (b) (a) Aston v. Blagrove, Str. 617.
Id. Ray. 1396.
Kent v. Pocock, Str. 1168.
Rex v. Revel, Str. 420.
(b) R. v. Pocock, Str. 1157.

Sect. 74. Justices of the peace are not punishable civilly for acts done by them in their judicial capacities, but if they abuse the authority with which they are entrusted, they may be punished criminally at the suit of the king by way of information. But in cases where they proceed ministerially rather than judicially, if they act corruptly, they are liable to an action at the suit of the party, as well as to an information at the suit of the king. The court of king's-bench, however, will never grant an information against a justice of the peace for a mere error in judgment (c); for even where a justice does an illegal act, yet although the judgment was wrong, if his heart was right (d), if he acted honestly and candidly, without oppression, malice, revenge, or any bad view or ill intention whatsoever, the court will never punish him Cio. Eliz. 130.
1 Leon. 167.
Post, ch. 13. s. 20.
(c) Rex v. Cox, 1 Burr. 785.
(d) Rex v. Young, 1 Burr. 556.

by

(e) *Rex v. Palmer and Baine*, 2 Burr. 1162.
(f) *Rex v. Jackson*, 1 Ter. Rep. 653. *Barley v. Newman*, Trin. 16 Geo. 3.

by the extraordinary course of information (e), but leave the party complaining to the ordinary legal remedy by action or by indictment: but if they act improperly knowingly, an information shall be granted. (f)

Cro. Car. 175.
285. 467.
Vaughan, 213.
Noy, 38.
1 Roll, 274.
Moor, 845.
1 Mod. 181.
1 Burr. 602.
2 Burr. 1162.

† *Sect. 75.* It is enacted by 7 Jac. 1. c. 5. made perpetual by 21 Jac. 1. c. 12. "That if any action upon the case, trespass, battery, or false imprisonment, shall be brought against any JUSTICE OF THE PEACE, mayor, or bailiff of city or town corporate, headborough, portreve, constable, tythingman, or collector, for or concerning any manner, cause, or thing, by them or any of them done by virtue or reason of their or any of their office or offices, it shall be lawful for such officers or any of them, and all others which in their aid or assistance, or by their commandment, shall do anything touching or concerning his or their office or offices, to plead the general issue, not guilty, and give the special matter in evidence to the jury which shall try the same; and if the verdict shall pass with the defendant in such action, or the plaintiff become nonsuit, or suffer a discontinuance, in every such case, the justices or justice, or such other judge before whom the said matter shall be tried, shall allow to the defendant his double costs."

4 Inst. 174.
1 Inst. 283.
Vaughan, 113.
115. 117.
Morgan's Vade Mec. 49.
Str. 116.

† *Sect. 76.* And it is further enacted by 21 Jac. 1. c. 12. (which extends the above act to churchwardens and overseers of the poor). "That the said suit shall be laid within the county where the trespass or fact shall be done and committed, and not elsewhere; and that upon the trial, if the plaintiff shall not prove to the jury that it was so done and committed, the jury shall find the defendant not guilty, without having any regard or respect to any evidence given by the plaintiff touching the cause of action."

† *Sect. 77.* By 24 Geo. 2. c. 44. "No writ shall be sued out against, nor any copy of any process, at the suit of a subject, be served on, any justice of the peace for any thing by him done in the execution of his office, until notice in writing of such intended writ or process shall have been delivered to him or left at the usual place of his abode, by the attorney or agent for the party who intends to sue or cause the same to be sued out or served, at least one calendar month before the suing out or serving the same; in which notice shall be clearly and explicitly contained the cause of action which such party hath, or claimeth to have against such justice of the peace; on the back of which notice shall be indorsed the name of such attorney or agent, together with the place of his abode, who shall be intitled to have the fee of twenty shillings for the preparing and serving such notice, and no more."

N.B. By 30 Geo. 2. c. 24. s. 2. this clause is extended to justices acting under that act.

† *Sect. 78.* By 24 Geo. 2. c. 44. s. 2. "It shall and may be lawful to and for such justice of the peace, at any time within one calendar month after such notice given as aforesaid, to tender amends to the party complaining, or to his or her agent or attorney; and, in case the same is not accepted, to plead such tender

"tender in bar to any action to be brought against him, grounded on such writ or process, together with the plea of not guilty, and any other plea, with the leave of the court; and if, upon issue joined thereon, the jury shall find the amends so tendered to have been sufficient, then they shall give a verdict for the defendant; and in such case, or in case the plaintiff shall become nonsuit, or shall discontinue his or her action, or in case judgment shall be given for such defendant or defendants upon demurrer, such justice shall be entitled to the like costs as he would have been entitled unto, in case he had pleaded the general issue only; and if upon issue so joined the jury shall find that no amends were tendered, or that the same were not sufficient, and also against the defendant or defendants on such other plea or pleas, then they shall give a verdict for the plaintiff and such damages as they shall think proper, which he or she shall recover, together with his or her costs of suit." Douglas, 367.

† But by 24 Geo. 2. c. 44. s. 3. "No such plaintiff shall recover any verdict against such justice in any case where the action shall be grounded on any act of the defendant as justice of the peace, unless it is proved upon the trial of such action, that such notice was given as aforesaid; but in default thereof such justice shall recover a verdict and costs as aforesaid."

† Sect. 79. By 24 Geo. 2. c. 44. s. 4. "In case such justice shall neglect to tender any amends, or shall have tendered insufficient amends, before the action brought, it shall and may be lawful for him, by leave of the court where such action shall depend at any time before issue joined, to pay into court such sum of money as he shall see fit; whereupon such proceedings, orders, and judgments shall be had, made, and given in and by such court (9), as in other actions where the defendant is allowed to pay money into court."

† And by 24 Geo. 2. c. 44. s. 5. "No evidence shall be permitted to be given by the plaintiff on the trial of any such action as aforesaid, of any cause of action, except such as is contained in the notice hereby directed to be given."

† Sect. 80. By 24 Geo. 2. c. 44. s. 6. "No action shall be brought against any constable, headborough or other officer, or against any person or persons acting by his order and in his aid, for any thing done in obedience to any warrant under the hand or seal of any justice of the peace, until demand hath been made or left at the usual place of his abode, by the party or parties intending to bring such action, or by his, her, or their attorney or agent, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused, or neglected for the space of six days after such demand; and in case after such demand and compliance therewith, by shewing the said warrant to, and permitting a copy to be taken thereof by the party demanding the same," Cro. Car. 394.
10 Co. 76.
Wood, b. 1. c. 7.

(9) It must appear that the action was for something done in the execution of his duty; or the court will fix a time for him to plead. But if it

appear upon the production of the notice of action, it is sufficient. 2 Black. 859.

“ same, any action shall be brought against such constable, head-
 “ borough, or other officer, or against such person or persons
 “ acting in his aid for any such cause as aforesaid, without
 “ making the justice or justices who signed or sealed the said
 “ warrant defendant or defendants, that on producing or proving
 “ such warrant at the trial of such action, the jury shall give their
 “ verdict for the defendant or defendants, notwithstanding any
 “ defect of jurisdiction in such justice or justices (10); and if
 “ such action be brought jointly against such justice or justices,
 “ and also against such constable, headborough, or other officer,
 “ or person or persons acting in his or their aid as aforesaid, then,
 “ on proof of such warrant, the jury shall find for such constable,
 “ headborough, or other officer, and for such person or persons so
 “ acting as aforesaid, notwithstanding such defect of jurisdiction
 “ as aforesaid; and if the verdict shall be given against the justice
 “ or justices, that in such case the plaintiff or plaintiffs shall reco-
 “ ver his, her, or their costs against him or them, to be taxed in
 “ such manner by the proper officer as to include such costs as
 “ such plaintiff or plaintiffs are liable to pay such defendant or
 “ defendants for whom such verdict shall be found as aforesaid.”

2 Ventris, 45.

† Sect. 81. But is provided by 24 Geo. 2. c. 44. s. 7. “ That
 “ where the plaintiff in any such action against any justice of
 “ the peace shall obtain a verdict, in case the judge before whom
 “ the cause shall be tried shall, in open court, certify on the
 “ back of the record, that the injury for which such action was
 “ brought, was wilfully and maliciously committed, the plaintiff
 “ shall be intitled to have and receive double costs of suit.—
 “ And no action shall be brought unless commenced within six
 “ calendar months after the act committed.”

(a) Rex v. Pick-
 ins, Mich.
 23 Geo. 3.
 Dougl. 307.
 nota.

† Sect. 82. It has been determined (a) on this branch of the
 statute, that where there is a special verdict, and it appears from
 the facts found that the act for which the action was brought was
 done by the defendant, by virtue or reason of his office as a justice
 of the peace, the master, on a verdict for the plaintiff, must tax
 double costs, though there has been no certificate or allowance by
 the judge before whom the cause was tried; but when it does
 not appear upon the record in what capacity the defendant was
 acting, an allowance of the judge at nisi prius is necessary.

Grindley v.
 Holloway,
 Dougl. 307.

Entick v. Car-
 rington, 11 St.
 Tr. 331.

Sect. 83. It hath also been determined, that secretaries of
 state and privy counsellors are not magistrates, and that the king's
 messengers are not officers within the protection of the fore-
 going statutes.

Hill v. Bate-
 man, 1 Str. 710.

Sect. 84. It was agreed, than when an action is brought
 against justices of the peace for any wrong done by the exercise
 of their authority, as by committing a person under a conviction
 on the game laws without first attempting to distrain for the
 penalty, it is incumbent on the defendants to shew the regularity
 of

(10) If a justice of peace make a warrant in a
 case which is plainly out of his jurisdiction, such
 warrant is no justification to a constable. 1 Stra.
 711. Wood, b. 1. c. 7. 2 Stra. 1002. But if

the justice exceed his authority in granting a war-
 rant, yet the officer must execute it, and is indem-
 nified for so doing. Cro. Car. 394. 10 Co. 76.

of their convictions; and that the informations, &c. laid before them upon which their convictions are grounded, must be produced and proved in court.

Sect. 85. It is also agreed that an action of trespass will not lie against justices of the peace for making a warrant to distrain for the poor's rate under the 14 Eliz. c. 2. if the rate has not been appealed from, and the warrant is not void so as to make the parties executing it trespassers *ab initio*. But if a justice issue a warrant totally illegal, as if a pauper return without a certificate to the parish from whence he was removed, and the justice make a warrant to commit him to the house of correction, "there to remain until discharged by due course of law," instead of pursuing the statutes under which his authority on this subject is derived (*a*), he is liable to an action of false imprisonment, although he did not, in granting such warrant, act intentionally wrong. (*b*)

Hutchins v. Chambers,
1 Burr. 580.

(*a*) 13 & 14
Car. 2. c. 12.
s. 3.
17 Geo. 2.
c. 53.
(*b*) *Baldwin v. Blackmore,*
1 Burr. 596.

XVIII. How far justices of the peace may award costs.

Sect. 86. By 18 Geo. 3. c. 19. "Where any complaint shall be made before any justice of the peace, and any warrant or summons shall issue in consequence of such complaint, it shall be lawful to and for any justice or justices of the peace who shall have heard and determined the matter of the said complaint, to award such costs to be paid by either of the parties, and in manner and form as to him or them shall seem fit, to the party injured; and if they shall not pay down or give satisfactory security for the same, the said justice or justices shall, by warrant under hand and seal, levy the said sum or sums by distress and sale, and where goods and chattels of such person cannot be found, shall commit such person to the house of correction for the county or place where such person shall reside, there to be kept to hard labour not exceeding one month, nor less than ten days, or until such sum or sums of money, together with the expenses of the commitment, be first paid."

+ *Sect. 87.* But it is provided by the said statute, "That upon the conviction of any person or persons upon any penal statute where the penalty shall amount to, or exceed, five pounds, the said costs shall be deducted by the said justice or justices, according to his or their discretion, out of the said penalty or penalties, so that the said deduction shall not exceed one-fifth part of the penalty or penalties aforesaid; and the remainder shall be paid to, or divided among, the person or persons who would have been intitled to the whole in case this act had not been made."

Of the Court of Sessions.

The court of justices of the peace in sessions is an assembly of two or more such justices, whereof one is of the *quorum*, at a certain day and place before appointed, in order to inquire, hear, and determine, in pursuance of their commission, of any causes

Dalton, c. 185.
Jurym's Office of Sheriff, 364.

or matters therein contained; and this court, when legally convened, is a court of record.

For the better understanding hereof I shall consider,

1. At what time such court is to be held.
2. By whom, and in what manner, it is to be summoned and appointed.
3. In what manner such court shall be adjourned.
4. What persons are bound to give their attendance at it.
5. Whether it hath any power over its own members.
6. The difference between *general*, *special*, and *quarter sessions*.
7. What persons may practise in it.
8. Of the extent and nature of its jurisdiction.
9. In what cases it may amend proceedings.
10. In what cases justices may award costs.
11. In what cases the sessions may make orders respecting the county.

I. At what time such court is to be held.

Sect. 1. By 12 Rich. 2. c. 10. "The justices shall keep their sessions in every quarter of the year at least, and by three days, if need be, on pain of being punished according to the discretion of the king's council, at the suit of every man that will complain."

(a) Vide ante. *Sect. 2.* By 2 Hen. 5. st. 1. c. 4. it is enacted, "That the justices of the peace in every shire named of the *quorum*, &c. (a) shall make their sessions four times in the year, viz. in the first week after Michaelmas—Epiphany—Easter—and the translation of St. Thomas the Martyr, and oftener if need be; and that the same justices shall hold their sessions throughout England in the same weeks every year."

Cro. Cir. 30. *Sect. 3.* But by 14 Hen. 6. c. 4. it is enacted, "That the justices of the peace for the county of Middlesex shall keep, observe, and execute the court of the session of the peace two times in the year at least, and more often if need be." And because of the great business in this county, it is usual to hold four *general* and four *general quarter-sessions* in the year.

2 Hale, 49. *Sect. 4.* By 33 Hen. 8. c. 10. the Tuesday after Easter week is expounded to be in the week after *clausum paschæ* for the sessions to be held; yet *clausum paschæ*, or Low Sunday, is the first day in that week.

2 Hale, 49. *Sect. 5.* Sir Matthew Hale says, the strict regular exposition of the statute of Henry the Fifth for the week after Michaelmas, &c. is, that if Michaelmas fall upon a Sunday or Monday, the quarter-sessions, in strictness, should be held in the ensuing week, and not the same week. Yet it is very plain that the quarter-sessions are variously held in several counties, some at one day,

day, some at another; and it hath been ruled, that these are each of them good quarter-sessions within the several acts that relate to quarter-sessions, for that these acts, especially that of the 2 Hen. 5. c. 4. is only directive and in the affirmative; and therefore, though the sessions are held at another day, according to the general direction of the statute 12 Rich. 2. c. 10. yet they are quarter-sessions.

II. By whom, and in what manner, the session is to be summoned and appointed.

Sect. 6. It seems clear from the express words of the commission, that any two justices of the peace, whereof one is of the *quorum*, may hold such court at such days and places as shall be appointed by them; and that the sheriff is bound to return proper juries; and that the *custos rotulorum* ought to bring the rolls of the peace before them, &c.

C. C. C. 29.
Lamb. b. 4. c. 2.
and 70.
Dalt. ch. 185.

Sect. 7. And from hence it seems to follow, that any two such justices may direct their precept under their *teste* to the sheriff for the summons of the sessions of the peace, thereby commanding him to return a grand jury before them, or their fellow-justices, at a certain day and place, and to give notice to all stewards, constables, and bailiffs of liberties, to be present and do their duties at such day and place, and to proclaim in proper places throughout his bailiwick, that such sessions will be holden at such day and place, and to attend there himself to his duty, &c.

Lamb. b. 4.
c. 20.

† *Sect. 8.* And such precept should bear *teste* or be dated fifteen days before the return, and ought forthwith to be delivered to the sheriff, to the end that he may have sufficient time to proclaim the sessions; to summon and return the several juries; and to warn all officers and others that have business there to attend.

Nelson, 35.
4 Burn, 218.

Sect. 9. And it is said that such a precept by any two such justices cannot be superseded by any of their fellows, but only by a writ out of chancery.

2 Hale, 41.
Lamb. b. 4. c. 2.
Crom. Jur. 12.

† *Sect. 10.* But it is not sufficient that the precept run under the name of the *custos rotulorum* alone; for he hath no more authority in this behalf than any one of his fellow-justices; and the words of the commission are, “that the sheriffs shall cause a jury “to appear at such days and places as the said justices, or two “or more of them, shall appoint.”

Lamb. 382.

Sect. 11. It is said that such justices may hold such a session without any such summons, which seems to be a well-grounded opinion, as to their proceeding on indictments before taken before themselves or others, or on other particular occasions, for which there is no need either for the attendance of the grand jurors, or officers, &c.

Vide 4 Burn,
181.
Lamb. 380.

† *Sect. 12.* It seems to be generally understood, that if a sufficient number of justices do not appear on the day appointed for holding the sessions, that the session for that quarter of the year is irrecoverably lost; but this must be understood, that there cannot be time to summon a session *de novo* in the very identical week next after any of the respective holydays mentioned in the statute 2 Hen. 5. c. 4; for a session may be opened without

Lamb. 380.
4 Burn, 217.

out such summons, and adjourned to another day; and the justices who open the session may issue their precept to the sheriff against the day of adjournment; and how many adjournments soever shall be holden afterwards in that quarter of the year, all shall refer to the first commencement of the sessions. For though a session shall not be holden within a week after such feast-day, it does not follow that therefore it cannot be holden in any of the twelve weeks afterwards, especially as it appears that any two justices, one whereof is of the *quorum*, may issue a precept to summon a session for the general execution of their authority, and that such session, holden at any time within that quarter of the year, is a general quarter-session.

† *Sect. 13.* It was formerly thought, that if two or more justices appointed a session to be holden in one town, and so many more appointed a session in another town the same day, that both sessions were good, and that appearance at one would be a good discharge of service at the other. (a) But this has been justly questioned; (b) and it is now settled, that where two sets of magistrates have a concurrent jurisdiction, and one set appoints a session or a meeting for a special purpose, *their* jurisdiction attaches so as to exclude the other appointing a subsequent session or meeting, and not only renders their acts illegal, but subjects such justices to an indictment. (c)

III. In what manner such court shall be adjourned.

† *Sect. 14.* The court of sessions, when regularly opened, can only be continued by adjournment, (d) in the entry of which it ought to appear when the original sessions commenced; (e) and therefore if an indictment be taken at an adjourned session, and it do not appear on what day the original session began, to bring it within the time prescribed by the statute 2 Hen. 5. c. 4. it is erroneous. (f) So also in trespass and false imprisonment, where the defendant justified under a warrant made at a general quarter-sessions that was held on the ninth day of October, by virtue of which said warrant he took the plaintiff on the tenth of October to bring him to the sessions; the court held the plea ill, because it was not shewn that the session was continued till the tenth of October; (g) for all its proceedings, whether under the authority of particular statutes, or by the common law, must contain formal and regular continuances; (h) and therefore where the caption of an indictment stated that the session was held on Tuesday the fourth of October, in the twenty-fifth year of the reign, and then stated that the same sessions were adjourned till Tuesday the sixth day of July aforesaid, it was held, on demurrer, to be bad, for the adjournment was to an impossible day. But the continuance of the session from day to day need not be particularly set out, (i) for while the session continues, it is considered in law as one day. (k) But if a sessions be once dropped, and not adjourned, it cannot be resumed; (l) and therefore if the sessions refer a matter to the determination of the judges of assize, who decline intermeddling, and the sessions afterwards make an order in the matter, it is void, for such reference is not a proper adjournment. (m) So if the court are equally divided upon a question, it must be adjourned, or no order can be made at a subsequent session.

(a) Dalt. c. 185.

(b) 4 Burn, 219.

(c) Rex v. Sainsbury, Mich. Ter. 32 Geo. 3.
4 Term. Rep. 451.

(d) Rex v. Reading, B. R. H. 80.
(e) 2 Stra. 832.
Rex v. Harrowby, Burr. S. C. 102.
(f) Fisher's case, 2 Stra. 865.
Rex v. Grind, 2 Bott. P. L. 841.

(g) Doughty v. Mills, 1 Lev. 229, *lumen quare*.
(h) Rex v. Polsted, Stra. 1263.
B. R. St. 79.
(i) Rex v. Fearnley, 1 Term Rep. 319.

(j) Andr. 101.
(k) 2 Salk. 606.
(l) Stra. 1263.
Burr. S. C. No. 105.
(m) Rex v. Readley, B. R. H. 79.
Rex v. Heddingham-Sible, Burr. S. C. 112.

session.(a) An adjournment must be made by the same number of justices as are necessary to hold a session.(b)

(a) Rex v. War-
lign, 2 Bott.
P. L. 844.

(b) Rex v. Westington, 2 Bott. P. L. 844. pl. 834.

IV. What persons are bound to attend the court of sessions.

Sect. 15. There is no doubt but that the sheriff, (who is bound both to return his precept, and also to take the charge of all the prisoners who shall be committed to him,) and also all constables of hundreds, who are to make their presentments required by several statutes, (as that of *hue and cry*, and those relating to highways and ale-houses, &c.) and also all bailiffs of franchises, and all persons returned on a jury, and the keeper(c) of the house of correction, &c. are bound to attend on every such summons as is above-mentioned, on pain of being amerced for their default at the discretion of the court, &c.

4 Com. Dig.
153. D. 4.
For the mode of
proceeding at
sessions, vide
Burn, tit. "Ses-
sions," and Cro.
Cir. Com. 28 to
79. Lamb. 402.
Dalt. ch. 185.
See the statute
of Winchester.
(c) 7 Jac. 1. c. 4.

+ **Sect. 16.** Justices of the peace also ought, without doubt, to appear at the sessions; for without their appearance the sessions cannot be holden.(d)

(d) Dalt. c. 185.

V. Whether the court of sessions hath any power over its own members.

Sect. 17. It seems certain that this court hath no authority to amerce any justice of peace for his non-attendance at any such court, as the justices of assize may for the absence of any such justice at the gaol-delivery; for it is a general rule, that *inter pares non est potestas*, it being reasonable rather to refer the punishment of persons in a judicial office, in relation to their behaviour in such office, to other judges of a superior station, than to those of the same rank with themselves; and therefore it seems to have been holden, that if a justice of peace at the sessions who is not of the *quorum* shall use such expressions towards another who is of the *quorum*, for which, if he were a private person, he might be committed or bound to his good behaviour, yet the sessions have no authority to commit him, or to bind him to his good behaviour: and yet it seems to be agreed, that if a justice of peace give just cause to any person to demand the surety of the peace against him, he may be compelled by any other justice to find such security, as hath been shewn in the first book;(e) for the public peace requires an immediate remedy in all such cases.

Lamb. 402.

Crom. 122.
F. Jus. de
Peace, 3.

(e) B. 1. tit.
"Surety of the
Peace."

VI. The difference between *general*, *special*, and *quarter* sessions.

Sect. 18. Mr. Lambard seems to make no distinction between *general*, *special*, and *quarter* sessions, but to take them as synonymous terms. But it seems the better opinion, that the *quarter* sessions are a species only of *general* sessions, and that such sessions are properly called *general quarter sessions* which are holden in the four quarters of the year,(1) in pursuance of the above-mentioned statute of 2 Hen. 5. c. 4; and that any other sessions holden at any other time for the general execution of the authority of justices of peace, which, by the above-mentioned statute, justices of the peace are authorised to hold oftener than

Lamb. b. 4.
c. 19, 20.

2 Hale, 49, 50.

Salk. 474, 476.
480, 482.
5 Mod. 322.

at

(1) The Michaelmas quarter-sessions, by st. 54 Geo. 3. c. 84. is directed to be held the first week after the 11th of October.

Comb. 448.
Carth. 322.
Lut. 911.

at the times therein specified, if need be, may be properly called *general sessions*; and that those holden on a special occasion, for the execution of some particular branch of their authority, may properly be called *special sessions*.

VII. What persons may practise in the court of sessions.

† *Sect. 19.* By 22 Geo. 2. c. 46. s. 12. it is enacted, "That no person whatsoever shall act as solicitor, attorney, or agent, or sue out any process at any general quarter sessions of the peace for any county or place within this kingdom, either with respect to matters of a criminal or civil nature, unless such person shall have been admitted and continued an attorney of one of his majesty's courts of record at Westminster, and duly enrolled pursuant to 2 Geo. 2. c. 23. or such other laws as may relate thereto, upon a penalty of fifty pounds, to be recovered by action of debt, bill, plaint, or information, in any of the courts of record at Westminster, by any person or persons who shall sue for the same within twelve months after the offence committed, with treble costs of suit."

† *Sect. 20.* By 22 Geo. 2. c. 46. s. 13. "If any attorney or attornies shall permit and suffer any person or persons whatsoever, not being admitted and enrolled as aforesaid, to make use of his or their name or names, respectively, in the courts of general or quarter sessions aforesaid, he shall be liable to a like penalty of fifty pounds, to be recovered in manner aforesaid. But this shall not deprive the attornies of the duchy of Lancaster, or of the great sessions of Wales, or of the counties palatine of Chester, Lancaster, and Durham, from acting within their respective jurisdictions."

Williams's case,
4 Term. Rep.
496.

Sect. 21. The court of King's Bench will refer an attorney's bill to be taxed, for business done at the quarter sessions.

(a) By 3 and 4
Edw. 6. c. 1.
37 Hen. 8. c. 1.
and 1 Will. and
Mary, c. 21. s. 4.

† *Sect. 22.* And by 22 Geo. 2. c. 46. s. 14. to the end that justice may be more impartially administered, it is further enacted, "That no clerk of the peace (a) or his deputy, nor any under-sheriff or his deputy, shall act as a solicitor, attorney, or agent, or sue out any process at any general or quarter sessions of the peace to be held for such county or place where he shall execute the office of clerk of the peace, (2) or deputy clerk of the peace, under-sheriff or deputy, on any pretence whatsoever, upon the like penalty of fifty pounds, to be recovered in manner aforesaid."

VIII. Of the extent and nature of the jurisdiction of the sessions.

† *Sect. 23.* The court of sessions may proceed against offenders by presentment, by information, or by indictment. (b)

† *Sect. 24.* The clause in the statutes of 18 Edw. 3. c. 2. and 34 Edw. 3. c. 1. (c) that the justices in sessions shall have power to "hear and determine trespasses at the king's suit, &c." is construed

(2) The lord chancellor is to appoint a *custos rotulorum*, who shall appoint a clerk of the peace, able, and residing in the same county, to execute the office.—Vide Shower, 538. By this appointment he has the office *quantum se bene gesserit*, Shower, 556. 4 Mod. 167. He is bound to attend

the sessions, and upon his misbehaviour, he may, by the statute 1 Will. and Mary, c. 21. be suspended, or discharged, 1 Shower, 427. 506. 516. 536. Mod. Cases, 192. 4 Mod. 32. according to the direction of the act, 2 Stra. 996.

strued to mean, that by *commissions* they may have such a power; and, therefore, whenever they hold such pleas, they must shew an appointment to hear and determine. (a)

(a) *Rex v. Carter*, 1 Stra. 414.

† *Sect. 25.* If a statute give jurisdiction to the court of quarter sessions, and a proceeding be regularly commenced on such statute, and the justices adjourn the hearing and the final determination thereof, a repeal of the statute between the commencement of the cause and the day of adjournment is an abolition of the jurisdiction of the sessions upon the subject, and they cannot proceed, though their authority had once attached.

Rex v. Justices of the Peace for the city of London, 3 Burr. 1456.

† *Sect. 26.* Where authority is given to two justices of the peace to do any act, the sessions may do it in all cases, except where appeal is directed to the sessions.

Rex v. Boughten 1 *Ld. Ray.* 426.

† *Sect. 27.* If a statute direct a proceeding at a special sessions, an original order made in the matter at a general quarter sessions is bad, even though the parties consent to the making thereof; for consent cannot give jurisdiction to a court that has none, and in such case the general quarter sessions has no original jurisdiction.

Rex v. Harts-horn and Another, 2 Burr. 745.

† *Sect. 28.* If a statute, as 5 Eliz. c. 4. s. 39. for exercising a trade, not having served an apprenticeship for seven years, enact, that the penalty may be recovered "in any of the king's courts of record, or before any of the justices of *oyer and terminer*, or before any other justices, or president and council, before recommended by action of debt, information, bill of complaint, or otherwise," the quarter session may proceed by information for such penalty. But if jurisdiction be given to the sessions to hear and determine, without saying by information, this shall be by indictment, and not upon information. (b)

Farem qui tum Williams, Cowp. 369.

(b) *Dalt*, c. 191. 4 Burr. 221.

† *Sect. 29.* The sessions have no power to judge of the validity of a deed, and therefore if a pauper is bound out an apprentice by the justices, and his master assigns him over to another, the sessions cannot adjudge the assignment void.

Rex v. Barnes, 1 Stra. 48.

† *Sect. 30.* The sessions have no jurisdiction over new-created offences not against the peace, unless the statute give them such jurisdiction in express terms; for by the general words of the commission from whence their authority is derived, they can only hear and determine offences against the peace, (c) and therefore they cannot take an indictment against the bailiff of a borough for having taken the oath of allegiance without having received the sacrament within the space of six months. (d)

Rex v. James, 2 Stra. 1256.
Rex v. Buggs, 4 Mod. 379.

(c) *Rex v. Alsop*, 4 Mod. 51.

(d) *Rex v. Bristow*, *Sayer*, 130.

† *Sect. 31.* The sessions are bound, like other courts of law, to make a direct and final judgment on the proceedings before them; (e) and therefore they cannot refer a matter of which they have a jurisdiction to the determination of other persons; (f) but they may, by the consent of the parties, refer a thing to another to examine, and make a report to them for their determination; for the court of King's Bench will never suffer the party who consented to the reference to set it aside. (g)

(e) *B. R. II.* 81.

(f) *Rex v. Harding*, 2 Salk. 477.

(g) *Cald.* 30.

† *Sect. 32.* The sessions may by the common law proceed to outlawry in cases of indictments found before them; and by the statute 21 Jac. 1. c. 4. in "all offences hereafter to be committed

(a) 12 Co. 103.
 (b) 2 Hale, 52.
 Lamb. 521.
Quere.
 But see post,
 ch. 27. s. 115,
 116.

Rex v. Bartlett,
 2 Sess. Cases,
 176.

“ted against any penal statute, for which any common informer
 “may lawfully ground any popular action, bill, plaint, suit, or in-
 “formation, before justices of peace in their general or quar-
 “ter sessions, the like process may be commenced, sued, or pro-
 “secuted, as in an action of trespass *vi et armis* at the common
 “law.” And it seems admitted by the statute 34 Hen. 8. c. 34.
 which requires the sessions to return a certificate of every out-
 lawry into the King’s Bench, that they may issue a *capias utlaga-*
tum, (a) or return the record of the outlawry into the King’s
 Bench, from whence process of *capias utlagatum* shall issue. (b)

† *Sect. 33.* The sessions cannot award an attachment for a
 contempt in not complying with their order; but the ordinary and
 proper method is by indictment.

IX. In what cases the sessions may make amendments.

† *Sect. 34.* It is enacted by 5 Geo. 2. c. 19. “That upon all
 “appeals to be made to the justices of the peace at their respec-
 “tive general or quarter sessions in England, against judgments
 “or orders given or made by any justices of the peace, such jus-
 “tices so assembled at any general or quarter sessions, shall, and
 “they are hereby required, from time to time, within their re-
 “spective jurisdiction, upon all and every such appeals so made
 “to them, to cause any defect or defects of form that shall be
 “found in any such original judgments or orders, to be rectified
 “and amended without any cost or charge to the parties con-
 “cerned, and, after such amendment made, shall proceed to hear,
 “examine, and consider the truth and merits of all matters con-
 “cerning such original judgments or orders, and likewise to exa-
 “mine all witnesses upon oath, and hear all other proofs relating
 “thereto, and to make such determinations thereupon as by law
 “they should or ought to have done in case there had not been
 “such defect or want of form in the original proceeding.”

For the condi-
 tions upon
 which the *cer-*
tiorari is allowed
 to remove these
 proceedings,
 vide title “Pro-
 cesses.”

X. In what cases the sessions may award costs.

Vide 43 Eliz.
 c. 2.
 17 Geo. 2. c. 38.
 s. 6, 7.

† *Sect. 35.* By 8 and 9 Will. 3. c. 30. s. 3. it is enacted,
 “That the quarter sessions, upon any appeal concerning the set-
 “tlement of any poor person, or upon proof of notice of any
 “such appeal, though not afterwards prosecuted, shall award and
 “order such costs and charges as they think reasonable to be
 “paid by those against whom such appeal shall be determined,
 “or by the person who gave the notice as aforesaid; and if such
 “person live without the jurisdiction of the court, every justice
 “where such person shall inhabit, upon request, and a copy of
 “the order produced and proved upon oath, by warrant under his
 “hand and seal, shall cause the same to be levied by distress, and
 “if no distress, commit the party for twenty days.”

4 Comm. 269.

† *Sect. 36.* And by 8 and 9 Will. 3. c. 30. s. 6. “The appeal
 “against any order for the removal of any poor person from out-
 “of any parish, township, or place, shall be had, prosecuted, and
 “determined, at the general or quarter sessions for the county
 “for the place from whence such removal shall lie, and not else-
 “where.”

† *Sect. 37.* By 9 Geo. 1. c. 7. s. 9. “If the justices of the
 “peace

“ peace shall, at their quarter sessions, upon an appeal before them there had, concerning the settlement of any poor person, determine in favour of the appellant, that such poor person or persons was or were unduly removed, that then the said justices shall, at the same quarter sessions, order and award to such appellant so much money as shall appear to the said justices to have been reasonably paid by the parish, or other place, on whose behalf such appeal was made for or towards the relief of such poor person or persons, between the time of such undue removal and the determination of such appeal; the said money so awarded to be recovered in the same manner as costs and charges upon an appeal are prescribed to be recovered by the said statute, made in the ninth year of his late majesty King William the Third.” 8 and 9 W. 3. c. 30.

† Sect. 38. By 17 Geo. 2. c. 38. s. 4. “ In case any person or persons shall find him, her, or themselves aggrieved by any rate or assessment made for the relief of the poor, or shall have any material objection to any person or persons being put on, or left out, of such rate or assessment, or to the sum charged on any person or persons therein, or shall have any material objection to such account as aforesaid, or any part thereof, or shall find him, her, or themselves aggrieved by any neglect, act, or thing done or omitted by the churchwardens and overseers of the poor, or by any of his majesty’s justices of the peace; it shall and may be lawful for such person or persons, in any of the cases aforesaid, giving reasonable notice to the churchwardens or overseers of the poor of the parish, township, or place, to appeal to the next general or quarter sessions of the peace for the county, riding, division, corporation, or franchise, where such parish, township, or place lies; and the justices of the peace there assembled, are hereby authorized and required to receive such appeal, and to hear and finally determine the same; but if it shall appear to the said justices that reasonable notice was not given, then they shall adjourn the said appeal to the next quarter-sessions, and then and there finally hear and determine the same; and the said justices may award and order to the party for whom such appeal shall be determined, reasonable costs, in the same manner that they are empowered to do in case of appeals concerning the settlement of poor persons, by an act made in the eighth and ninth years of King William the Third.” Persons aggrieved may appeal. See 3 Bur. 1366.

Sect. 39. By 13 Geo. 3. c. 78. s. 80. “ If any person shall think himself or herself aggrieved by any thing done by any justice or justices of the peace, or other person, in the execution of any of the powers given by this act, and for which no particular method of relief hath been already appointed, every such person may appeal to the justices of the peace, at any general quarter-sessions of the peace to be held for the limit wherein the cause of such complaint shall arise, such appellant giving, or causing to be given, notice in writing of his or her intention to bring such appeal, and of the matter thereof, to the justice, or other person or persons against whom such complaint shall be made, within six days after the cause of such complaint arose, “ and

“ and within four days after such notice entering into recogni-
 “ zance before some justice of the peace within such limit, with
 “ one sufficient surety, conditioned to try such appeal at, and
 “ abide the order of, and pay such costs as shall be awarded by
 “ the justices at such quarter-session; and every justice of the
 “ peace, and other person, having received notice of such appeal
 “ as aforesaid, shall return all proceedings whatsoever had before
 “ them respectively, touching the matter of such appeal to the
 “ said justices, at their general quarter-sessions aforesaid, on pain
 “ of forfeiting five pounds for every such neglect; and the said
 “ justices at such sessions, upon due proof of such notice being
 “ given as aforesaid, and of the entering into such recognizance,
 “ shall hear and finally determine the causes and matters of such
 “ appeal in a summary way, and award such costs to the parties
 “ appealing or appealed against, as they the said justices shall
 “ think proper; to be levied and recovered as herein before di-
 “ rected; and the determination of such quarter-session shall be
 “ final and conclusive to all intents and purposes; and that no
 “ proceedings to be had or taken in pursuance of this act shall be
 “ quashed or vacated for want of form, or removed by *certiorari*,
 “ or any other writ or process whatsoever (except as herein be-
 “ fore mentioned), into any of his majesty’s courts of record at
 “ Westminster, any law or statute to the contrary notwithstand-
 “ ing: provided that no such appeal shall be made against any
 “ conviction for any penalty or forfeiture incurred by virtue of
 “ this act, unless the person convicted shall, at the time of such
 “ conviction, if he or she shall be then present, if not, within six
 “ days after, give notice of his or her intention to appeal, and at
 “ the same time enter into recognizance, with sufficient sureties,
 “ to pay such penalty or forfeiture, in case such conviction shall
 “ be affirmed upon such appeal; and upon his or her giving such
 “ security, the further proceeding for such penalty or forfeiture
 “ shall be suspended until such appeal shall be heard and deter-
 “ mined.”

Proceedings not
 quashed for
 want of form,
 nor removable,
 &c.

Appeal.

Sect. 41. By 18 Geo. 3. c. 19. s. 5. “ In case the overseer or
 “ overseers of the poor of any parish, township, or place, for the
 “ time being, shall find that the said parish, township, or place,
 “ is aggrieved by any neglect, act, or thing done or omitted, by
 “ the constable, headborough or tithingman, or by any of his ma-
 “ jesty’s justices of the peace, or shall have any material objec-
 “ tion to such account, or any part thereof, or to such determi-
 “ nation as aforesaid, it shall and may be lawful for such overseer
 “ or overseers, in any of the cases aforesaid, giving reasonable
 “ notice to the said justice, constable, headborough, or tithing-
 “ man, to appeal to the next general or quarter sessions of the
 “ peace for the county, riding, division, city, town corporate,
 “ franchise, or liberty, where such parish, township, or place
 “ lies; and the justices of the peace there assembled are hereby
 “ authorized and required to receive such appeal, and to hear and
 “ finally determine the same; but if it shall appear to the said
 “ justices that reasonable notice was not given, then they shall
 “ adjourn the said appeal to the next quarter-sessions, and then
 “ and there finally hear and determine the same; and the said
 “ justices

“justices may award and order, to the party for whom such appeal shall be determined, reasonable costs, in the same manner that they are empowered to do in case of appeals concerning the settlement of poor persons, by an act made in the eighth and ninth years of King William the Third.”

By a variety of other statutes, giving appeals to the sessions against orders of magistrates, they have the power also to award costs.

Sect. 42. An indictment will lie for not paying costs awarded by an order of sessions. *Sayer, 108.143.*

Sect. 43. The court of King's Bench will grant a *mandamus* to the sessions, commanding them to allow such costs and charges, under 9 Geo. 1. c. 7. s. 9. as appear to them just and reasonable. *St. Mary, Nottingham v. Kirk-
lington, 2 Bott.
867.*

Sect. 44. The sessions in directing costs and charges need not state in the order the sums that were expended by the party to whom they are ordered to be paid. *Maiden Bradley
v. Wallingford,
Foley, 247.*

Sect. 45. The sessions cannot order costs on the mere adjournment of an appeal. *Rex v. Stain-
field,
S. C. Burr. 205.*

XI. In what case the sessions may make orders respecting the county.

† *Sect. 46.* By 9 Geo. 3. c. 20. “The justices of the peace, or the major part of them, in their respective general or quarter sessions assembled, upon presentment of the grand jury of the ill state and condition of the shire hall, or other building, and the necessity of repairing the same, shall order and direct the same to be repaired in such manner as they in their discretions shall think fit, and shall assess and levy the necessary sums of money for this purpose upon the several divisions of the county, according to the directions of the 12 Geo. 2. c. 29. and 13 Geo. 2. c. 18.” *Where sudden
repairs are
wanted, not ex-
ceeding £30,
two justices
may make an
order therein.
But shire halls
repaired by any
particular per-
son or district,
shall still be at
their expense.*

Sect. 47. By 14 Geo. 3. c. 59. “The several justices of the peace in that part of Great Britain called England and Wales, within their several jurisdictions, in their quarter-sessions assembled, are hereby authorized and required to order the walls and ceilings of the several cells and wards, both of the debtors and the felons, and also of any other rooms used by the prisoners, in their respective gaols and prisons, where felons are usually confined, to be scraped and white-washed once in the year at least; to be regularly washed and kept clean, and constantly supplied with fresh air, by means of hand ventilators, or otherwise; to order two rooms in each gaol or prison, one for the men, and the other for the women, to be set apart for the sick prisoners, directing them to be removed into such rooms as soon as they shall be seized with any disorder, and kept separate from those who shall be in health; to order a warm and cold bath, or commodious bathing tubs, to be provided in each gaol or prison, and to direct the prisoners to be washed in such warm or cold baths, or bathing tubs, according to the condition in which they shall be at the time, before they are suffered to go out of such gaols or prisons upon any occasion whatever; to order” *Power of the
justices at ses-
sions ;*

" order this act to be painted in large and legible characters upon
 " a board, and hung up in some conspicuous part of each of the
 " said gaols and prisons; and to appoint an experienced surgeon
 " or apothecary, at a stated salary, to attend each gaol or prison
 " respectively, who shall, and he is hereby directed, to report to
 " the said justices by whom he is appointed, at each quarter
 " sessions, a state of the health of the prisoners under his care or
 " superintendence."

who may issue
 orders as they
 shall think fit.

Sect. 48. By 14 Geo. 3. c. 59. s. 2. " The said justices of the
 " peace, in their said quarter sessions assembled, are hereby au-
 " thorised to direct the several courts of justice within their re-
 " spective jurisdictions to be properly ventilated; to order clothes
 " to be provided for prisoners when they see occasion; to prevent
 " the prisoners from being kept under ground, whenever they can
 " do it conveniently; and to make such other orders, from time
 " to time, for restoring or preserving the health of prisoners, as
 " as they shall think necessary."

Expenses how
 to be defrayed.

Sect. 49. By 14 Geo. 3. c. 59. s. 3. " The expenses attending
 " the execution of the orders of the said justices, made in pursu-
 " ance of this act, so far as the same shall respect county gaols
 " and prisons, and courts of justice belonging to counties, shall
 " be borne and defrayed, at all times, out of the respective county
 " rates; and so far as the same shall respect the gaols and prisons,
 " and courts of justice, of particular cities, towns corporate,
 " cinque ports, liberties, franchises, or places, that do not contri-
 " bute to the rates of the counties in which they are respectively
 " situated, such expenses shall be defrayed out of the public
 " stock or rates of such cities, towns corporate, cinque ports, li-
 " berties, franchises, or places, having such exclusive jurisdictions,
 " to which such gaols, or prisons, or courts of justice, shall re-
 " spectively belong: and if any gaoler or keeper of any prison shall
 " at any time neglect or disobey the orders of such justices, made
 " in pursuance of this act, he may be proceeded against in a sum-
 " mary way, by complaint made to the judges of assize, or to
 " the justices in their quarter sessions; and if he be found guilty
 " of such neglect or disobedience, he shall pay such fine as the
 " judges of assize, or justices shall impose, and shall be commit-
 " ted in case of non-payment."

Gaolers dis-
 obeying orders
 to be proceeded
 against in a sum-
 mary way.

Rex v. the Inha-
 bitants of Essex,
 Easter, 32 Geo.
 3.
 4 Term. Rep.
 591.

† *Sect. 50.* If a fine be imposed on a county which the justices
 at sessions think illegal, they may order the treasurer to defray
 the expenses of litigating the question, out of the county stock:
 so also they may order the treasurer to pay the expense of litigat-
 ing any question respecting the repair of the highways, or county
 bridges, or the purchase of land adjoining to such bridges.

CHAP. IX.

OF THE COURT OF THE CORONER.

CORONERS are (a) ancient officers by the common law ; so (b) called, because they deal principally with the pleas of THE CROWN. (c) They were of old time the principal conservators of the peace within their county ; and there still ought to be a certain number of them in every county ; in (d) some more, in others less, according as the usage hath been. (1)

the earls gave the wardship of the county. Mirror, c. 1. s. 3. 1 Comm. 347. (b) 4 Inst. 31. (c) C. 8. s. 3. (d) F. N. B. 397. 4 Inst. 73. 271. 2 Inst. 175. 2 Hale, 5. 53. 1 Comm. 346. 4 Comm. 406. 2 Hale, 55.

(a) 2 Inst. 31. S. P. C. 48, 49. He is of equal antiquity with the sheriff, and was ordained with him to keep the peace, when 73. 271. 2 Inst.

Before I come to the particular consideration of their duty and authority, it may not be improper to premise the following particulars ; FIRST, What persons are qualified to be coroners.—SECONDLY, In what manner they are to be placed in their office.—THIRDLY, How they may be discharged.

As to the FIRST POINT, viz. What persons are qualified to be coroners.

Sect. 2. It is enacted by the statute of Westminster the first, c. 10. in the following words, “ Forasmuch as mean persons and indiscreet now of late are commonly chosen to the office of coroners, where it is requisite that persons honest, loyal and wise, shall occupy such offices : It is provided, that through all shires sufficient men shall be chosen to be coroners of the most loyal and most wise knights, which know, will and may best attend upon such offices, and which lawfully shall attach and present pleas of the crown.”

Sect. 3. It is observable, that this statute seems expressly to require, that none under the degree of knighthood shall be chosen a coroner, and that the statute of Merton, chapter the third, which was made near forty years before, seems to suppose that all coroners were knights. And it is farther remarkable, that in the writ *de coronatore exonerando* it is mentioned as a sufficient cause for the discharge of a coroner, that he is not a knight. Yet inasmuch as the principal intent of putting those words into the statute was to prevent the choosing of persons of mean ability, which is sufficiently answered by choosing men of good substance and credit ; and as it has been generally found impracticable to find knights enough in any county willing to undertake this office ; and the constant usage of many late ages, which is the best interpreter of

23 Ass. 7.
4 Inst. 271.
Reg. 177.
F. N. B. 164.

(1) CORONERS are of three kinds. 1. By virtue of an office. 2. By charter or commission. 3. By election. 1. The lord chief justice of the king's bench is, by virtue of his office, principal coroner in the kingdom, and may, if he please, exercise the jurisdiction of coroner in any part of the realm. 2. The lord mayor of London is by charter of 18 Edw. 4. coroner of London. The bishop of Ely also hath power to make coroners, by the

charter of Henry the Seventh ; and there are coroners of particular lords of franchises and liberties, who, by charter, have power to create their own coroners, or to be coroners themselves ; especially the jurisdiction of the Admiralty and the verge. 3. The general coroners of counties elected by virtue of statute Westminster the first, c. 18, and 28 Edw. 3. c. 6. 1 Hale, 52. 4 Rep. 57. 1 Comm. 348.

8. P. C. 48. c.
 1 Leon. 160,
 161.
 9. N. B. 164.
 10. Inst. 176.
 11. Hale, 55.

Co. Lit. 109.

of laws, hath suffered persons of good ability, under the degree of knights, to be chosen and continue coroners, without any objection against them on this account; it seems certain, that at this day it is no good cause to remove a coroner, that he is not a knight. For why should not such usage be as well allowed to make such an explanation of the law concerning coroners, as it unquestionably hath done of that relating to the representatives of a county in parliament, who by the writ for their election are expressly required to be *duo milites gladio cincti*, and yet may certainly be well chosen in pursuance of that writ, though they be under the degree of knights?

2 Inst. 175.

Sect. 4. It is further enacted by 14 Edw. 3. c. 8. "That no coroner be chosen, unless he have land in fee sufficient in the same county, whereof he may answer to all manner of people."

As to the SECOND POINT, *viz.* In what manner coroners are to be placed in their office.

2 Hale, 55.
 4 Inst. 271.

Sect. 5. It is observable, that they do not receive their authority from the king's commission, but from the election of the county in pursuance of the king's writ, issuing out of and afterwards returned into the chancery. And this is the reason why their authority does not determine by the demise of the king (*a*), as that of all judges, acting by the king's commission only, regularly does, as hath been more fully shown chapter the first, section the eleventh.

(*a*) 2 Inst. 175.
 1 Lev. 120.

1 Comm. 347.
 See the form of such certificate in Rastal's Entries, 133.

Sect. 6. The abovementioned writ for the election of a coroner is in this form: First, it recites the death or discharge of one or more former coroners, and then commands the sheriff to cause one other or more, as the case is, to be chosen, in a full county court, by the assent of the county, according to the form of the statute in that case made and provided; who, having taken his oath in the usual manner, may do all things which belongs to the office of a coroner, &c. and then it concludes with commanding the sheriff to certify to the court the name of the person chosen, &c.

(*a*) S. P. 49.
 2 Hale, 55.
 F. N. B. 163.
 4 Inst. 271.

Sect. 7. (*a*) A coroner, being chosen by virtue of such writ, shall be sworn by the sheriff, that he will lawfully do what belongs to the office of a coroner, &c.

(*b*) 2 Inst. 174,
 175.
 2 Hale, 56.

Sect. 8. (*b*) And inasmuch as he is chosen by the county, if he be insufficient, and not able to answer such fines, and other duties in respect of his office, as he ought, the county, as his superior, shall answer for him.

Sect. 9. And it is enacted by 28 Edw. 3. c. 6. "That all coroners of the counties shall be chosen in the full counties by the commons of the same counties, of the most meet and lawful people that shall be found in the same counties, to execute the said office; save always to the king and other lords, who ought to make such coroners, their seignories and franchises."

From this statute the two following points are observable.

F. N. B. 164.
 S. P. C. 49.

Sect. 10. First, That all such elections are appointed by it to be made

made by the commons of the counties, without mentioning freeholders ; and yet inasmuch as the said statute was made in affirmation of the common law, and (c) none but freeholders are suitors to the county court, and that usage hath always been, both before and since the said statute, for such only to vote, it is certain, that none but freeholders have a voice at any such election. (c) 2 Inst. 99.
2 R. Ab. 121.

Sect. 11. Secondly, That it is clearly supposed by the said statute, that not only the king, but also other lords, have the franchise of making coroners. From whence it seems reasonable to infer, that the king may lawfully claim such franchise by prescription, and that other lords may claim it by grant from the crown (d) ; but it is a privilege of so high a nature, that no subject can well entitle himself to it by prescription only. 2 Halc. 53, 54.
Co. Lit. 114.
(d) Vide note to section 1.

As to the THIRD POINT, viz. In what manner coroners may be discharged from their office.

Sect. 12. It is certain, that if any of them be so far engaged in any other public business in the county, that he cannot have leisure enough to attend the office of a coroner ; or if he be chosen verderer of a forest, or if he have not sufficient lands in the same county, whereon to live according to his state and degree, or if he be disabled either by old age, or any inveterate disease, as the palsy, or the like, to execute his office as he ought ; and as some say, if he follow any common trade, he may be discharged by the writ *de coronatore exonerando*, (2) ; which being directed to the sheriff, after a recital of the particular cause of the discharge of such coroner, commands him to cause another to be chosen in his room. Reg. 177.
F. N. B. 163,
164.
S. P. C. 48.
8 Co. 41.
2 Inst. 32.
1 Comm. 348.

Sect. 13. But if any writ of this kind be grounded on an untrue suggestion, the coroner may procure a commission from the chancery to inquire of the truth of it, and to return the inquiry before the king into the chancery ; and if upon such commission the suggestion be disproved, the king may make a *supersedeas* to the sheriff, that he does not remove such coroner ; or if he have removed him, that he suffer him to execute the office as he did before. Reg. 177, 178.
F. N. B. 164.
S. P. C. 49.

AND NOW I am particularly to consider the DUTY and AUTHORITY of a CORONER.

For the better understanding whereof I shall examine the following points :—

First, In what places he hath a jurisdiction.

Secondly, How far he is empowered, and in what manner he ought to take an inquisition.

Thirdly, How far to receive and proceed on a bill of appeal.

Fourthly,

(2) But as it is an office of freehold, the court of chancery, with whom the power of granting this writ resides, will not suffer it to issue unless on affidavit that the defendant has been served with notice of the petition for it, 3 Atk. 184. And

on an election of a new coroner, by a majority of freeholders (for the court cannot appoint a new one), the power and authority of the old coroner is *ipso facto* extinguished. Godb. 105.

Fourthly, How far to receive and proceed on the appeal of an approver.

Fifthly, How far to take the abjuration of a felon.

Sixthly, How far the act of any one of them shall be as effectual as if it had been done by all.

Seventhly, In what cases he may lawfully take a fee for the execution of his office.

Eighthly, In what cases a matter recorded by or found before him, admits of no traverse.

As to the **FIRST POINT**, *viz.* In what places a coroner hath jurisdiction, I shall consider, How far he hath a jurisdiction of offences committed on the sea; and, How far a coroner of the county may intermeddle with offences done within the verge of the court, and *vice versâ*.

As to the first particular, *viz.* How far a coroner hath a jurisdiction of offences on the seas.

(a) Owen, 122.
Moor, 892.

2 Hale, 51.
S. P. C. 51.

Summary, 151.
(b) F. Cor. 399.

4 Inst. 140.

2 R. Ab. 169.
7.

(c) 3 Inst. 113.
5 Co. 107.

Sect. 14. It is laid down as a general rule by (a) some, that he may inquire of a felony committed on the arms of the sea, where a man may see from the one side to the other; but by others, who seem to be more accurate, his (b) power is confined to such parts of the sea where a man standing on the one side may see what is done on the other. But it seems to be (c) agreed, that he hath no jurisdiction of offences committed in the open sea, between the high and low water-mark when the tide is in; but that he hath an authority over offences committed in such places when the tide is out. (3)

As to the second particular, &c. *viz.* How far a coroner of the county may intermeddle with offences done within the verge of the court, and *vice versâ*.

2 Leon. 160.

4 Co. 46.

2 Hale, 54, 55.

(d) The coroner of the verge was anciently appointed by the king's letters patent.

Sect. 15. It is said, that at the common law, as the coroner of the king's house had nothing to do with an offence committed in the county out of the verge; so neither had the coroner of the county any thing to do with an offence committed within the verge. (d) And therefore it seems, that, before the statute of *articuli super chartas*, if a person had been killed any where within the verge of the court, and the king had removed his court before the coroner of the king's house had taken an indictment, no coroner at all had any jurisdiction of the fact; not the coroner of the county, because he had nothing to do with what happened within the verge of the court; not the coroner of the king's house, because his authority ceased when the place where the matter happened ceased to be within the verge of the court. And this seems to be confirmed by the statute of *articuli super chartas*, c. 3. whereby it is recited, that, before the making of that

(3) The coroner of Portsmouth has jurisdiction on board a man of war lying in Portsmouth harbour, and the court granted an information against the captain for refusing to let him come on board;

for though the admiralty have a coroner of their own, he never takes inquisitions of *felo de se*. Strange, 1097. Andr. 231.

that act, "many felonies committed within the verge had been unpunished because the coroners of the county had not been authorised to inquire of felonies done within the verge, but the coroner of the king's house, which never continued in one place, by reason whereof there can be no trial made in due manner, nor the felons put in exigent, nor outlawed, nor any thing presented in the circuit, the which had been to the great damage of the king, and nothing to the preservation of the peace:" and thereupon it is ordained, "That from thenceforth in cases of the death of men whereof the coroner's office is to make view and inquest, it shall be commanded to the coroner of the county, that he, with the coroner of the king's house, shall do as belongeth to his office, and enroll it," &c. It is said indeed by Sir Edward Coke, that if a murder had been committed within the verge, and the king had removed before any indictment taken by the coroner of the verge, the coroner of the county might have inquired of the same at the common law, *ne maleficia remanerent impunita*. But since no authority is cited by him for the maintenance of this opinion, and the argument brought to prove it is founded on a mistaken supposition, inasmuch as it doth by no means follow, that such offences would be dispunishable if they could not be inquired of by the coroner of the county, since they might certainly be indicted before justices of oyer and terminer, or of the peace, who have a general jurisdiction throughout the whole county; the contrary opinion seems rather the more plausible, as being more agreeable to the purport of the said statute, and the general tenor of our law books. 2 Inst. 550.

Sect. 16. But it is certain, that an indictment taken before the coroner of the county, and the coroner of the king's house, of an offence not appearing by the indictment itself to have happened within the verge of the court, is insufficient, for that every material part of an indictment ought to be found by the oaths of the indictors, and cannot be supplied with any averment; and it doth not appear by the indictment, that the coroner of the king's house had any authority to take it; and it shall not be said to be void, and *coram non iudice*, as to the coroner of the king's house, and good as to the coroner of the county, inasmuch as the record is entire, and the indictment was taken entirely before both; and peradventure the jury was directed principally by the coroner of the house, and the witnesses examined and sworn by him. 4 Co. 47.
2 Inst. 550.

Sect. 17. It hath been resolved, that if the same person be coroner of the county, and also of the king's house, an indictment of death taken before him as coroner both of the king's house and of the county, is good, because the mischief expressed in the statute is remedied as well when both offices are in the same person as when they are in divers. 2 Hale, 55.
4 Co. 46.
3 Inst. 134.
2 Leon. 160.
the same case,
but no resolution.

Sect. 18. Also it is enacted by 33 Hen. 8. c. 12. s. 13. "That all inquisitions upon the view of persons slain within any of the king's palaces or houses, or any other house or houses, at such time as his majesty shall happen to be there demurrant or abiding in his royal person, shall be taken by the coroner
" for

“ for the time being of the king’s household, without any adjoining or assisting of another coroner of any shire within this realm, by the oath of twelve or more of the yeomen, officers of the king’s household returned by the two clerks controllers, the clerks of the check, and the clerks marshals, or one of them, for the time being, of the said household, to whom the said coroner of the same household shall direct his precept, which coroner shall be from time to time appointed by the lord great master or lord steward for the time being; and that the said coroner shall certify under his seal, and the seals of such persons as shall be sworn before him, all such inquisitions before the said lord master, or lord steward, &c.”

2 Hale, 54.

As to the SECOND GENERAL POINT, viz. How far a coroner is empowered, and in what manner he ought to take an inquisition, I shall consider his authority of this kind—First, in relation to death.—Secondly, in relation to other matters.

As to his authority to take an inquisition of death, I shall examine—First, in what cases and in what manner he ought to take such inquisition.—Secondly, what further care must be taken by him for the prosecution of the offender, after taking the inquisition.—Thirdly, what high credit the law gives to it.

As to the first of these particulars, viz. In what cases and in what manner a coroner ought to take an inquisition of death.

Bract. 121.
Fleta, b. 1.
c. 25.
2 Hale, 59.
Wood, b. 4.
c. 1.

Sect. 19. It is enacted by 4 Edw. 1. commonly called the statute *de officio coronatoris*, “ That the coroner upon information shall go to the places where any be slain, or suddenly dead or wounded, and shall forthwith command four of the next towns, or five or six, to appear before him in such a place; and when they are come thither, the coroner upon the oath of them shall inquire (a) in this manner; that is, to wit, if they know where the person was slain, whether it were in any house, field, bed, tavern, or company, and who were there.”

(a) If in an inquisition *super visum corporis*, the year of our Lord, in the caption, is in common figures, it shall be quashed. It should be in words at length, or at least in Roman numerals. Strange, 261.

By 4 Edw. 1. “ Likewise it is to be inquired, who were culpable, either of the act or of the force, and who were present, either men or women, and of what age soever they be (if they can speak or have any discretion). And how many soever be found culpable by inquisition in any of the manners aforesaid, they shall be taken and delivered to the sheriff, and shall be committed to the gaol: and such as be founden, and be not culpable, shall be attached until the coming of the justices, and their names shall be written in the coroner’s rolls.”

By 4 Edw. 1. “ If it fortune any man such man be slain which is found in the fields, or in the woods, first it is to be inquired whether he were slain in the same place or not: and if he were brought and laid there, they shall do as much as they can, to follow their steps that brought the body thither, whether he were brought upon a horse, or in a cart.”

By 4 Edw. 1. “ It shall be inquired also, if the dead person
“ were

“ were known, or else a stranger, and where he lay the night before; and if any be found culpable of the murder, the coroner shall immediately go unto his house, and shall inquire what goods he hath, and what corn he hath in his grange; and if he be a freeman, they shall inquire how much land he hath, and what it is worth yearly; and further, what corn he hath upon the ground.”

By 4 Edw. 1. “ And when they have thus inquired upon every thing, they shall cause all the land, corn, and goods, to be valued, in like manner as if they should be sold incontinently, and thereupon they shall be delivered to the whole township, which shall be answerable before the justices for all. And likewise of his freehold, how much it is worth yearly over and above the service due to the lords of the fee, and the land shall remain in the king’s hands until the lords of the fee have made fine for it. And immediately upon these things being inquired, the bodies of such persons being dead or slain shall be buried.”

By 4 Edw. 1. “ In like manner it is to be inquired of them that be drowned, or suddenly dead, and after such bodies are to be seen, whether they were so drowned or slain, or strangled by the sign of a cord tied strait about their necks, or about any of their members, or upon any other hurt found about their bodies, whereupon they shall proceed in the form above-said; and if they were not slain, then ought the coroner to attach the finders, and all other in company.”

Sect. 20. By 4 Edw. 1. “ Also all wounds ought to be viewed, the length, breadth, and deepness, and with what weapons, and in what part of the body the wound or hurt is; and how many be culpable; and how many wounds there be, and who gave the wounds; all which things must be enrolled in the roll of the coroners.”

By 4 Edw. 1. “ Also horses, boats, carts, &c. whereby any are slain, that properly are called deodands, shall be valued and delivered unto the towns as before is said.”

Sect. 21. It is observable, that this statute being wholly directory, and in affirmance of the common law, doth neither restrain the coroner from any branch of his power, nor excuse him from the execution of any part of his duty, not mentioned in it, which was incident to his office before; and from hence it follows, that though the statute mention only his taking inquiries of the death of persons slain or drowned, or suddenly dead; yet he may and ought to inquire of the death of all persons whatsoever who die in prison (4), to the end that the public may be satisfied, whether such persons came to their end by the common course of nature, or by some unlawful violence, or unreasonable hardships put on them by those under whose power they were confined.

F. Cor. 421.
3 Inst. 52. 91.
B. Cor. 168.
S. P. C. 51.
1 Hale, 432.
2 Hale, 57.

Sect.

(4) And this inquest upon prisoners ought to consist of a party jury, viz. six of the prisoners, and six of the next vill or parish. *Umfreville, 212.*

(a) 1 Sid. 204.
Hale, 416.
Keb. 723.
744, 745.
Con. Latch.
166.
Pop. 210.
Co. Ent. 354.

(b) C. Eliz. 31.

Sect. 22. And the like reason also seems to be the best ground of the resolution which we find in some (a) books, that there is no necessity that it appear in a coroner's inquest, that it was taken by the oaths of persons of the next adjacent towns, but that it is sufficient to say, that it was taken by the oaths of lawful persons of the county, inasmuch as such inquisitions being good before the said statute, which is wholly declaratory, must needs be so still. But it (b) seems, that it ought to appear in every such inquisition, at what place, and by what jurors by name it was taken, and that such jurors were sworn; and that the reason given in some books that such inquests shall be intended to have been taken by the men of the next towns seems very harsh, if it be supposed necessary to be taken by such persons; for that such intendment would be contrary to the general rule of the law, which will not suffer any material part of an indictment to be taken by intendment.

(c) F. Cor. 107.
Hale, 58.
S. P. C. 51.
Lev. 141.
Lat. 166.
Noy, 87.
2 R. 3. 2.
21 Ed. 4. 70.
Summary, 170.
Pop. 209.
(d) F. Cor. 329.
339. 421.
S. P. C. 51.
1 Keb. 278.
(e) 21 Edw. 4.
70.
2 R. 3. 2.
Hale, 58, 59.
S. P. C. 51.
Summary, 170.
Holt, 167.
B. Cor. 167.
173.
(f) S. P. C. 51.
Summary, 170.
Lev. 141.
Lat. 166.
1 Vent. 352.
Pop. 209.
Salk. 190.
1 Bac. Ab.
Noy, 87.
2 R. Ab. 96.
1 Roll. 217.

Sect. 23. Also it is further remarkable, that the statute doth not expressly say, that the coroner shall take his inquest on the view of the dead body, and that an inquest otherwise taken by him shall be void. And yet it is clearly agreed by all the books (c), that a coroner has no manner of power to take an inquisition of death without a view of the body; and that any such inquest taken by him without such view, is merely void. And for this reason it hath been (d) adjudged, that if a dead body, in prison, or other place, whereupon an inquest ought to be taken, be interred, or suffered to lie so long, that it putrify before the coroner hath viewed it, the gaoler or township shall be amerced. (5) Also it hath been (e) resolved, that a coroner may lawfully within convenient time, as the space of fourteen days after the death, take up a dead body out of the grave in order to view it, not only for the taking of an inquest, where none hath been taken before, but also for the taking of a good one, where an insufficient one hath been taken before. (6) But if the body cannot be (f) found, or have lain so long before the coroner hath viewed it, that he can be no way assisted from the view in the taking of his inquest; or if there be danger of infecting people in digging of it up, the inquest ought not to be taken by the coroner (unless he have a special writ or commission for that purpose), but by justices of peace or other justices authorised to inquire of, hear, and determine felonies, &c. who shall take the inquest on the testimony of witnesses. But none can take an inquest on view in any case, but the coroner.

(g) Rex v.
Causesy, Hilary,
8 Geo. 1.
Strange, 22.

Sect. 24. If a (g) coroner take an inquest after a body hath been so long buried, that it may reasonably be presumed that the view of it could be of no manner of use for the information of the jurors, the court into which the inquisition is returned will in discretion refuse to receive or file it, upon affidavit of the whole circumstances of the proceeding.

Sect.

(5) It is indictable as a misdemeanor, Salk. 377. to bury one who dies a violent death before the coroner has sat upon him, 7 Mod. 10.

(6) So also he may dig up the body if the first inquisition be quashed, Str. 533. But it must be

by order on motion of the king's bench, Stra. 167. And the judges will exercise their discretion, according to the time and circumstances, whether he shall or shall not do it, Salk. 377. Strange, 22. 533. 7 Mod. 16.

Sect. 25. (b) Yet it is not necessary, that the inquisition be taken in the very same place where the body was viewed; for it hath been resolved, that an inquisition taken at D. on the view of a body lying dead at L. may be good. (b) Lat. 166. See Pop. 209.

Sect. 26. As the coroner hath no power from the said statute, nor from 3 Hen. 7. c. 1. to inquire of any accessaries to a felony after the fact; so neither hath he any such power by the (c) common law; for he has nothing to do with any but those who some way or other caused the party's death: and therefore it hath been resolved, that an indictment of J. S. before a coroner for having received and comforted one who had been guilty of a murder, is void, (c) 4 H. 7. 18. F. Forfeit. 10. 1 Hale, 416. 2 Hale, 63. S. P. C. 183. Keilw. 67. Dalls. 39. Moor, 29.

Sect. 27. But it is certain, that a coroner may inquire of the accessaries before the fact, as well as of the principals; and that he (d) also may inquire, whether any in such manner found to have been guilty did fly for the offence; for which flight they forfeit all their goods and chattels. (d) S. P. C. 183. 2 Lev. 141. 152. 2 Hale, 63. 65. Post. s. 31.

Sect. 28. Also it is (e) certain, that a coroner may and ought to inquire of all the circumstances of the party's death, and also of all things which occasioned it; and (f) therefore it is said, that if it be found by his inquest, that the person deceased was killed by a fall from a bridge into a river, and that bridge was out of repair by the default of the inhabitants of such a town, and that those inhabitants are bound to repair it, the township shall be amerced. (7) (e) Keilw. 67. 1 Hale, 422. 2 Hale, 62. (f) Aleyu, 51.

Sect. 29. Also it is agreed, that if a coroner be remiss (8) in coming to do his office when he is sent for, &c. he shall be amerced (9) by virtue of the above-mentioned statute *De coronatoribus*. Also it is further enacted by 3 Hen. 7. c. 1. "That if any person be slain or murdered in the day, and the murderer escape untaken, the township where the said deed is so done, shall be amerced for the said escape, and that the coroner have authority to inquire thereof upon the view of the body dead: And that if any coroner be remiss, and make not inquisitions upon the view of the body dead, he shall forfeit for every default an hundred shillings." S. P. C. 51. Salk. 377. Str. 69. F. Cor. 292. Summary, 170. 1 Hale, 424. 2 Hale, 58.

As to the second particular, viz. What further care must be taken by a coroner for the prosecution of the offender, after taking inquisition of death against him.

Sect. 30. It is further enacted by the said statute of 3 Hen. 7. c. 1. "That after the felony found, the coroners deliver their inquisition afore the justices of the next general gaol-delivery, in

(7) So if the township bury the body before the coroner is sent for, the township shall be amerced. Hale, 424.

(8) If the coroner omit to take an inquisition upon an untimely death, it may be done by justices of gaol-delivery, oyer and terminer, or of the peace, but it must be done openly; and if it be done secretly it may be quashed. 1 Barr. 17.

(9) And if he impose an improper inquisition upon the jury, he may be committed. Strange, 99. Vide post, sect. 58. where by 25 Geo. 2. c. 29. if he be convicted of extortion, wilful neglect, or misdemeanor, he may be punished and removed from his office. Vide also note to section 12.

" in the shire where the inquisition is taken, the same justices to
 " proceed against such murderers if they be in the gaol, or else
 " the same justices to put the same inquisitions afore the king in
 " his bench. And if any coroner do not in such manner certify
 " his inquisition, he shall forfeit an hundred shillings."

Sect. 31. By 1 and 2 Philip and Mary, c. 13. it is also enacted,
 " That every coroner, upon any inquisition before him found,
 " whereby any person or persons shall be indicted for murder
 " or manslaughter, or as accessory or accessories to the same,
 " before the murder or manslaughter committed, shall put in
 " writing the effect of the evidence given to the jury before him,
 " being material. And shall bind all such, by recognizance or
 " obligation, as do declare any thing material, to prove the same,
 " to appear at the next general gaol-delivery to be holden within
 " the county, city, or town corporate where the trial thereof shall
 " be, then and there to give evidence against the party so
 " indicted at the time of the trial, and shall certify as well the
 " same evidence, as such bond or bonds in writing, as he shall
 " take, together with the inquisition or indictment before him
 " taken and found, at or before the time of his said trial thereof
 " to be had or made. And in case any coroner shall offend in
 " any thing contrary to the true intent and meaning of this act,
 " the justices of gaol-delivery of the shire, city, town, or place
 " where such offence shall happen to be committed, upon due
 " proof thereof, by examination before them, shall for every such
 " offence set such fine on every such coroner, as they shall think
 " meet, and estreat the same as other fines and amerciaments
 " assessed before justices of gaol-delivery ought to be."

Sect. 32. And by 1 Hen. 8. c. 7. " If any coroner shall not
 " endeavour himself to do his office upon any person dead by
 " misadventure, he shall forfeit forty shillings."

Vide ante,
 s. 29.

† Also by 25 Geo. 2. c. 29. s. 6. " If any coroner who is not
 " appointed by virtue of an annual election or nomination, or
 " whose office of coroner is not annexed to any other office, shall
 " be lawfully convicted of extortion, or wilful neglect of his duty,
 " or misdemeanor in his office, it shall be lawful for the court
 " before whom he shall be so convicted, to adjudge that he shall
 " be removed from his office: and, thereupon, if such coroner
 " shall have been elected by the freeholders of any county, a writ
 " shall issue for the removing him from his office, and electing
 " another coroner in his stead, in such manner as already directed
 " by law; and if the coroner so convicted shall have been ap-
 " pointed by lord or lords of any franchise or liberty, or in any
 " other manner than by the election of the freeholders of any
 " county, the lord or lords of such liberty or franchise, or the per-
 " son or persons intitled to the nomination or appointment of
 " any such coroner, shall, upon notice of such judgment of
 " amercial, nominate and appoint another person to be coroner in
 " his stead."

As to the third particular, viz. What high credit the law gives
 to an inquisition of death found before a coroner.

Sect.

Sect. 33. It seems (a) certain, that anciently the judges would not receive a verdict, acquitting a person of the death of a man, found against him by a coroner's inquest, unless the jury so acquitting the defendant, had found at the same time what other person (10) did the fact, or by what other means the party came to his death; because it appeared by the coroner's view upon record, that a person was killed. But it is (b) agreed, that the judges cannot compel a jury to make such further inquiry on an acquittal of a defendant from any other indictment, because it doth not in such manner appear of record by any such inquisition, that a person is dead. And it seems hard to reconcile the said practice of compelling a jury to find such further matter with reason in any case, unless it appear in the course of the evidence by what other means, not mentioned in the indictment, the party lost his life. For it seems strange, that a jury should be in any case compelled to find a matter upon their oaths, which they have no evidence to support; and therefore if no way appear to them, by what other means the death in question was occasioned, it seems difficult to maintain that it shall not be sufficient for them to declare so to the court.

(a) 13 E. 4. 5.
37 Ass. 13.
11 H. 4. 93.
14 H. 7. 2.
F. Cor. 213.
Keilw. 686.
S. P. C. 181.
2 Hale, 301.
Finch. 415.
B. Appeal, 42.
112.
B. Indict. 10.
35.
B. Cor. 38.
39. 52. 117.
(b) See the books above cited.

Sect. 34. How high a credit is given by the law to a coroner's inquisition of self-murder, or of the flight of a person indicted for the death of another, will be more fully shewn in the three last sections of this chapter.

As to the second division of the Second General Point, viz. What authority a coroner hath to take an indictment of other matters.

Sect. 35. It is expressly said in some books (c) that a coroner hath no power *ex officio* to inquire of any felony, but only of the death of a man upon view. And both Staunford (d) and Hale (e) seem to speak doubtfully of this matter upon the authority of those books; and Sir Edward Coke (f) seems expressly to declare his opinion, that a coroner hath no power to take an indictment in any other case. Yet since it is expressly declared by the above-mentioned statute *De officio coronatoris* (g) that a coroner ought to inquire of the breakers of houses; and it is said by Britton (h) that he may inquire of rape, and of the breach of a prison; and such power hath never been expressly taken from him; it seems hard to say that he may not still make such inquiries, if he please; for as to the authority of 27 Ass. 55. and 35 Hen. 6. pl. 27. b. which are cited for the maintenance of the contrary opinion, it may be answered, that this point is not resolved in either of those books, but only spoken of incidentally; for the very point resolved in the Book of Assizes seems to be no more than this, that a coroner hath no power to take an indictment of an accessory after the fact; and that which is said in the Year Book of Henry the Sixth concerning this matter, is only brought in by way of argument concerning a point of a quite different nature.

(c) 35 H. 6. 27.
27 Ass. 55.
F. Cor. 206.
B. App. 111.
(d) S. P. C. 51
(e) Summary, 171.
2 Hale, 65.
(f) 4 Inst. 171.
2 Inst. 147.
(g) See the statute at large.
(h) Britton, 3.

Sect. 36. However, there seems to be no doubt but that the coroner may and ought to inquire of treasure-trove, concerning which

Bracton, b. 3.
chapter 6.

(10) This is commonly a business of form; and if the fact be not known, the jurors usually say, that it was done by "persons unknown." 2 Hale, 301.

which it is enacted by the said statute of 4 Edw. 1. *De officio coronatoris*, "That a coroner being certified by the king's bailiffs, or
 " other honest men of the county, shall go to the places where
 " treasure is said to be found." And it is further enacted in the following part of the same statute in these words, "A coroner
 " ought also to inquire of treasure that is found, who were the
 " finders, and likewise who is suspected thereof. And that may
 " be well perceived where one liveth riotously, haunting taverns,
 " and hath done so of long time; hereupon he may be attached
 " for this suspicion by four, or six, or more pledges, if he may be
 " found."

S. P. C. 51.
 Bracton, 120.

Sect. 37. It is also said that a coroner may inquire of royal fishes, as sturgeons, whales, &c.

2 Hale, 66.

Sect. 38. As to the THIRD GENERAL POINT, viz. How far a coroner is empowered to receive and proceed on a bill of appeal, (11) I shall endeavour to shew—1st, How far he is authorised to receive such appeal—2dly, How far to proceed upon it; and in what manner it may be removed by *certiorari*.

As to the first of these particulars, viz. How far a coroner is authorised to receive an appeal.

(a) See the statute at large.

(b) Brac. 122.
 147.

Fleta, 1. c. 25.

Britton, 5.

S. P. C. 64.

22 Ass. 97, 98.

Finch, 321.

(c) Con. 17.

Ass. 5.

B. Appeal, 56.

Summary, 171.

S. P. C. 52, 64.

(d) 4 Inst. 176.

4 H. 6. 16.

B. Appeal, 44.

(e) Sum. 172.

2 Hale, 67.

(f) 39 H. 41.

4 H. 6. 16.

Con. B. App.

41.

Sect. 39. It appears clearly from the above-mentioned statute (a) of 4 Edw. 1. *De officio coronatoris*, and also from our ancient law books, (b) that a coroner in the county court may receive an appeal of any felony or mayhem, upon the plaintiff's finding sufficient pledges to the sheriff for the prosecution of the suit. And it is observable, that the said books generally mention the coroner as the person before whom such appeal (c) is to be commenced, without joining any other with him; from whence it seems clearly to be intimated, that the coroner is the only (d) person who hath a jurisdiction in this matter; and that at common law he might receive (e) such appeal without the concurrence of any other, as he certainly may the appeal of an approver, &c. But it being provided by the statute of Westminster 1. c. 10. that the sheriff shall have counter-rolls with the coroners, it seems that no appeal since that statute is well commenced before the coroner, (f) unless the sheriff be also present, in order to take a counter-roll of the proceeding. But it seems that the sheriff, by virtue of this statute, is no more a judge of the matter than he was before; and therefore, where it is said by the statute of 3 Hen. 7. c. 1. that an appeal of felony may be commenced before the sheriff and coroners of the county where it was done, it seems reasonable to intend the meaning of the statute to be, that it may be commenced before them in the same manner as before, and not without express words (g) to make any alteration of the jurisdiction given them by the common law.

(g) Qu. Staunford's Pleas of the Crown, 64.

(h) Summary, 171, 172.

2 Hale, 67.

S. P. C. 52, 53.

F. Corone, 437.

Sect. 40. But it is certain (h) that a coroner hath no power to receive a bill of appeal of any offence done out of the county, whereof he is coroner, because the offender cannot be tried by the county. But it is agreed that he may receive the appeal of an approver, or take the abjuration of one who acknowledges a felony

(11) This part of the coroner's duty is now abrogated by st. 59 Geo. 3. c. 46. which abolishes appeals generally.

felony done by him in any county, because that after such confessions there is no need of any trial.

As to the second particular, viz. How far a coroner may proceed upon such appeal.

Sect. 41. It seems probable(a) that before the statute of Magna Charta, c. 17. coroners might try offenders as well as receive accusations against them; but it is agreed(b) that they cannot proceed so far since that statute, by which it is enacted, "that no sheriff, constable, coroner, or other bailiff of the king, shall hold pleas of the crown." Also it is agreed(c) that process may be awarded in the county court on such appeals till the exigent; but it seems questionable,(d) whether such process may properly be said to be awarded by the sheriff and coroner jointly, since the coroner being the only judge, as I have endeavoured to prove, sect. 39. it seems to be most proper that the process be awarded by him only. Neither doth it seem clear that the above-mentioned statute of Magna Charta doth restrain the coroner from awarding an exigent, and thereon outlawing an appellee; for since, as it is agreed by all, an offender might become attainted by an abjuration of a felony made before a coroner, why not as well by an outlawry pronounced by him? And accordingly we find it taken for granted in some of the old books(e) of the best authority since this statute, that appellees may be outlawed for not appearing on process before the coroner.

(a) See Dalt. Sh. c. 106.
2 Hale, 56.
(b) 22 Ass. 97, 98.
Bracton, 147.
Fleta, c. 25.
2 Inst. 30, 31, 32.
2 Hale, 67.
B. App. 56, 62.
B. Corone, 82.
(c) S. P. C. 64. Summary, 171.
(d) Con. S. P. C. 64.
Summary, 171.
27 Assize, 47.
(e) 22 Ass. 97.
F. Cor. 184.
Con. B. App. 82.
Qu. B. App. 109.
S. P. C. 64. Summary, 171.
2 Hale, 67.

As to the third particular, viz. In what manner an appeal before the coroner may be removed by *certiorari*.

Sect. 42. There is(f) no doubt but that it may be removed either into the King's Bench or Chancery, by *certiorari* directed to the coroner and sheriff. But it hath been resolved(g) that it cannot be removed by such writ directed to the sheriff only, because the coroner is the judge, and the sheriff hath only a counter-roll by virtue of the above-mentioned statute of Westminster, chapter the tenth.

(f) S. P. C. 64. Summary, 171.
2 Inst. 176.
(g) 14 H. 4. 15. b. 16.
B. Appeal, 44.
2 Inst. 176.
S. P. C. 64.
2 Hale, 67, 70.

As to the FOURTH GENERAL POINT, viz. How far a coroner is authorised to receive and proceed on the appeal of an approver.

Sect. 43. There is no doubt but that the coroner alone may receive such appeal,(h) whether the offence were committed in the same or in any other county, and may also award process to the sheriff against the appellee, being in the same county, till it come to the exigent; and it seems(i) that it may be probably argued, that he may award process even to an outlawry, as hath been more fully shewn in the forty-first section of this chapter. But it is certain, that he cannot award any process against an appellee in a foreign county, but must leave it to the justices(k) of gaol-delivery, or others, before whom the appeal is afterwards recorded, who shall award process against such appellees in such manner as shall be more fully set forth in the chapter concerning approvers, sect. 22.

(h) Summary, 172.
2 Hale, 67, 68.
S. P. C. 53.
Ante, sect. 40.
(i) S. P. C. 73. Summary, 172.
(k) S. P. C. 53. 73.
Summary, 172.
F. Cor. 462.
29 Ed. 3. 42.

As to the FIFTH GENERAL POINT, viz. How far a coroner is authorised to take the confession and abjuration of a felon.

Sect. 44. There seems to be no doubt but that he may record the confession of the breach of prison by any felon, &c., and also the

- (a) Vide S. 36. and 49.
 (b) F. Cor. 420. S. P. C. 117. 3 Inst. 115.
 (c) S. sect. 40.
 (d) B. Cor. 183. S. P. C. 123. Finch, 388.
 (e) B. Cor. 181. Finch, 389. S. P. C. 116. S. P. C. 116, 117.
 B. Cor. 181. Finch, 388.
 (f) S. P. C. 116. 3 Inst. 115. Finch, 388.
 (h) S. P. C. 118. 3 Inst. 117.
 (i) S. P. C. 117. F. Cor. 54. 3 H. 7. 12.
 (k) S. P. C. 119, 120. Finch, 389.
 (l) 7 H. 7. 7. B. Cor. 145. S. P. C. 121. (m) F. Cor. 443. S. P. C. 122. Finch, 389. 3 Inst. 217.

As to the SIXTH GENERAL POINT, viz. How far the act of any one coroner is as effectual as if it were done by all.

- (n) S. P. C. 53. 14 H. 4. 34.
 (o) 2 Hale, 56. 58.
 Vide C. 1. s. 10.
 (p) 2 Hale, 59. 67.
 F. Corone, 107. S. P. C. 52. Summary, 172. S. P. C. 53. 14 H. 4. 34, 35. 39 H. 6. 40. 6. 41, 42.
- Sect. 45.* It seems clear that wherever (n) coroners are authorised to act as judges, as in the taking of an inquisition (o) of death, or receiving an appeal of felony, &c. the act of any one of them, who first proceeds in the matter, is of the same force as if all had joined in it: but it is said, that after such proceeding by one of them, the act of any other will be void. (p) Also it seems certain, that where coroners are empowered only to act ministerially, (12) as in the execution of process directed to them upon the default or incapacity of the sheriff, all their acts will be void wherein they do not all join.

As to the SEVENTH GENERAL POINT, viz. In what cases a coroner may lawfully take a fee for the execution of his office.

- 2 Inst. 176.
- Sect. 46.* It is enacted by the statute of Westminster the first, c. 10. which was made in affirmance of the common law, "That no coroner demand or take any thing of any man to do his office, upon pain of great forfeiture to the king."

- Vide 3 Inst. 210.
- Sect. 47.* But by 3 Hen. 7. c. 1. "A coroner shall have for his fee upon every inquisition taken upon the view of a body slain, thirteen shillings and four-pence of the goods and chattels of the slayer and murderer, if he have any goods; and if he have no goods, of such amerciaments as shall fortune any township to be amerced for the escape of the murderer, &c."

Sect. 48. But coroners endeavouring to extend this statute to persons slain by misadventure, it is enacted by 1 Hen. 8. c. 7. "That

(12) One coroner may execute the writ, as in case of an exigent; but if there be more coroners than one for the county, the return must be in the name of all. 3 Hale, 56.

“ That upon a request made to a coroner to come and inquire upon the view of any person slain, drowned, or otherwise dead by misadventure, the said coroner shall diligently do his office, without taking any thing therefor, upon pain to every coroner that will not endeavour himself to do his office (as afore is said), or that taketh any thing for doing of his office, upon every person dead by misadventure, for every time, forty shillings.”

† Sect. 49. To the intent, however, that coroners may be encouraged to execute their office with diligence and integrity, it is enacted by 25 Geo. 2. c. 9. “ That for every inquisition, not taken upon the view of a body dying in a gaol or prison, which shall be duly (13) taken in England by any coroner or coroners, in any township or place contributing to the rates directed to be levied by 12 Geo. 2. c. . the sum of twenty shillings; and for every mile which he or they shall be compelled to travel, from the usual place of his or their abode, to take such inquisition, the further sum of nine-pence, over and above the said sum of twenty shillings, shall be paid to him or them out of the monies arising from the rates before-mentioned, by order of the justices of the peace in their general or quarter sessions assembled for the county, riding, division, or liberty, where such inquisition shall have been taken, or the major part of them; and which order they are hereby directed to make without fee or reward.”

† Sect. 50. And by 25 Geo. 2. c. 9. s. 2. “ For every inquisition which shall be duly taken upon the view of a body in any gaol or prison in England, by any coroner or coroners of a county, so much money, not exceeding the sum of twenty shillings, shall be paid to him or them, as the justices of the peace, in their general or quarter sessions assembled, for the county, riding, or division, wherein such gaol or prison is situate, or the major part of them, shall think fit to allow as a recompense for his or their labour, pains, and charges, in taking such inquisition, to be paid in like manner, by order of the said justices, or the major part of them, out of the monies as afore-said.”

† Sect. 51. And by 25 Geo. 2. c. 9. s. 3, 4, 5. it is provided, “ That over and above the recompense hereby limited and appointed, the coroner or coroners shall also have the fee of thirteen shillings and four-pence, payable by virtue of 3 Hen. 7. c. 1.”—“ That no coroner to whom any benefit is given by this act, shall by colour of his office, or upon any pretext whatsoever, take for his office, doing as aforesaid, other than the said fee of thirteen shillings and four-pence, and the recompense hereby limited and appointed, upon pain of being deemed guilty of extortion.”—“ That no coroner of the king’s house-
“ hold,

(13) Whether an inquest has been duly taken is for the justices to decide, (11 E. 231.) R. v. the Justices of Kent. In that case the justices disallowed the coroner’s charge, as they thought the inquest had been unnecessarily taken, the party having manifestly died by the visitation of God.

Lord Ellenborough in this case observed, that there had been many instances of coroners who had exercised their offices very vexatiously, by intruding into private families, to their great annoyance, when there was no pretence of the deceased having died otherwise than by a natural death.

“hold, and of the verge of the king’s palaces, nor any coroner of
 “the admiralty, county palatine of Durham, city of London and
 “borough of Southwark, or of any franchises belonging to the
 “said city; nor any coroner of any city, borough, town, liberty,
 “or franchise, which is not contributing to the rates directed by
 “12 Geo. 2. c. . or within which such rates have not been usu-
 “ally assessed, shall be intitled to any fee, recompense, or bene-
 “fit, given to, or provided for, coroners by this act.”

As to the EIGHTH GENERAL POINT, viz. In what cases a mat-
 ter recorded by, or found before, a coroner, admits of no traverse.

I shall consider the same in relation, 1st, to abjurations or con-
 fessions made before him; 2dly, to escapes; 3dly, to flights; and,
 4thly, to self-murders.

As to the first particular, viz. That relating to *abjurations*.

(a) Sum. 171.
 F. Cor. 124.
 S. P. C. 52.
 (b) S. P. C. 32.
 25 E. S. 42.
 pl. 35.
 F. Corone, 134.
 (c) F. Cor. 118.
 169.
 12 Assize, 29.
 (d) F. Cor. 124.
 S. P. C. 52.
 (e) F. Cor. 118.
 124. 169.
 12 Assize, 29.
 B. Corone, 75.

Sect. 52. It is said that a coroner’s record of an abjuration, (a)
 or of the confession of breaking prison, (b) or of the confession of
 a felony by an approver, (c) is of so great authority, as not only to
 estop the party from taking any traverse to his having made such
 confession, but also from alleging that what was said by him was
 extorted by duress, or other unfair means. Also it seems, that if
 the party plead that he is not the same person who abjured, &c.,
 and the coroner (d) record that he is the same person, such record
 is conclusive, &c. But in these cases (e) it seems, that the judge,
 for the better information of his conscience, may in his discretion,
 if he think fit, take an inquiry from the people living next to the
 place, of the whole circumstances of the matter, &c.

As to the second particular, viz. That relating to *escapes*
 found before a coroner.

(f) S. P. C. 34,
 35. 183.

Sect. 53. It is said, (f) that if it be found by a coroner’s in-
 quest that a murder was committed in such a town, and that the
 murderer escaped untaken, the township cannot traverse such
 escape, because it makes them only liable to an amerciamment, *et*
de minimis non curat lex.

As to the third particular, viz. That relating to a *flight* found
 before a coroner.

(g) 13 H. 4. 13.
 6.
 F. Forfeit, 29.
 32. 35.
 1 Hale, 363.
 5 Co. 109.
 Dyer, 238.
 Summary, 271.
 1 Hale, 363.
 2 Hale, 154.
 (h) B. Cor. 151.
 8 E. 4. 4.
 2 Levinz, 11.
 B. Trav. 229.
 3 Keb. 564. 566.
 1 Hale, 363.
 414. 415. 417.
 2 Hale, 63, 64.
 301.
 (i) 2 Inst. 147.
 148.
 3 Keb. 366.
 1 Hale, 363.

Sect. 54. It seems that if a person indicted of a murder by a
 coroner’s inquest, be also found to have fled for it, and after-
 wards, upon his trial, be acquitted (g) of the murder, and also
 found not to have fled for it; yet he shall forfeit his goods, be-
 cause such a finding that he did not fly by a jury, who, as some
 say, had nothing to do with it, and ought not to have been
 charged with such inquiry, shall not controul the coroner’s in-
 quest, which is of such authority, that, immediately upon the
 flight, the party’s goods shall be delivered to the township, which
 shall be answerable for them. Also it seems generally (h) to be
 taken for granted, that the party has no remedy whatsoever to
 traverse such flight found against him by a coroner’s inquest; for
 that such inquest is of very great authority, (i) inasmuch as all
 persons of the neighbouring towns, above the age of twelve
 years, are bound to attend at the taking of it; and yet I cannot
 find any direct resolution settling this point; but, on the con-
 trary,

trary, it is certain that Sir William Staundford makes a quære of it; and the reason above-mentioned, which is brought to support the credit of such inquests, holds as strongly against the traversing them as to the point of the offence, in which respect it is at this day generally holden that they may be traversed, as will be more fully shewn in the next section. And surely the other reason which is given for this opinion, that the party only forfeits his chattels by such finding, and therefore shall not traverse it, because the law reckons chattels among those *minima de quibus non curat lex*, is very harsh and unaccountable; and it is very hard to say, that a man shall be liable to forfeit all his goods, which may, perhaps, be all that he is worth, by an inquest(a) taken in his absence, without either hearing him, or giving him an opportunity of defending himself.

(a) 3 Inst. 55.
2 Levinz, 141.
Summary, 29.
1 Vent. 181,
182.

As to the fourth particular, viz. That relating to *self-murder* found before a coroner.

Sect. 55. It is holden strongly in some books, (b) that no inquest of this kind admits of any traverse. But the contrary opinion being also holden by books(c) of as great authority, and seeming also to be more agreeable to the general tenor of the law in other cases, it seems to be the better opinion, that such inquest, being moved into the king's bench by *certiorari*, may be there traversed by the executor or administrator of the person deceased, and perhaps also by the king, or the lord of the manor, &c.

(b) 8 Ed. 4. 4.
b. 1. c. 9. sect.
11. and the
books there
cited.
B. Cor. 151.
2 Lev. 141. 152.
2 Keb. 859.
2 Sid. 90. 101.
144.
2 Jon. 198.
1 Ven. 278.

3 Keb. 564. 566. 604. 800. (c) See the books above cited, Rex v. Roupel, Cowp. 458. and Rex v. Heaton, 2 Term Rep. 183.

If, however, no matter be depending before the court to make it necessary, the King's Bench will not order the coroner to return the depositions he has taken upon an inquisition of *felo de se*.

See the case of
the Coroner of
Westminster,
2 Stra. 1073.

Sect. 56. Also if it appear, (d) that a coroner hath been guilty of any corrupt practice in the taking of an inquisition, it seems that a *melius inquirendum* shall be awarded for the taking of a new one by special commissioners, who shall not proceed on the view of the body, but on the testimony of witnesses; and the coroner shall have nothing to do in the taking such new inquest, because it appears from his former misbehaviour, that he is not fit to be trusted. But where (e) his inquisition is quashed for a defect in point of form only, he may, and ought, to take a new one, in like manner as if he had not taken any before. (14)

(d) Eliz. 371.
3 Keb. 800. 855.
1 Modern, 82.
Salkeld, 190.
Carthew, 72.
2 Keb. 859.
1 Ven. 181,
182. 351.
3 Mod. 80. 100.
238.
Con. 2.
Jones, 198.
(e) 2 R. Ab. 32.
Ed. 4. 70. b.

Salk. 190. 2 Hale, 59. 69. 1 Hale, 415. 2 Anderson, 204. Strange, 69.

(14) The coroner also possesses a ministerial office as the sheriff's substitute. For when just exception can be taken to the sheriff for suspicion of partiality, (as that he is interested in the suit, or of

kindred to either of the parties,) the process must then be awarded to the coroner, instead of the sheriff, for execution of the king's writs. 4 Inst. 271. 1 Comm. 349.

CHAP. X.

OF THE SHERIFF'S TORN.

Finch, 241.
F. N. B. 82.
2 Hale, 70.

THE *sheriff's torn* is the king's court of record, holden before the sheriff for redressing of common grievances within the county.

For the better understanding the nature whereof I shall examine the following points,

First, The original institution of this court.

Secondly, At what time, and in what place, it must be holden.

Thirdly, What persons owe suit to it.

Fourthly, What authority the sheriff (or his steward) hath as judge of it.

Fifthly, What kind of offences are inquirable in it.

Sixthly, Within what place such offences must arise.

Seventhly, By what jurors and in what manner indictments in it ought to be found.

Eighthly, In what manner they are to be proceeded upon.

Ninthly, In what manner they are to be traversed and determined.

As to the **FIRST POINT**, viz. The original institution of the sheriff's torn.

(a) 9 Co. Preface.

Dalt. Sher. 385.

Mag. Char. 35.

2 Inst. 70, 71.

73. 122.

B. Leet, 42.

Britton, 71.

(b) See the books above cited, Fleta, b. 1. c. 27.

Bracton, 124.

2 Inst. 121.

Lamb. of Constables, 8.

Kell, 141.

4 Inst. 259.

2 Hale, 69.

4 Comm. 270.

Sect. 2. It is observable that by the (a) common law, every sheriff ought to make his torn or circuit throughout every hundred in his county twice in the year, in order to hold a court in every such hundred for the reformation of common grievances, and the preservation of the peace and good government of the kingdom. For which purpose all the (b) inhabitants of such hundreds, being above the age of twelve years, and not specially privileged, in such manner as shall be more fully set forth under the third point, are bound to attend at such courts, in order to make inquiries of all such offences; and also to give security to the public for their good behaviour, by taking an oath to be faithful to the king, and to observe his laws, and also by incorporating themselves into some free-pledge or tithing, which formerly signified a certain number of families living together in the same precinct, the masters whereof were every one of them mutually bound for each other, and punishable for the default of any member of any such family, in not appearing to answer for himself, on any accusation made against him.

2 Inst. 71, 72.

Dalt. Sher. 385. 129.

F. Leet, 11.

Mirror, c. 1.

s. 13 & 16.

Sect. 3. And the better enforcing of this order seems anciently to have been the principal end of holding this court, the style whereof even to this day must be *Curia visus franci plegii domini regis tenta apud C. coram vicecomite in turno suo tali die, &c.* But it hath been resolved, that the law doth not take notice of any

any such court under the style of *turn' vicecom' tent. tali die*; for the word "torn," properly taken, doth not signify the sheriff's court, but his perambulation.

As to the SECOND POINT, viz. At what time and in what place this court is to be holden.

Sect. 4. It is said, that at the common law it might be holden at any place within the hundred, and as often as the sheriff thought fit. But this having been found to give the sheriff too great a power of oppressing the people, by holding his court at such times and places at which they could not conveniently attend, in order thereby for his own advantage to increase the number of his amercements, it was enacted by the statute of Magna Charta, 35. "That no sheriff or his bailiff shall make his torn through a hundred but twice in a year, and at the place accustomed, viz. once after Easter, and again after the feast of St. Michael; and that the view of frank-pledge shall be at the term of St. Michael."

6 H. 7. 2.
Dalt. Sher. 390.
Con. Coke Lit.
115.
Kitchen, 44.
Dalt. Sher. 390.

See Harg. Co.
Lit. 117.
note (11).

Sect. 5. And it is further enacted by 31 Edw. 3. c. 15. "That every sheriff shall make his torn yearly, one time within the month after Easter, and another time within the month after St. Michael; and if they hold them in other manner, that then they shall lose their torn for the time."

Sect. 6. And it seems (a) certain, that since these statutes, the sheriff is indictable for holding this court at another time than what is therein limited, or at an unusual place.

(a) Dyer, 151.
Keilw. 192.
Dalt. Sher. 390.

Sect. 7. Also it hath been (b) resolved, that an indictment found at a sheriff's torn appearing to have been holden at another time, is void.

(b) 38 H. 6. 7.
6 H. 7. 2 b. 3.
S. P. C. 84.
2 Hale, 70.
2 Saund. 290.

2 Danv. Abr. 256. 2 Inst. 71.

Sect. 8. But it is observable, that neither of these statutes expressly mentions a court-leet, and therefore it is said in some (c) books, that they do not extend to it; neither do I find any resolution, that an ancient court-leet holden at any other time, or at an unusual place, is void. But on the contrary it is (d) said, that a court-leet may be holden at any place within the precinct which the lord thinks fitting. And it seems to be (e) agreed, that a prescription to hold such court oftener than twice in the year, is good; which seems hardly reconcilable with the general rule of law, that no prescription can stand good against a statute which has negative words, if a court-leet be construed to be within the purview of the above-mentioned statutes. It is true indeed, that both Sir Edward Coke and Kitchen endeavour to solve this difficulty by offering a distinction, that the said rule extends not to statutes made in affirmance of the common law; but it is questionable how far this will amount to a good answer, since it seems to be holden by (f) others of good authority, that the said statutes were not made in affirmance of the old law, but are introductory of a new one; yet it is certainly safest to hold a court-leet at the times accustomed, for it is (g) said, that if it be holden at an unusual time it is void. And it (h) seems, that no court-leet granted since the statute can be holden at any other time

(c) B. Lert, 23.
2 Leon. 74.
1 Roll. 201.
(d) 8 H. 7. 4.
Kitchen, 44.
Owen, 35.
Dalison, 61.
(e) Co. Lit. 115.
Kitch. 8. 44.
C. Eliz. 125.
245.
1 Rol. 201.

(f) Dalt. Sher.
390.
6 H. 7. pl. 2.
(g) 38 H. 6. 7.
F. Lect. 2.
B. Lect. 38.
2 Saund. 291.
(h) C. Eliz. 245.
Con. 2 Inst. 78.
2 Saund. 291.

time than what is limited by it, because every such court is derived out of the torn, to which the statute certainly did extend.

(a) 2 Keb. 731.
3 Ven. 107.
Saund. 290.

Sect. 9. It hath been (a) holden, that in every caption of an indictment taken in a sheriff's torn, or court-leet, the day whereon it was taken ought to be set forth, that it may appear not to have been on a Sunday.

(b) See sect. 2. As to the **THIRD POINT**, viz. What (b) persons owe suit to the sheriff's torn.

Sect. 10. It is certain, that regularly all persons above the age of twelve years are by the common law bound to appear at this court in their proper persons, and that no persons so bound to appear are within the benefit of the statute of (c) Merton, c. 10. which allows suit-service to be performed by attorney. And that not only masters of families, but also all their servants, are bound to pay such suit, and that every (d) master may be amerced for suffering a servant to continue with him a year and a day without being put into the decennary, &c.

(c) F. N. B. 161.
Dalt. Sher. 387.
2 Inst. 121.
Qu. B. Lect. 38.
Doug. 190.
(f) F. N. B. 160.
2 Inst. 121.
Register, 175.
(g) 2 Inst. 120.
121.
Register, 175. **Sect. 11.** But (c) tenants in *ancient demesne* are privileged by the common law from coming to this court, unless they and their ancestors have time out of mind used to come to it. Also (f) parsons of churches have the like privilege by the common law; and all (g) peers of the realm and women have the same privilege by the statute of Marlebridge, c. 10. (and perhaps by the common law), unless their presence be especially required for some particular cause.

(h) Reg. 175.
F. N. B. 160.
Dalt. Sher. 387. **Sect. 12.** Also it seems (h) clear that by the common law, as well as the said statute of Marlebridge, c. 10. no man can be obliged to do suit to any such court, within the precincts whereof he doth not reside, in respect of any lands which he may have within the jurisdiction of it; for that no suit of this kind is due in respect of the tenure of any lands, but only in respect of the personal residence of the party. And (i) if a man have a house which stands upon the precincts of two leets, it is said, that he shall do his suit to the court within the jurisdiction of which his bed-chamber lies. And if (k) one have a house and family in two leets, it seems that he ought to do his suit to that wherein for the most part he personally resides: but no man be of two leets; and therefore one who lives within a (l) private leet, cannot be obliged to do suit to the sheriff's torn, or to any other grand leet, unless such private leet, for some default of the lord, be seized into the king's hands, or (m) unless the lord of the leet neglect to hold his court.

As to the **FOURTH POINT**, viz. What authority the sheriff (or his steward) hath as judge of this court, I shall consider the same in relation, 1st, to indictments; 2dly, to fines and amercements in general; and, 3dly, to the appointment of constables.

As to the first of these points, viz. What authority the sheriff or steward of the torn has in relation to indictments.

Sect. 13. It seems, that by the common law he might proceed to

to (a) hear and determine any offence within his jurisdiction, being indicted before him and requiring a trial. But it is clear, that he is restrained from this power by the statute of Magna Charta, c. 17. by which it is enacted, "That no sheriff, constable, or other bailiff of the king, shall hold pleas of the crown." And it seems, that this statute also extends to the (b) stewards of courts-leet, who cannot deliver any persons indicted before them of felony, but must refer them to the justices of gaol-delivery: neither can they try any person indicted before them of any other offence; and therefore there is no remedy to avoid such presentments before them as are traversable, but by removing them into the King's Bench, &c. (c) as will be more fully shewn under the ninth point.

27 H. 8. 2. Kitch. 22, 23. Summary, 175. 1 Ed. 3. c. 17. See Rex v. Roupell, Cowp. 458. and Rex v. Heaton, 2 Term Rep. 184.

Sect. 14. But it is certain, that the above-mentioned statute of Magna Charta doth neither restrain the sheriff's torn, nor the court-leet, from taking indictments or presentments, or awarding process thereon in the same manner as before (d); but this power of awarding such process having been abused by the sheriffs in their torns, (e) was taken from all of them (except those of London), but not from any court-leet, by 1 Edw. 4. c. 2. which is more fully set forth under the eighth general point of this chapter.

As to the second point, viz. The sheriff's authority in his torn in relation to fines and amercements, I shall consider,—1st, In what cases he may, and in what cases he ought to impose a fine. 2dly, In what cases he ought to award an amercement.—3dly, In what manner such amercement is to be awarded and offered. 4thly, In what manner such fine or amercement is to be recovered.—5thly, What further penalty may be added to such fine or amercement.

As to the first particular, viz. In what cases and in what manner he ought to levy a fine.

Sect. 15. It seems clear, that the sheriff's power in this court is still the same it anciently was, in all cases not within either of the above-mentioned statutes of Magna Charta, or 1 Edw. 4. c. 2. from whence it follows, that he still continues a judge of record, and may impose a fine on all such as are guilty of (f) any contempt in the face of the court. Also there seems to be no doubt, but that he may impose what reasonable fine he shall think fitting, upon a (g) suitor refusing to be sworn, or upon a (h) bailiff refusing to make a panel, &c. or upon a (i) tithingman neglecting to make his presentment, or upon one of the jury (k) refusing to present the articles wherewith they are charged, or upon a person duly chosen (l) constable refusing to be sworn.

Sect. 16. But it hath been (m) resolved, that all such fines ought to be severally imposed on each particular offender, and not jointly upon all of them, except where a whole vill is to be fined; in which case, for the necessity of the thing, a joint fine upon all is good.

(a) Dalt. Sher. 400.
2 Hale, 69.

(b) 2 Inst. 32.
Dalt. Sher. 400.
2 Hale, 71.

(c) 8 H. 4. 17.
B. Lect. 11.

(d) Kitch. 42.
Finch, 386.
1 Ed. 3. c. 17.
See Sir George
Colebroke v.
Elot, 3 Burr
1861.
2 Hale, 69.
(e) Dalt. Sher.
400, 401.
2 Hale, 71.

(f) Book 2.
sect. 11.
Ante, 4. s. 15.
(g) F. Lect. 11.
Dalt. Sher. 400.
2 Inst. 142,
143.
44 E. 3. 19.
(h) 7 H. 6. 12.
(i) 10 H. 6. 7.
8 Co. 38.
(k) See 8 Co.
38 b. 39.
(l) 8 Co. 38.
Dalt. Sher. 400.
Dyer, 211
Dalt. Sher. 401.

(m) 1 Roll. 33.
73
11 Co. 42, 43.
Dyer, 211.



As to the second particular, viz. In what cases the sheriff in his torn ought to award an amercement.

- (a) Dalt. Sher. 400.
F. Leet, 11.
1 Co. 39, 40.
Kitchen, 43.
(b) B. Leet.
Kellw. 66.
Skinner, 392.
Finch, 468.
Kitchen, 51, 52.
(c) F. Torn, 4.
8 E. 4. 5.
Dalt. Sher. 401.
- Sect. 17.** It seems that he hath a discretionary power (a) either to award a fine or amercement for contempts to the court, as for a suitor's refusing to be sworn, &c. Also there seems to be no doubt, but that at the common law he might, as the steward of a court-leet still may, award an (b) amercement of any person indicted for an offence not capital within his jurisdiction, without any further proceeding or trial. And it seems to be taken for granted in (c) some books, that he might in such cases impose a fine on the offender, if he thought fit; and the statute of 1 Edw. 4. c. 2. which restrains him from levying any fines or amercements on indictments found before him, clearly supposes him to have had a power of imposing such fines; from all which it seems probable, that in such cases he had, and that the steward of a court-leet still hath a power, either to amerce or fine the offender, especially if the (d) crime were any way enormous, as an affray accompanied without wounding, &c.
- (d) 8 Ed. 4. 5.

As to the third particular, viz. In what manner such amercement is to be awarded and affixed.

- (e) 1 Jones, 301.
C. Car. 275.
8 Co. 38. 40.
- Sect. 18.** It seems, that if by an amercement be meant the judgment that the party shall be *in misericordia domini regis*, this being a (e) judicial act, ought to be the act of the court only, and requires not the concurrence or assent of the jury or any other, as appears from the constant form of all entries. Neither do I see any reason why such an award of a *misericiordia* by a judge of a court-leet, should express any certain sum for which the party should be *in misericordia*, except in such cases only where no other person is afterwards to affix it; for in other cases the award of a *misericiordia* is only in order to authorise others to fix the sum which the party is to pay to the king for his default; and in such (f) cases the courts of Westminster Hall never do more than award that the party be *in misericordia*, without mentioning any sum in certain; and there seems no reason why the judge of a court-leet should not follow the same rule; and, accordingly, I find the opinion of the lord chief justice (g) Hobart, which is the chief ground of a resolution in Levinz's third report, (h) that every such award of an amercement must express a certain sum: (i) over-ruled of late by the court of king's bench.
- (f) 8 Co. 40.
Rast. Ent. 553.
606.
F. N. B. 76.
(g) Hob. 129.
1 R. Abr. 542.
(h) 3 Lev. 206.
3 Mod. 132.
(i) Salkeld, 56.
Vide 3 Burr. 1806.

- (k) 8 Co. 40.
3 Lev. 2. 6.
Rast. Ent. 606.
Kitchen, 46.
Kellwood, 66.
3 Keble, 362.
(l) Kitchen, 51,
52, 53.
- Sect. 19.** But if by an amercement be meant, the taxing, or reducing to a certainty, the sum to be paid by the party to the king, upon the award of his being *in misericordia*, it (k) seems, that if it be for an offence indicted, it ought to be done by certain officers called afferors, being specially chosen and sworn for this purpose. It is true (l) that the common entry of an amercement upon a presentment in a court-leet is, that the party be amerced, or *in misericordia* to such a sum; without distinguishing between the award of the *misericiordia* and the assessment of the amercement, or shewing by whom they are made; yet in judgment of law the award of the *misericiordia* is the act of the

the court only, and the assessment of the sum to be paid, the act of the afforors, and so it ought to be pleaded. But if the (a) amercement be for a contempt of the court, it may be settled by the judge himself, and needs no other afforcement; for the (b) judge of every court of record is the most proper judge of all contempts offered to such court; and an amercement of this kind is in (c) nature of a fine, and called so in some (d) books; and it seems to be a general (e) rule, that no fine for a contempt is within the statutes which require that amercements be affored.

Rastal, 553. 8 Co. 38, &c. 2 Inst. 196. (a) Magna Charta, 11 W. 1. 13.

As to the fourth particular, viz. In what manner such fines and amercements are to be recovered.

Sect. 20. It seems that the king or lord have an election of common right, either to distrain for them. (f) or to bring an action of debt.

(f) Rast. 151. 553. 606. 2 H. 4. 24. 10 H. 6. 7. C. Eliz. 581. Raym. 68. Sav. 93, 94.

For the better understanding of the nature of which remedies, I shall first lay down some rules concerning both of them in common, and then descend to each of them in particular.

As to what concerns the said remedies in common, I shall lay down the following rules:—

Sect. 21. FIRST, That it is safest in every avowry, or declaration of this kind, expressly to (g) shew that the offence was committed within the jurisdiction of the court. For if it were not, all the proceedings were *coram non iudice*; and a court shall not be presumed to have a jurisdiction, where it doth not appear to have one. But perhaps it is not necessary to allege in the presentment itself, that (h) the offence arose within the jurisdiction of the court; yet it is certainly advisable to have such an allegation, and that (i) perhaps may supply the want of the averment of jurisdiction in the pleadings.

Sect. 22. SECONDLY, That it is (k) advisable expressly to allege, that the offence was committed as well as that it was presented, &c.; yet I cannot find any express opinion to this purpose; but on the contrary, it is observable, that the (l) precedents of pleadings of this kind in the best authors do not expressly aver that the offence was committed, but only that it was presented, and that it arose in such a place within the jurisdiction of the court, &c. It is true, indeed, that it hath been generally (m) holden, that in an avowry or declaration for an amercement in a court-baron, it is as necessary to allege that the offence was committed, as that it was presented. But to this it may be answered, that a court-baron is not a court of record, and consequently not of so high authority as the sheriff's torn or a court-leet; neither are presentments in a court-baron, nor even in any other court whatsoever, so highly credited by the law as those made in a torn or leet, which admit of no traverse to the truth of them, except in some special cases, as will be more fully shewn under the ninth general point of this chapter.

Sect.

(a) Keilw. 66.
3 Keb. 362.
Co. Ent. 572.
773.
(b) Rast. 553.
606.
9 E. 4. 40.

Sect. 23. THIRDLY, That it is the safest in (a) setting forth a presentment, or an afferment of an amercement, to shew the names of the presentors and afferors; yet I cannot find this done in any of (b) Rastal's precedents; and some have said, that it is necessary to set forth the names of the presentors in an action of debt, but not in *replevin*.

(c) 10 H. 7. 15.
1 Ven. 105.
Raym. 204.
Co. Ent. 572.
573.
Rast. 553. 606.
1 R. Abr. 363.
468.
2 R. Abr. 136.
1 Roll. 201.
(d) Co. Ent.
572. 573.
Rast. 553. 606.
(e) 45 E. 3. 9.
Rast. 553. 606.

Sect. 24. FOURTHLY, That it is advisable to shew that proper (c) notice was given of the holding of this court; yet this I find omitted in some (d) precedents; and perhaps the contrary opinion may be the better, for that every court of record shall be presumed to observe all necessary previous incidents for the holding of it, and all persons within its jurisdiction shall be intended to have notice of it. And for the like reason perhaps, it is not necessary in an avowry for a (e) distress for such fine or amercement, to shew that the party had previous notice what it was.

As to the recovery of such fines and amercements by way of distress, I shall observe,

(f) 1 R. Abr.
665. 666.
1 Roll. 201.
11 Co. 15.
8 Co. 41.
C. Jac. 382.
10 H. 7. 15.
10 H. 6. 7.
Con. 11 H. 7.
14.
21 H. 7. 40.
(g) 1 Ven. 105.
Raym. 204.
2 Keb. 701.
739. 745.
(h) 1 Roll. 76.

Sect. 25. FIRST, That it seems to be (f) settled at this day, that a distress is incident of common right to every fine and amercement in a sheriff's torn or court-leet, whether the same belong to the king or a subject, if the offence for which they were imposed be of common right incident to the jurisdiction of such courts; but (g) if such offence be only the neglect of a duty created by custom, it is questionable whether it do not require the like custom for a distress, though the duty be of a public nature; but if it be for the (h) private benefit of a subject, it seems clear that no distress is incident to it without a special custom.

(i) 2 H. 4. 21.
47 E. 3. 13.
B. Lect. 28. 41.
F. Avow. 191.
1 R. Abr. 670.
2 Inst. 101.
(k) 47 Ed. 3.
12. 13.
F. Distr. 15.
1 R. Abr. 670.

Sect. 26. SECONDLY, That the sheriff, or lord of a leet, may for such fines and amercements distrain the goods of the offender in (i) any lands within the county or precinct of the leet, of whomsoever they shall be holden, except (k) only in such lands which shall be in the king's hands; for that all such lands, while they continue in the king's possession, are wholly out of the jurisdiction of such courts.

(l) 2 Inst. 131.
47 E. 3. 13.
1 And. 72.

Sect. 27. THIRDLY, That such a distress may lawfully be taken in the (l) highway; for that the statute of Marlebridge, c. 15. which prohibits the taking of a distress there, is to be intended only of distresses taken for services due by way of tenure of lands.

(m) 47 Ed. 3.
13.
41 E. 3. 26.
B. Distr. 3.
F. N. B. 100.

Sect. 28. FOURTHLY, That such fines and amercements, being for a personal offence, no (m) stranger's beasts can lawfully be distrained for them, though they have been *levant et couchant* on the lands of the offender.

Owen, 146. Noy, 20. Con. 1 R. Abr. 669.

(n) Het. 62.
Finch, 476.

Sect. 29. FIFTHLY, That it seems to be (n) agreed, that where any such court is in the king's hands, the goods distrained for such fines and amercements may lawfully be sold after they have been

been kept a reasonable time, as the space of sixteen (*a*) days; and it seems the better (*b*) opinion that where any such court is in the hands of a common person, if the goods were distrained for an offence of a public nature, they may be sold of common right, without any special custom for that purpose.

Sect. 30. SIXTHLY, That no bailiff can lawfully distrain for any such fine or amercement, without a special (*c*) warrant for so doing, which must be set forth by him in an avowry or justification of such distress. (1)

Moor, 574. 607. 2 Keb. 745. Salkeld, 108.

Sect. 31. As to the recovery of such fines and amercements by action of debt, being scarce able to find any thing remarkable concerning this matter, except what hath been already taken notice of, I shall content myself with this one observation, that the defendant shall (*d*) not be suffered to wage his law in an action, because it is grounded on the act of a court of record.

See also 2 Lord Raym. 1173. 2 Burr. 1259. 1 Wils. 218. 2 Wils. 20. 4 Com. Dig. "Leet." (O. 10.)

As to the fifth particular, *viz.* What further penalty may be added to such fines and amercements.

Sect. 32. There seems to be no doubt, but that upon a presentment of a common nuisance in a torn or leet, the sheriff or steward may either amerce the person presented, and (*e*) also order him to remove the nuisance by such a day, under pain of forfeiting a certain sum, or may order him to remove it under such a pain (*f*) without amercing him at all. But it seems doubtful, whether such person be bound at his peril to take notice of and obey such order, being made in his (*g*) absence, unless express notice be given him of it; but if he have such notice, it seems clear, that he shall forfeit the pain upon a presentment at another court, that he hath not removed such nuisance, (*h*) without any further proceeding: also it seems, that no such pain can be affixed to any (*i*) lesser sum than what is at first set; and it is said that every such pain, when forfeited, may be recovered (*k*) either by distress or action of debt, in the same manner as a fine or amercement may be: and this point seeming to be agreed by most of the books cited in the margin, it seems probable, that the reason of the judgment is mistaken in the case of *Fletcher v. Ingram*, as reported by Mr. Serjeant (*l*) Salkeld, wherein the contrary opinion is said to have been holden.

(*l*) Salkeld, 175. See 5 Mod. 96. 130. Carthew, 73. Barnard, K. B. 128. 214. Fitzg. 46. 109.

The Sheriff's Torn, as to the Appointment of Constables.

Before I come to the third point, *viz.* The authority of the sheriff as judge of the torn, in relation to the appointment of constables,

(1) And in replevin it must be averred, "that the defendant was guilty," but in trespass the conviction is sufficient to justify the officer. The

amercement also must appear to have been by the court and not by the jury. *Strange*, 847.

constables, I shall in brief premise some considerations concerning the antiquity and nature of the office of a constable.

AND FIRST, As to the antiquity of the office of a constable.

(a) Salkeld, 175, 381.
1 H. 7. 108.
Owen, 105.
Finch, 336.
Kitchen, 47, 48.
4 Inst. 265.
Popham, 13.
C. Eliz. 375.
376.
Lamb. Constable, 5, 9, 10.
6 Co. 77.

Sect. 33. It seems to be the (a) better opinion, that both constables of hundreds, which are commonly called high constables, and also constables of tithings, which are at this day commonly called petit constables or tithingmen, and were anciently called chief pledges, were by the common law, and not first ordained by the statute of Winchester, c. 6. as it is holden by (b) some that they were; for that statute doth not say, that there shall be such officers constituted, but seems clearly to suppose that there were such before the making of it.

Lord Raym. 1193. (b) Lamb. Constable, 5. 1 Burn, 384. 4 Inst. 267. 1 Comm. 115, 335.

(c) See the books cited, section 33.

(d) See c. 12.

(e) Kitchen, 48.

13 H. 7. 10.

2 Hale, 88.

4 Comm. 289.

(f) B. 1. tit.

"Affray."

(g) Lamb. Constable, 5, 6, &c.

45 E. 3. 27.

(h) Rust. Ent.

151.

Crompton, 212.

Dalt. Sher. 388.

Kitchen, 47.

Lord Raym.

1299. 1301.

Sect. 34. As to the nature of this office, there seems to be no doubt but that the (c) original institution of it was for the better preservation of the peace; for which purpose a constable is said to be authorised by the common law to (d) arrest felons, and also all suspicious (e) persons that go abroad in the night, and sleep by day, or resort to bawdy-houses, or keep suspicious company, and to suppress (f) affrays. And to the same end also it (g) seems, that he ought, by the ancient common law, to present at the torn or leet all those within his precinct, who have not been admitted into some tithing and sworn to the king's allegiance; and it seems that he still ought by the law in (h) use at this day, to present all offences inquirable in the torn or leet; yet in the oath set down by Kitchen, he only swears to present all bloodsheds, outcries, affrays, and rescoues done within his office.

(i) Salk. 380.

Sect. 35. Also it is (i) said, that a constable was at the common law a subordinate officer to the conservators of the peace; and consequently since the office of such conservators hath been disused, and justices of the peace constituted in their stead, it hath always been holden, that the constable is the proper officer to a justice of peace, and bound to execute his warrants; and therefore it hath been (k) resolved, that where a statute authorises a justice of peace to convict a man of a crime, and to levy the penalty by warrant of distress, without saying to whom such warrant shall be directed, or by whom it shall be executed, the constable is the proper (l) officer to serve such warrant, and indictable for disobeying it.

(k) 5 Mod. 130.

446.

Salkeld, 175.

Carthow, 508.

Lord Raym.

545.

(l) Salkeld, 381.

2 Roll. 78.

1 Hale, 581. 2 Hale, 88. But see *Blutcher v. Kemp*, 1 H. Black. Rep. 15. notis.

(m) 1 R. Ab. 591.

Moor, 845.

Crom. 222.

3 Bulst. 77.

Dalt. c. 1.

1 Roll. 274.

1 Sid. 355.

1 Levins, 235.

March, 30.

2 Keble, 309.

Sect. 36. Yet inasmuch as the office of constable is wholly ministerial and no way judicial, it seems, that he may appoint a deputy to execute a (m) warrant directed to him, when, by reason of sickness, absence, or otherwise, he cannot do it himself. For the public good requires, that there should be always some officer ready at hand to execute such warrants, and the too rigorous restraint of the service of them to the proper officer, could not but

1 Sid. 355. Moor, 845. 1 Hale, 581. 2 Hale, 88. Wood, b. 1. c. 7. *Strange*, 943. And see the case of *Midhurst v. Waite*, that a constable may appoint a deputy to billet soldiers under the Mutiny Act; for it is a ministerial and not a judicial act, 2 Burr. 1259; and in the case of *Rex v. Clarke*, it seems to be admitted as a settled point that a constable may make a deputy, 1 Term Rep. 692.

but sometimes cause a failure of justice; yet I do not find it settled, that a constable can make a deputy without some such special cause.

† And by 1 Will. and Mary, c. 18. s. 7. “ If any person dis-
“ sending from the Church of England be chosen, or otherwise
“ appointed to bear the office of high constable or petit constable,
“ or any other parochial or ward office, who shall scruple to take
“ upon him any of the said offices, in regard of the oaths or
“ of any other matter or thing required by the law to be taken
“ or done in respect to such office, he may provide a sufficient
“ deputy to execute the same for him.” And by 3 Geo. 3. c. 32.
s. 7. the like privilege is extended to Roman Catholics, on their
taking and subscribing the oath and declaration therein speci-
fied.

For the better understanding of the authority of the sheriff, as
judge of the torn, in relation to the appointment of constables, I
shall consider the following particulars:—

First, Whether the sheriff in his torn hath power to make or
remove a constable.

Secondly, What persons are privileged from being con-
stables.

Thirdly, In what manner persons, duly chosen constables,
may be punished for refusing to be sworn.

Fourthly, What remedy persons having a right to this office,
or to be discharged, may have to be admitted into, or restored to
it, or discharged of it.

Fifthly, What power justices of peace have in relation to
these matters.

As to THE FIRST PARTICULAR, *viz.* Whether the sheriff in his
torn hath power to make or remove a constable.

Sect. 37. It being said in some (*a*) books, that both high and
petit constables are to be chosen and appointed by the sheriff in
his torn; and by (*b*) others, that they are to be chosen by the
decennary, it seems difficult to determine to whom this power
doth of common right belong; yet it seems clear that whether
a constable be to be chosen by the sheriff or decennary, yet he
is to be sworn and placed in his office by the sheriff, as being
judge of the court. Also it seems certain, that a custom for
choosing a constable either way, is good; and it seems to have
been the opinion of the makers of 13 and 14 Car. 2. c. 12, that
the lords of the courts-leet have this power of common right;
for the said statute, on the neglect of such lords to appoint a
constable, gives to justices of peace the sole power of making
one; from whence it seems probable, that the makers of that
statute thought that the like power did originally belong of com-
mon right to such lords, and consequently to the sheriff in his
torn, where there is no court-leet: but (*c*) it hath been said, that
a custom

(*a*) Dalt. Sher.
400.
1 Roll. 34.
(*b*) 2 Jones,
212.
Lamb. Con-
stable, 8.
Salkeld, 175.
Holt, 152.
Lord Raym.
70. 138.
Cowp. 13. 16.
11 Modern,
125.
Douglas, 537.

(*c*) C. Car. 389.
2 Keb. 309.
578.
1 Lev. 266.
1 Sid. 355.
Strange, 943.

a custom in a town that the inhabitants shall serve the office of constable by turns, according to the situation of their several houses, is not good; for that by that such a course it may come to a woman's turn to be constable, as inhabitant of one of those houses; yet we find such customs allowed to be good in later books; and it seems, that the consequence of the reasoning above-mentioned may well be denied, since such woman in such case may procure another to serve for her.

Sect. 38. However it seems clear, that the sheriff or steward having power to place a (a) constable in his office, have by consequence a power of removing him.

As to THE SECOND PARTICULAR, viz. What persons are privileged from being constables.

(b) Noy, 112,
113.
March, 30.
C. Car. 389.
2 Keb. 470.
Douglas, 538.

Sect. 39. It (b) seems certain, that if a sworn attorney, or other officer of any of the courts of Westminster Hall be chosen into this office, he may have a writ of privilege for his discharge; for that all such officers, being bound to give their personal attendance to such courts, shall be privileged from all such inferior offices, which it is apparent that for the most part they cannot personally execute. And it hath been resolved, that such officers shall have this privilege not only where there is no special custom concerning the election of constables, but (c) also where they are chosen by a particular custom, in respect of their estates or otherwise; for that no such custom shall be intended to be more ancient than the usages of those courts, and therefore shall give way to them. And upon the like reasons I find it (d) taken for granted, that practising barristers at law, and the servants of members of parliament, have the same privilege, but I know not of any resolution to this purpose.

(c) 2 Keb. 508.
C. Car. 389.
1 Lev. 265.
266.

(d) 1 Modern,
22.
2 Keb. 578.
1 Modern, 13.

(e) 1 Jon. 462.
C. Car. 585.
Douglas, 538.

Sect. 40. It hath also been resolved, than an (e) alderman of London is not compellable to be a constable, for that as an alderman he is bound to be present in the city for the good government of it.

(f) See 3 Keb.
109.
1 Sid. 272. 355.
1 Levinz, 233.
1 Keble, 933.

Sect. 41. But (f) it hath been holden, that a captain of the king's guards, being presented to serve as constable, in pursuance of a custom in respect of his lands in a town, cannot claim this privilege; for that notwithstanding he be bound by his office to personal attendance on the king's person, yet such office being of late institution, shall not prevail against an ancient custom.

(g) 2 Keble, 578.
1 Modern, 22.
(h) 1 Keble, 439.
Con. 2 Keble,
578.

(i) Sid. 272.
See 1 Keble,
933.
2 Shower, 75.
A tenant in
ancient de-
meane is liable
to the office,
Vent. 344.

Also it (g) seems, that a practising physician being chosen constable, in pursuance of such custom, has no remedy for his discharge; for that there are no precedents of this kind, and his calling is private; yet if such an officer, or a (h) gentleman of quality who hath no such office, or a practising physician, be chosen constable of a town, which has sufficient persons besides to execute this office, and no special custom concerning it, perhaps he may be relieved by the king's bench. But it (i) seems, that even a custom cannot exempt fitting persons from serving the

the office of constable, where there are not sufficient besides them to execute it. Yet these points seem not to be settled, as appears by the various opinions in the books concerning this matter, which are very differently reported.

Sect. 42. It is alleged in the petition of the London surgeons, whereon the statute of 5 Hen. 8. c. 6. is made, "That the wardens and fellowship of the craft and mystery of surgeons enfranchised in the city of London, not passing in number twelve persons, for the continual service and attendance that they at all hours and times give to the king's people, have been exempted and discharged from all offices and business wherein they should use or bear any manner of armour or weapon, &c." And thereupon it is enacted and established, "That from thenceforth the said wardens and fellowship be discharged, and not chargeable of constableness, watch, and all manner of office bearing any armour, &c. and also that the said act extend to all barber-surgeons, admitted and approved to exercise the said mystery of surgeons, according to the form of the statute made in that behalf, so that they exceed not, nor be at any time above the number of twelve persons."

Sect. 43. And it seems that by the equity of this statute, and the ancient custom of the realm, all surgeons have been allowed the like privilege. 2 Keble, 578.
1 Burn, 387.

† And by 18 Geo. 2. c. 15. s. 10. "For making the Surgeons of London and the Barbers of London two separate and distinct corporations," it is enacted, "That all freemen of the corporation of surgeons (a) for so long time as they shall use and exercise the art and science of surgery, and no longer, shall be exempted from the several offices of constable, scavenger, overseer, and all other parish, leet, and ward offices, and from serving upon juries."

(a) On an indictment against a surgeon for refusing the office of constable, it may be moved to the attorney-general that a

noli prosequi be granted, unless cause be shewn by the opposite party against it. Comyns, 312.

Sect. 44. Also by 32 Hen. 8. c. 40. "The president of the commonalty and fellowship of the science and faculty of physic in London, and the commons and fellows of the same, shall not be chosen constables in the city of London, or suburbs of the same, &c." Yet it seems to have been holden, that the equity of this act doth not extend to other physicians not mentioned in it; perhaps for this reason, because physicians have no special custom for their discharge as surgeons are said to have. Vide sup. s. 41.

Sect. 45. By 6 Will. 3. c. 4. which hath been continued by subsequent statutes, "All persons using the art of an apothecary, who have been brought up and served as apprentices in the said art for seven years, according to the statute of 5 Eliz. shall be freed and exempted from the office of constable, in the counties and places where they live, for so long as they use and exercise the said art."

† By 1 Will. and Mary, c. 18. s. 11. "Every teacher or preacher in holy orders, or pretended holy orders, that is a minister,

"minister, teacher, or preacher of a congregation, that shall take the oaths, make and subscribe the declaration, and also subscribe such of the Articles of the Church of England as the act requires, shall be thenceforth exempted from serving upon any jury, or from being chosen or appointed to bear any parochial office, ward office, or other office, in any hundred of any shire or place."

† By 31 Geo. 3. c. 32. s. 7. the like privileges are given to Roman Catholics, on their taking and subscribing the oath and declaration therein specified.

† By 10 and 11 Will. 3. c. 23. "All and every person or persons who shall apprehend and take any person guilty of burglary, or of privately stealing goods to the value of five shillings in any shop, warehouse, coach-house, or stable, or who shall assist, hire, or command, any person or persons to commit such offence, and prosecute him to conviction, shall have a certificate in the manner directed by the act, by virtue whereof he shall and may be discharged of and from all and all manner of parish and ward offices within the parish or ward wherein such felony shall be committed."

† Also by 31 Geo. 2. c. 17. s. 13. "No person within the city or liberty of Westminster shall be liable, or compelled, to serve as a constable, or to find a person to serve in his stead, who is of the age of *sixty-three* years, or upwards."

5 Bur. 2790.

† It hath been determined that a naturalized foreigner, excluded by the act of parliament from "taking any civil office of trust," is thereby rendered ineligible to the office of constable.

Doug. 531.

† So also a college barber of Oxford, although he resides in the city of the university, and out of the precincts of the college, seems exempted from this office.

1 Term Rep. 679.

† But a younger brother of the Trinity House is not exempted from the office by the charters of the fraternity: the king, however, may exempt any person, or whole bodies corporate, from serving the office of constable, subject to the restriction, that the exemption be not extended so far as to prevent the existence of the office in any particular place.

Cowp. 13.

† A person who is *resiant* within a private leet within a hundred, is not therefore exempt from serving the office of constable within the hundred.

As to THE THIRD PARTICULAR, *viz.* In what manner persons duly chosen constables may be punished for refusing to be sworn.

C. Car. 567.
Co. Ent. 572.
5 Mod. 130.
Salk. 175.
8 Coke, 38.
Ld. Raym. 69.
138.

Sect. 46. It seems that no person can lawfully be committed for such refusal without more; but it is said, that if the party be present in the court, he may be fined; and that if he be absent, and have a certain time and place appointed him for the taking of the oath before a justice of peace, and have also express notice of such appointment, and be presented at the next court, for having refused to take it accordingly, he may be amerced. Also it seems, that

that in either case he may be indicted either at the sessions of the peace, or before justices of *oyer and terminer*. And it is advisable in all pleadings in any action concerning such a fine or amercement, and in all indictments for such refusal, especially and expressly to set forth the manner of every such election, appointment, notice, and refusal, and before (a) whom the court was holden. And it hath been adjudged, that it is insufficient to say in general, that the party was (b) *debito modo electus*, or *legitimè electus*, or that he had notice (c) thereof, without setting forth the special circumstances of such notice, &c. Also it is said (d) to have been adjudged, that an indictment for not finding a sufficient person to serve the office of constable, without shewing that the party refused to serve it himself, is sufficient; and it is said not to be sufficient to shew that a man was presented and returned to be a chief pledge, without shewing that there were other inferior pledges.

(a) 1 Mod. 24.
(b) 5 Mod. 96.
129.
(c) Aleyn, 78.
5 Mod. 96. 129.
130, 131.
1 Keb. 418.
Vide sup. f. 66.
(d) 1 Keb. 416.
6 Co. 77.
Vide also
2 Strange, 920.
Fitzg. 192.
Barnard, K. B.
413.
11 Mod. 215.
12 Mod. 280.
Sess. case, 480.
Saund. 290.

As to THE FOURTH PARTICULAR, *viz.* What remedy persons having a right to be constables, or to be discharged, may have to be admitted into or restored to their office, or discharged of it.

Sect. 47. It seems clear at this day, that the court of King's Bench, having the supreme controul of all inferior jurisdictions, may, upon the complaint of any person apprehending himself to be unjustly aggrieved in any such respect, award a writ to the judge of the court, thereby commanding him to swear, restore, or discharge the party, as the case shall be; whereupon, if such judge do not obey such writ, nor an *alias* and *pluries* to the same purpose, or return a sufficient cause to the court to justify his not obeying it, the court will at last award a peremptory *mandamus*.

1 R. Ab. 535.
541.
2 Roll. 82.
Con. 1 Bulst.
174.

Sect. 48. Also it hath been holden, that a person duly chosen constable at a court-leet, and refused to be sworn by the steward, may be relieved by the sessions of the peace. But this point shall be more fully considered in the next section.

2 Jones, 212.

As to THE FIFTH PARTICULAR, *viz.* What power justices of peace have in relation to these matters.

Sect. 49. It is observable, that the constable being a principal peace officer, and it being necessary for the preservation of the peace, that every vill should be furnished with one, the justices of peace have, ever since the institution of their office, taken upon them, as conservators of the peace, not only to swear constables which have been chosen at a torn or leet, but also to nominate and swear those who have not been chosen at any such court, on the neglect of the sheriffs or lords to hold their courts, or to take care that such officers are appointed in them. Also it seems, that such justices have always used for good cause to displace such officers which have been so chosen and sworn by them, and this power of justices of peace having been confirmed by the uninterrupted usage of many ages, shall not now be disputed, but shall be presumed to have been grounded on sufficient authority. And some have carried this point so far, as to allow the justices, at their sessions, to swear one who was chosen at the leet, and unduly

Salk. 175, 176.
1 Modern, 13.
2 Jones, 212.
1 Bulst. 174.
Aleyn, 78.
Dalt. f. 366,
367.
12 Mod. 180.
Strange, 798.
1050.
2 Hale, 88.
Con. 1 Bulst.
174.

duly rejected by the steward, who had sworn another in his place.(4)

Strange, 446, and the books cited in the precedent section. For the cases in which a constable, &c. is exempted from actions, vide 1 Jac. 1. c. 5. 21 Jac. 1. c. 12. 24 Geo. 2. c. 44. Ante, p. Concerning the expenses of his office, vide 27 Geo. 2. c. 20. For his reimbursement, vide 18 Geo. 3. c. 19. And for his account and removal, vide 12 Geo. 2. c. 29. a. 8.

Sect. 50. However, it is certain that justices of peace had power to nominate and swear constables on the default of the torn or leet, before the statute of 13 and 14 Car. 2. c. 12. s. 15. and therefore they have such authority in some cases not mentioned in that statute, which, reciting "That the laws and statutes for apprehending rogues and vagabonds had not been duly executed, sometimes for want of officers, by reason lords of manors do not keep court-leets every year for the making of them," doth enact, "That in case any constable, headborough, or tithingman, shall die or go out of the parish, any two justices of peace may make and swear a new constable, headborough, or tithingman until the said lord shall hold a court, or until next quarter-sessions, who shall approve of the said officers so made and sworn as aforesaid, or appoint others, as they shall think fit: and if any officer shall continue above a year in his or their office, that then, in such case, the justices of peace, in their quarter-sessions, may discharge such officers, and may put another fit person in his or their place until the lord of the said manor shall hold a court as aforesaid.(5)

Of the Sheriff's Torn.

Having considered the power of the sheriff in his torn, as to the appointment of constables, I shall proceed to the FIFTH GENERAL POINT of this chapter, viz. What kind of offences are inquirable in the sheriff's torn. I shall premise the following observations.

4 Inst. 261.
Crom. 213.

First, That it is no certain rule that such offences as are omitted in 18 Edw. 2. concerning the view of frank-pledge, are not within the jurisdiction of the torn or leet.

F. Torn, 5.
Infra, s. 52.

Secondly, That offences made treason or felony, or in any other manner having a restraint by statute superadded to that of the common law, are not inquirable here in respect of any such statute, but only as offences at the common law; for that the jurisdiction of these courts is wholly confined to offences at common law.

Keilw. 66. b.

Thirdly, That no offence whatsoever is cognizable in any such court, unless it arose since the holding of the last court.

Offences

(4) A constable was chosen at a court-leet, and afterwards sworn in before a single justice of the peace; upon motion for an information, the court held it to be a good swearing.—Strange, 1149. 2 Hale, 88. Justices of the peace may appoint a constable even in a privileged place, where there has been none for fifty years before, and proceed against him for not taking the oath. In the hamlets about the Tower they chose five where there was formerly but one, and it was held they might do so. For though originally constables were chosen in leets, yet being officers whose duty it is to keep the peace, the justices may choose them in case of necessity. Case of the constable of Holmbury, 1 Bac. Ab. 437.

(5) But justices, even in sessions, are not empowered, by the force of this statute, to discharge constables chosen and sworn in at the court-leet, Strange, 798; and the statute must be strictly pursued by the sessions, and therefore an appointment in the disjunctive, "for a year, or until others be chosen," was quashed.—Strange, 1050. So also the court will grant a *quo warranto* against a constable elected at a vestry, and sworn in at the sessions, under this statute; for *prima facie* the right of appointing is in the leet, and the sessions have no power if there has been no default.—Strange, 1213. Fitzgibbon, 192. Douglas, 536.

Offences inquirable in this court are either *capital*, or *not capital*. The capital offences are either treasons or felonies.

And FIRST, as to treasons.

Sect. 51 It is said in some books,^(a) that the sheriff in his torn may inquire of them all in general, and in others,^(b) that he may inquire of all which are not against the king's person; but I can find no reason given for this distinction; and since it is a general rule that offences are inquirable in this court, in respect of their being of a public nature, on which account the lowest offences against the king, as ^(c)*mortmains* and *purprestures*, and such like, are inquirable in it, it seems strange that the highest should be exempted. However, it is clear^(d) that the sheriff has no power to inquire of any offence made treason by statute, as of a treason, but only as it was an offence at common law.

(a) *Crom.* 212.
Dalt. Sher. 292.
 7 H. 6. 12.
 10 H. 6. 7.
Qu. Bro. Lect.
 26.
 (b) 9 H. 6. 44.
 (c) *Inf. s.* 58.
 (d) *Kitchen*, 8,
 9. 22.
Summary, 173.
 6 H. 7. 4, 5.

SECONDLY, as to felonies.

Sect. 52. It is also generally said in some books,^(e) that the sheriff, in his torn, may inquire of all kinds of felonies; and in others,^(f) that he may inquire of all, except of the death of a man, or rape. Of the first of which it is said that he cannot inquire, because it is not a common nuisance, but only a wrong to a single person. But if this reasoning be the only foundation for this opinion, it seems difficult to maintain it; for if an assault and battery of a single person, being accompanied with bloodshed or robbery, be inquirable in this court, in respect of the enormity of the offence, and the danger to the public from suffering such offenders to go unrestrained, it seems strange, if such an assault proceed to murder, that it should not be inquirable in it also. But it is said^(g) that the sheriff cannot inquire of a rape as of a felony, because it is made a felony by the statute of Westminster the second, c. 34. by which it is enacted, "That he who ravishes a woman, shall have judgment of life and member." But if this statute had only repealed the 13th of Westminster 1. (by which this offence, which was a *felony* at common law, was made a *trespass* only,) it seems that it would have restored the jurisdiction of the sheriff's torn over it as a felony, because then it would have been a felony by the common law again; but now, it being a felony only by the statute, it is inquirable as a *trespass* only in this court.

(e) 10 H. 6. 7.
Kitchen, 9, 10.
Crompton, 212.
Dalt. Sher. 392.
 (f) 9 H. 6. 44.
 22 E. 4. 22.
 7 H. 6. 12.
F. Torn, 5.
 40 *Assize*, 30.
B. Lect., 18. 26.
Finch, 241.
Kitchen, 22.
 (g) *Kitchen*, 22.
 18 E. 2.
View of Frank-
pledge.
 2 *Inst.* 181.
 22 E. 4. 22.
 6 H. 7. 4, 5.
F. Torn, 5.
F. Lect., 3.
 1 *Halc*, 632.
 2 *Halc*, 69. 71.

Offences, not capital, inquirable in the sheriff's torn, are either such as amount to an actual trespass, or such as do not amount to an actual trespass.

And FIRST, as to such offences amounting to an actual trespass.

Sect. 53. It is agreed,^(h) that an assault and battery is inquirable here if there be any bloodshed in it, but otherwise not; because in such case it is not looked on as a common grievance, but as an injury to a particular person.

Sect. 54. SECONDLY, That all affrays⁽ⁱ⁾ are also inquirable here, for that they are in *terrorem populi*.

(h) 8 E. 4. 5.
Dyer, 233.
 1 R. 3. 1.
 4 H. 6. 18.
 18 E. 2.
View of Frank-
pledge.
Kitch. 37, 38.
 (i) 4 H. 6. 10.
 1 R. 3. 1.
B. Lect., 15.

Sect.

(a) Kitch. 11.
B. Lect. 26.
22 E. 4. 23.
Finch, 241.

Sect. 55. THIRDLY, That the common breaking (a) of hedges, walls, or dykes, may also be inquired of in this court, but not the breaking of any particular hedge, for that it is no common grievance.

(b) Dalt. Sher.
394.
Kitch. 11. 37.
Con. 4 Leon. 12.

Sect. 56. FOURTHLY, Also it is commonly said, that all pound breaches (b) may be inquired of in this court, as being common grievances, in direct contempt of the authority of the law, by which pounds are provided for the legal detainment of distresses till they shall be delivered by due course of law.

Offences under the degree of capital, not amounting to an actual trespass, and inquirable in this court, either immediately concern the king's interest, or do not.

FIRST, As to those which immediately concern the king's interest.

(c) Dalt. Sher.
393.

(d) Kitch. 23.
38, 39.

(e) Kitch. 40.
18 Ed. 2.
View of Frankpledge.

(f) Kitchen,
12, 13, 23, 40.
Dalt. Sher. 393.
Crom. 213.

(g) 34 E. 3. 19.
(h) 1 Saund.
135.

Raym. 160.
12 H. 4. 8.

Sect. 57. It seems to be agreed, that all *purprestures* (c) or incroachments upon the king, and alienations (d) in mortmain, and seizures (e) of treasure-trove, or of waifs (f) or estrays, (f) or goods wrecked, (f) belonging to the king, may be inquired of in this court. But it seems questionable, (g) whether a prescription in a court-leet to inquire of the seizure of such things belonging to the lord of it, being a subject, be good or not, since it is against the general rule (h) of the law for the court-leet to take cognisance of trespasses done to the private damage of the lord, because that would make him his own judge.

SECONDLY, As to offences of this kind, which do not immediately concern the king's interest.

(i) 1 R. 3. 1.
4 H. 6. 10.
22 E. 4. 22, 23.
1 R. Ab. 541,
542, 543.
(k) Kitch. 11.
(l) 1 R. 3. 1.
B. Lect. 1.
4 Inst. 261.
Kitch. 11. 23.
3 Burr. 1861.
(m) 2 Inst. 72.
4 E. 4. 24.
4 Inst. 262.
R. Abr. 543.
But breaking
the assize of
bread as estab-
lished by the
statute 3 Geo. 3.
c. 11. is not
within the juris-
diction of this
court.

Sect. 58. It seems to be a general rule, (i) that all common nuisances are indictable in this court, as all annoyances to common bridges or highways, (k) bawdy-houses, &c.; and also all other such like offences, as selling (l) corrupt victuals, or exposing them to sale; breaking (m) the assize of beer and ale; neglecting to hold a fair (n) or market, in pursuance of a grant or prescription. Also it seems, that the keeping of false (o) weights or measures is indictable in this court, whether it appear that they were actually made use of or not. Also it is said, that all common disturbers of the peace may be here indicted, as barrators, (p) common scolds, (p) eves-droppers; (p) and also all common oppressors, as usurers, (q) &c.; and also all dangerous (r) and suspicious persons, as vagabonds, or those who go abroad in the night, and sleep in the day; or those who inordinately haunt taverns, having no visible means to live by, &c.; and also all suitors (s) to the court who shall make default, &c.; and also (t) all those who shall levy a *hue and cry* without cause, or shall neglect to levy one where they ought, or to pursue one rightly levied.

(n) Crom. 212.
Hobart, 246.
(s) Kitchen, 10.

(o) 18 E. 2. View of Frankpledge. Con. Kitch. 11. Dalt. Sher. 395. (p) Kitchen, 11.
(q) Crom. 212. Dalt. Sher. 394. (r) 18 E. 2. View of Frankpledge. Kitchen, 11.
(t) Dalt. Sher. 394. 18 E. 2. View of Frankpledge.

(u) Kitchen, 13.
See the next
chapter.

Sect. 59. Also it (u) is said, that every vill within the precinct of a torn is indictable in it for not having a pair of stocks, and shall forfeit five pounds.

(x) Kitchen, 12.
2 Davv. Abr.
201.

Sect. 60. Also by statute, (x) many other offences are inquirable

quirable in this court, which it would be too long to enumerate in this place.

Sect. 61. But it hath been resolved, *(a)* that a man cannot be amerced in a court-leet for surcharging a common, because this only concerns the private interest of the inhabitants. (a) 1 R. Abr. 51.
2 R. Abr. 83.

Sect. 62. Yet it hath been holden, *(b)* that if there be a by-law made in a court-leet, in pursuance of a custom to make by-laws, that no one shall receive a poor man to be his tenant, who shall be chargeable to the town, under a certain penalty, and afterwards an inhabitant offend against such by-law, he may be presented at the court-leet, and compelled to pay such penalty. But if such by-laws be valid, it seems clear that they depend entirely on the custom, and are not binding of common right; for that the court-leet, as such, hath nothing to do with such matters of a private nature: and how far any such court may receive, from a special custom, a new collateral power of a different nature from what naturally belongs to it, may deserve to be considered. But it seems *(c)* that of common right any court-leet, with the assent of the tenants, may make by-laws under certain penalties, in relation to matters properly within the conuance of such court, as the reparation of the highways, &c. Also there seems *(d)* to be no doubt but that, by custom, a court-baron may make by-laws, for the well regulating of commons, and such like private matters; and therefore where a court-leet and court-baron are holden together at the same place, as they usually are, it seems that what is transacted therein in relation to public matters, shall be applied to the jurisdiction *(e)* of the court-leet, and what is done in relation to private matters shall be intended to be done by the court-baron. (b) 1 R. Abr. 542.
Lanc, 55, 56.
(c) 11 H. 7. 14.
21 H. 7. 40.
5 Co. 63.
Hobart, 212.
Kitchen, 45.
(d) 1 Davv. 735, 737.
Kitchen, 78.
(e) Chap. 11.
sect. 6.

As to the SIXTH GENERAL POINT of this chapter, *viz.* Within what place offences indictable in the sheriff's torn must arise.

Sect. 63. It seemeth that it is not material, whether such *(f)* offences did arise within the hundred in which the torn is holden or not; for though the sheriff ought to hold his torn in every particular hundred, yet it seems, that in each of them he holds it for the whole county; and it is certain, that he hath a general jurisdiction throughout the whole; yet it seems, that the jurors shall not be charged on their *(g)* oaths to present any offences but those arising within their particular hundreds. Also it is provided by the statute of Marlebridge, c. 10. that those who have tenements in different *(h)* hundreds, shall not be compelled to come to any torn, but only in the bailiwick wherein they shall be conversant; Also it *(i)* seems clear, that no offence, arising within the precincts of a leet, is inquirable in the torn, unless there hath been a neglect to present it in the leet; but after such a neglect it seems the better *(k)* opinion, that it is inquirable in the torn, lest otherwise there should be a failure of justice. Yet it seems certain, that in pleading you *(l)* cannot justify the proceedings of the sheriff's torn against any offence arising within a leet, without expressly alleging that the leet has neglected to inquire of it, for that such a neglect is not to be presumed, where it doth not appear. (f) Dalt. Sher. 285.
Finch, 241, 242.
Com. C. Jac. 551.
(g) Crom. 212.
Dalt. Sher. 388.
(h) 2 Inst. 120.
122.
(i) 1 R. Abr. 543.
Crom. 212.
Co. Lit. 168.
B. Present. 1.
Dalt. Sher. 395, 396.
3 Keb. 230.
(k) 10 H. 4. 4.
12 H. 7. 18.
Moor, 607.
Finch. 246.
C. Jac. 551.
584.
Con. 4 Inst. 261.
(l) C. Jac. 551.

As

As to the SEVENTH GENERAL POINT of this chapter, viz. By what jurors, and in what manner, indictments in the sheriff's torn ought to be found.

2 Inst. 387.

2 Hale, 70. 152.

Sect. 64. It is enacted by the statute (7) of Westminster the second, c. 13. "That the sheriff shall take no inquest either *ex officio*, or by virtue of the king's writ, but by twelve lawful men "at the least, who shall put their seal to such inquisitions;" and the same is also provided as to bailiffs of franchises.

Dalton's Office
of Sheriff, 389.

Sect. 65. In the construction of this statute it hath been holden, that if there be more than twelve jurors, and all agree to the inquisition, all must set their seals to it; but that it is sufficient, if twelve of them only agree, for those twelve to set their seals. (8)

Sect. 66. And it is further enacted by 1 Rich. 3. c. 4. "That "no officer return or impanel any person to be taken or put in "any inquiry in any sheriff's torn, but such as be of good name "and fame, and having freehold to the yearly value of twenty "shillings, or copyhold to the yearly value of twenty-six shillings "and eightpence, on pain of forty shillings, &c. And that every "such indictment before any sheriff in his torn otherwise taken, "shall be void."

2 Inst. 388.

S. P. C. 85.

7 H. 6. 13.

12 H. 7. 18.

B. Lect. 14.

3 H. 7. 4.

Sect. 67. And note, that the courts-leet seem to be within the letter of the said statute of Westminster the second, and are said by some to be within the equity of the said statute of 1 Rich. 3: but this seems questionable; for it is said, by some books, that any person happening to be present at a court-leet, or to be riding by the place where it is holden, may for the want of jurors be compelled by the steward to be sworn, whether he be resident within the precincts of the leet or not; by which it seems to be implied, that any person whatsoever is capable of being put upon the jury in a court-leet.

2 Inst. 388.

S. P. C. 85.

12 Co. 43.

Sect. 68. And to prevent the altering or embezzling of any such indictment, it is enacted by (9) 1 Edw. 3. st. 2. c. 17. "That the sheriffs and bailiffs of franchises, and all other that "do take indictments in their torns or elsewhere, where indict- "ments ought to be made, shall take such indicted by roll in- "dented, whereof the one part shall remain with the indictors, "and the other part with him that taketh the inquest; so that "the indictments shall not be embezzled, as they have been in "times past; and so that one of the inquests may shew the one "part of the indenture to the justices, when they come to make "deliverance."

2 Hale, 71.

Sect. 69. And there is no doubt, but that this statute extends as well to courts-leet as the sheriff's torn.

Sect.

(7) This act respects only such inquisitions as are a foundation for imprisonment, and not inquisitions for offences where the party cannot be apprehended. 3 Burr. 1861.

(8) But see the case of *Colebrooke v. Elliot*, where it is determined that it is not necessary that inquisitions should be sealed, except only such as are a foundation for imprisonment. 3 Burr. 1861.

(9) This act only relates to such indictments as were to be delivered over to the justices; presentments are not within the meaning of it, and therefore not necessary to be indented. 3 Burr. 1861.

Sect. 70. Also there are many particular customs and usages in relation to the taking of indictments in these courts; but it seems to have been anciently the most general course to impanel not only a grand jury, but also a jury of twelve men, which was commonly called the Petit Jury; and that all offences were first presented by the headboroughs, and the presentments affirmed by the petit jury, before they were brought to the grand jury: however, it seems that no exception can be taken to any such indictment, in respect of the non-observance of any such custom or usage, for that no averment lies against the acts of a court of record, and every judge of such court shall be presumed to act according to the rules of it.

Keilw. 141.
148.
Dalt. Sher. 388,
389.
Crom. 212, 213.
Keilwood, 66.
9 H. 6. 44.

Sect. 71. What is above said concerning indictments taken before the sheriff in his torn, is to be intended of such only as are taken before him *ex officio*, for that he is restrained to take any such indictment, by virtue of any writ or commission by 28 Edw. 3. c. 9. which, reciting that the people had suffered many mischiefs, for that sheriffs of divers counties, by virtue of commissions and general writs granted to them at their own suit, for their singular profit to gain of the people, had made and taken divers inquests, to cause to indict the people at their will, and had taken fine and ransom of them to their own use, and had delivered them, whereas such persons indicted were not brought before the king's justices to have deliverance, doth thereupon enact, for to eschew all such mischief, "That all such commissions and writs before made, be utterly repealed, and that from thenceforth no such commissions nor writs shall be granted."

2 Hale, 69.
C. Eliz. 371.

Sect. 72. Yet it seemeth not to be clearly settled, whether, by virtue of this statute, all such writs and commissions, and the proceedings thereon, be made wholly void or not.

F. N. B. 92.
144. 250.
C. Eliz. 371.
Salkeld, 190.
2 Inst. 388.

As to the EIGHTH GENERAL POINT of this chapter, viz. In what manner indictments in the sheriff's torn are to be proceeded upon.

Sect. 73. It is recited by 1 Edw. 4. c. 2. "That many of the king's people by inordinate and infinite indictments and presentments of felonies and other offences, taken before sheriffs at their torns, or law-days (which were oftentimes affirmed by jurors having no conscience, nor any freehold, and often by the sheriff's menial servants), had been arrested and imprisoned, and constrained to make grievous fines and ransoms, after which they have been enlarged out of prison, and the said indictments and presentments embezzled and withdrawn." And therefore it is enacted, "That all indictments and presentments before any of the king's sheriffs in his counties, except in London, their under-sheriffs, clerks, bailiffs, or ministers at their torns or law days, they, nor any of them, shall have power to attach, arrest, or put in prison, or to levy or take any fine or amercement of any person so indicted or presented, by reason of any such indictment or presentment, but that the said sheriffs and under-sheriffs, clerks, or bailiffs, and their ministers, shall deliver all such indictments and presentments to the justices

Summary, 173.
S. P. C. 77. 84.
Dalt. Sher.
388, 389.
3 Mod. 238.

See 4 Term
Rep. 505.

" of

"of peace at their next county sessions, on pain of forty pounds."

And by 1 Edw. 4. c. 2. it is further enacted, "That the said justices of peace shall have power to award process upon all such indictments and presentments as the law doth require, and in like form as if the said indictments and presentments were taken before the said justices of peace; and also to arraign and deliver all such persons so indicted and presented before the said sheriffs, &c. And such persons which shall be indicted or presented of trespass, shall make such a fine as shall seem lawful by their discretions. And the estreats of the said fines and amercements shall be enrolled, and by indenture be delivered to the said sheriffs, under-sheriffs, their clerks, bailiffs, or ministers, or some of them, to the use and profit of him that was sheriff at the time of such indictments or presentments taken."

And by 1 Edw. 4. c. 2. "If any of the said sheriffs, their under-sheriffs, clerks, bailiffs, or their ministers, do arrest, attach, or put in prison, or cause any fine or ransom to be taken, or levy any amercement, of any person or persons so indicted or presented, by reason or colour of any such indictment or presentment taken before them, at their torns or law-days above rehearsed, before that they have process from the said justice of peace, or estreats delivered out, of the said indictments or presentments so brought, delivered, and presented to them, that then the sheriffs which so do, shall forfeit an hundred pounds."

2 Hale, 70,
71. 142.
S. P. C. 87.
4 E. 4. 31.
F. Torn, 3.

Sect. 74. It is observable, that by the words of this statute, justices of peace may award process on any such indictments, in like manner as if they had been taken before themselves; and yet it is clear, that if the sheriff's torn had no authority to take the indictment removed before such justices, they have no power to proceed upon it, as they might have done, if it had been taken before themselves; for the statute, in giving them such power to proceed upon indictments in the sheriff's torn, must be intended to mean such only as were there lawfully taken, not those which were void *ab initio*, as being taken *coram non judice*; nor is there the least intimation in the statute of an intent to enlarge the sheriff's power in taking indictments, but the whole purport of it is to restrain him from proceeding on them. And to this purpose it hath been so largely construed, that not only the judge of the court is punishable for awarding such process, but also the officer for obeying it.—† It has also been held, that this statute takes away the power which sheriffs had by the common law, and the statute 23 Hen. 6. c. 9. of bailing persons indicted before him in his torn, (a) and obliges him to return such indictments to the justices at the next sessions.

1 Jones, 301.
C. Car. 275.

(a) Bengough
v. Rossiter,
4 T. Rep. 505.

As to the NINTH GENERAL POINT of this chapter, viz. In what manner indictments in the sheriff's torn are to be traversed and determined.

Sect.

Sect. 75. It seems to be (a) agreed, that a presentment by (b) twelve or more in a torn or leet, of any offence within the jurisdiction of the court, being neither capital nor concerning any freehold, subjects the party to a fine or amercement without any further proceeding, and binds him for ever after the day on which it is found, and admits of no traverse to the truth of it; but some (c) say, that the party may have a writ of false presentment against the jurors the same day on which the indictment is found; yet it seems agreed, that no instance can be shewn of any such writ being actually brought. But if the presentment concern the party's life or (d) freehold, as if it charge him with not repairing such a highway, which he is charged to be bound to repair by the tenure of his land; it seems clear, that he may remove it into the King's Bench and traverse it; but not if it barely charge his person, as for digging a ditch in the highway, or not cutting the branches of his trees hanging over it, &c. Also it (e) seems, that a man may in like manner traverse an indictment of an offence wholly out of the jurisdiction of a court-leet; as of an affray or nuisance done out of the precinct of it, or of the non-appearance of a person at a leet, who lives out of the precinct of it. But if the affray or nuisance were within the precinct of the leet, it seems, that no one can traverse it in respect of his own not living in it; and that a person who lives within the precinct of a leet, shall have no traverse to a presentment for not appearing at it.

(a) Finch, 386.
Keilw. 52. 66.
3 Modern, 138.
Dyer, 13.
(b) Keilw. 141.
45 E. 3. 26, 27.
(c) F. Bar. 271.
Keilw. 66.
41 Ed. 3. 28.
(d) 5 H. 7. 4.
B. Trav. 183.
Keilw. 52. 66.
Dyer, 13.
(e) Keil. 66.
41 E. 3. 27.

Sect. 76. But it seems certain, that at this day neither the torn nor the leet have any power to try any traverse whatsoever, as hath been more fully shewn, section the thirteenth.

Sect. 77. But it is certain, that the justices of peace may by force of the above-mentioned statute of 1 Edw. 4. try a man indicted of felony before the sheriff in his torn.

Sect. 78. Also it seems, that they may try a person upon any other indictment in the torn, which is traversable at common law; but that they have no power to take any traverse of any other indictment in the torn, for that the words of the statute are only that they may award process on any such indictments as if they had been taken before themselves, and also arraign and deliver the persons indicted, which must be intended of those indicted of felony, who only are said to be arraigned, and that persons indicted of trespass shall make fines, &c. by their discretion, without saying, that they shall be tried; by which it seems to be implied, that persons so indicted shall be fined, as they usually were before in the torn, and still are in the leet, and that in some cases without any further trial, as is more fully shewn in the precedent section. (11)

(11) For the sheriff's oath of office, vide 3 Geo. 1. c. 15.; for the manner of passing his accounts, 3 Geo. 2. c. 15, 16.; and for further particulars, vide Impey's Office of Sheriff.

CHAP. XI. OF THE COURT-LEET.

A COURT-LEET is a court of record, having the same jurisdiction within some particular precinct, which the sheriff's torn hath in the county. And therefore since it hath been shewn in the precedent chapter, at what (*a*) time and in what place the sheriff's torn is to be holden; and what persons owe suit to it; and what (*b*) authority the judge of it hath in relation to his proceeding on (*c*) indictments; and also in relation to (*d*) fines and amercements; and the (*e*) appointment of constables; and having also shewn what (*f*) kind of offences are inquirable in this court; and within what (*g*) place such offences must arise; and by what (*h*) jurors, and in what manner indictments in it are to be found; and in what manner they are to be (*i*) proceeded upon, traversed, and determined; and since the court-leet hath regularly the very same jurisdiction with the sheriffs torn as to all these points, except in some special cases, which have been already taken notice of in the chapter concerning the Sheriff's Torn; I shall refer the reader to the said chapter for all these particulars.

4 Comm. 270.
Finch, 246.

(*a*) Sect. 45, &c.

(*b*) Sect. 10, &c.

(*c*) Sect. 13, &c.

(*d*) Sect. 17,
&c.

(*e*) Sect. 33, &c.

(*f*) Sect. 51.
&c.

(*g*) Sect. 64,
&c.

(*h*) Sect. 65,
&c.

(*i*) Sect. 74, &c.

2 Inst. 71, 72.
22 Ed. 4. 22.

And I shall only consider in this place,

1. The end of instituting the court-leet.
2. How far it exempts those who live within its precincts from the torn.
3. How far it is subject to the oversight of the torn.
4. For what causes it may be forfeited.
5. What ought to be the form of a caption of an indictment in it.

As to the **FIRST POINT**, the end of instituting the court-leet.

12 H. 7. 18.
2 Inst. 71, 72.

(*k*) Sect. 2.
1 Jones, 283.
6 Coke, 77.

Dyer, 30.

13 H. 4. 9.
11 Coke, 42.

Sect. 2. It seems that anciently all people who now owe suit to any court-leet were bound to come to the sheriff's torn, in order there to take the oath of allegiance to the king, and to be incorporated into some tithing, and for such other purposes as are set forth more at large in the precedent chapter. (*k*) But it being more for the ease of the people, to have courts of this kind holden in their own townships or manors, by degrees grants of such courts were obtained from the king for most manors and towns, not only by the lords of manors, but also by other persons who had no lands in the places for which they obtained such grants, and for a recompense to such grantees, for the charge and trouble they were supposed to have been at in procuring such grants, it was usual for the inhabitants who had the benefit of them to agree to pay a certain sum of money, called *Capitage*, or *certum letæ*, &c. at every such court-leet; and for the non-payment of this duty, or refusal to present it, such grantees

grantees may prescribe to amerce the defaulters, and to distrain for the amercement; but no such prescription shall be allowed for any other matter whatsoever of a private nature.

1 Roll, 32. 7A.
1 R. Abr. 211.
4 Burrow, 1861.

As to the SECOND POINT, viz. How far a court-leet exempts those who live within the precincts of it from the torn.

Sect. 3. It seems to be a general (a) rule, that no man can be within two leets at the same time, and in the same respect; from whence it follows, that he who resides within the precincts of a leet, the lord whereof doth duly hold his court, cannot be compelled to come to the torn, or any other superior leet, for the taking the oath of allegiance, or any other such like purpose, which may be as well answered by his attendance at his own leet. Yet if such private leet have not the general jurisdiction of the torn, but be (b) specially granted for two or three articles of it only, it seems, that the inhabitants within its precinct must attend the sheriff's torn for all such matters of which such private leet hath no jurisdiction. Also it (c) seems to be a good prescription for a grand leet (to which other inferior leets may be subordinate in the same manner as that is to the torn) to oblige the chief pledges, and a certain number of the inhabitants of every town within its precinct, to appear at every such grand leet, to inquire of such offences as have not been inquired of in the inferior leets.

(a) Dalt. Sher. 402, 403.
1 Jones, 283.
6 Coke, 77.
18 H. 6. 13.
F. Leet, 1.
C. Jac. 584.
Post, c. 10.
sect. 12.
Con. Kitchen, 34.
1 R. Abr. 542.
(b) Keilw. 141, 142.
2 R. Abr. 203.
(c) C. Jac. 583.
Raymond, 204.
C. Car. 75, 76.
See chap. 10.
sect. 12. 61.

As to the THIRD POINT, viz. How far the court-leet is subject to the oversight of the torn.

Sect. 4. It is said, that the sheriff's torn as an (d) overseer of this court, is to inquire whether the tithings be whole or no, and to present defaults that are not redressed in the leet; and it seems also, that it may of common right inquire of the concealment of offences inquirable in leets, and of the defaults of the lords of such courts. However it (e) seems clear, that a prescription to this purpose is good. And there is no doubt, but that if a leet be (f) seized into the king's hands, all those who owed suit to it ought to come to the torn.

(d) Finch, 246.
See c. 10.
sect. 64.
Dalt. Sher. 387.
391.
(e) C. Jac. 581.
(f) 2 R. Abr. 203.
Finch, 246.

As to the FOURTH POINT, viz. For what causes a court-leet may be forfeited.

Sect. 5. It seems, that this being a franchise not intended to be granted for the private benefit of the grantee, but for the good of the public, for the more easy and convenient administration of justice, shall not only be forfeited by acts of gross and palpable oppression and injustice, (g) but also by bare omissions, in not making it answer the end of its institution; as in the not (h) punishing offenders in the same manner as the law requires, or in (i) neglecting to hold a court when it ought to be holden (at least if such neglects be often repeated, and without a reasonable excuse), or in not (k) providing an able steward to discharge the office, or in not taking care to have such other officers, or other things as are necessary for the execution of justice, as constables and ale-tasters, &c. and (l) pillory and tumbrel; but

(g) Co. Lit. 233.
Kitchen, 33.
C. Jac. 155.
9 Co. 50.
2 R. Abr. 155.
11 Ed. 4. 1.
2 H. 7. 11.
(h) 1 Jon. 283.
Keilw. 148.
152.
(i) Kitchen, 33.
(k) 1 Jones, 283.
(l) F. Leet, 12.
C. Eliz. 125.
698.
2 Jones, 283.

Mo. 573, 574. 607.

(a) C. Eliz. 698. Moor, 607. but it is (a) said, that a vill may be bound by prescription to provide a pillory and tumbrel, and (b) that every vill is bound of common right to provide a pair of stocks. *Quære.*
 (b) Kitchen, 13. Carter, 29. Con. Moor, 573, 574. 1 Jon. 283.

As to the FIFTH POINT, viz. What ought to be the form of the caption of an indictment in a court-leet.

(c) Vide sup. c 10. sect. 9. Salkeld, 195. It hath been (c) resolved,

Sect. 6. FIRST, That the caption of an indictment, *ad cur. vis. franc. pleg. cum cur. baron. &c.* is good; for that the words *cum cur. baron.* shall be rejected; and it cannot but be intended that the indictment was taken by that court, which alone hath the colour of authority to take it.

Salk. 200. Sect. 7. SECONDLY, That the not setting forth in the caption whether such court be holden by grant or prescription, is helped by a multitude of precedents.

CHAP. XII.

OF ARRESTS BY PRIVATE PERSONS.

HAVING thus endeavoured to shew the nature of the courts which have jurisdiction over criminal offences, I am now to shew in what manner offenders are to be proceeded against by such courts.

And in order hereto I shall consider,

1. How they are to be apprehended.
2. In what manner, and in what cases, they are to be bailed.
3. In what cases, and in what manner, they are to be committed to prison.
4. How far they and their assistants are punishable for a hinderance in bringing them to public justice.

As to the first of these points I shall consider,

FIRST, In what manner such offenders are to be apprehended by private persons.

SECONDLY, In what manner by public officers.

THIRDLY, In what cases it is lawful to break open doors in order to apprehend them.

As to arrests of such offenders by private persons, I shall examine :

1. Where arrests of this kind are commanded and enjoined by law.
2. Where they are permitted by law.
3. Where they are rewarded.

As to THE FIRST POINT, viz. In what cases arrests by private persons are commanded and enjoined by law.

Sect. 1. It seems clear, that all(*a*) persons whatsoever who are present when a felony is committed, or a dangerous wound given, are bound to apprehend the offender, on pain of being fined and imprisoned for their neglect, (*b*) unless they were under age at the time.

Sect. 2. And for this cause, (*c*) by the common law, if any homicide be committed, or dangerous wound given, whether with or without malice, or even by misadventure (*d*) or self-defence, in any town, or in the lanes (*e*) or fields thereof, in the day-time, and the offender escape, the town shall be amerced, and if out of a town, the hundred (*f*) shall be amerced.

Sect. 3. And since the statute of Winchester, c. 5. which ordains that walled (*g*) towns shall be kept shut from sun-setting to sun-rising, if the fact happen in any such town by night or by day, and the offender escape, the town shall be amerced.

Sect. 4. And as all private (*h*) persons are bound to apprehend all those who shall be guilty of any of the crimes above-mentioned in their view, so also are they with the utmost diligence to pursue, and endeavour to take, all those who shall be guilty thereof out of their view, upon a *hue and cry* levied against them.

Sect. 5. *Hue* (*i*) and *cry* is the pursuit of an offender from town to town till he be taken, which all who are present when a felony is committed, or a dangerous wound given, are, by the common law, as well as by statute, bound to raise against the offenders who escape, on pain of fine and imprisonment. Also it seems (*k*) certain, that a man may lawfully raise it against one who sets upon him in the highway to rob him. It is also enacted by the statute of Winchester, 13 Edw. 1. c. 4. (*l*) that the *hue and cry* shall be levied upon any stranger who shall not obey the arrest of the watch in the night-time; and 21 (*m*) Edw. 1. st. 2. which was made against trespassers in forests, chases, parks, and warrens, seems to allow the levying thereof upon any such offenders. But if a man take upon him to levy a *hue and cry* without sufficient cause, he shall be punished as a disturber of the peace.

Sect. 6. In order rightly to raise a *hue and cry*, you ought to go to the constable of the next town, and declare the fact, and describe (*n*) the offender, and the way he is gone; whereupon the constable ought immediately, whether it be night or day, to raise his own town, and make a search for the offender; and, upon the not finding him, to send the like notice, with the utmost expedition, by horsemen as well as footmen, to the constables of all the neighbouring towns, who ought, in like manner, to search for the offender, and also to give notice to their neighbouring constables, and they to the next, till the offender be found.

Sect. 7. Also every private (*o*) person is bound to assist an officer demanding his help for the taking of a felon, or the suppressing an affray, or apprehending the affrayers, &c.

(*a*) 3 Inst. 53.
139. 152.
Sum. 89, 90.
1 Hale, 448.
3 H. 7. c. 1.
2 Inst. 52.
F. Cor. 293.
(*b*) F. Cor. 395.
2 Hale, 75, 76.
1 Black. 561.
(*c*) Summ. 90.
2 Hale, 73, 75,
76.
3 H. 7. c. 1.
3 Inst. 53.
4 Inst. 183.
C. Car. 252.
3 Leon. 207.
F. Cor. 238.
293. 299, 302.
425.
Con. 1. Leon.
107.
(*d*) 2 Inst. 315.
F. Cor. 302.
(*e*) Dyer, 210.
(*f*) S. P. C. 31.
(*g*) S. P. C. 31.
3 Inst. 53.
7 Coke, 6, 7.
(*h*) Sum. 90.
1 Hale, 448.
481. 592.
2 Hale, 75, 76.
3 Inst. 117.
2 Inst. 172.
(*i*) 3 Inst. 116,
117.
1 Hale, 508.
2 Hale, 99, 102.
Dalton, 109.
2 Inst. 172.
F. Corone, 395.
C. Eliz. 654.
Crom. 178, 179.
Bracton, 3. c. 1.
(*k*) 9 E. 4. 26.
(*l*) Cro. Eliz.
204.
Savil. 83.
Vide also
4 Edw. 1. st. 2.
De officio corn-
naturalis.
(*m*) 29 E. 3. 39.
F. Tres. 252.
Crompton, 179
1 Hale, 100,
101.
21 H. 7. 28
(*n*) 3 Inst. 116.
Dalton, 109
Summary, 91.
Crompton, 178.
(*o*) B. 1. tit.
"Affray."

(a) This is not a penal law within the statutes of Jeofail.

Cro. Jac. 496.

12 Mod. 242.

Rastal, 406.

Litch. 127.

Cro. Eliz. 142.

270. 753.

Brook, Debt,

103. Godbolt, 58. 7 Co. 6. 2 Inst. 569. 1 Sid. 11. (b) 3 Lev. 320. Herne, 215. Thesaurus Brevium, 141. 2 Saund. 376. (c) Cro. Jac. 187. 118. Yelv. 116. Noy, 125. Shower, 94. Andr. 115. 117. Comb. 160, 161.

2 Vent. 215.

(d) To be recovered at Westminster, in the name of the clerk of the peace, and for the use of the hundred where the offence is committed; which suit shall not abate by his death or removal.

Dyer, 370.

Cro. Jac. 673.

3 Mod. 287.

Co. Ent. 348.

Clift. 378.

Rastal, 406.

Cro. Eliz. 142.

C. Car. 26. 37.

2 Salkeld, 614.

(e) Strange, 406. 1170.

Comyns, 343.

(f) Wilson,

105. 109.

† Also by the statutes of Winton, (a) 13 Edw. 1. st. 2. c. 1 & 2. and 28 Edw. 3. c. 11. it is enacted, "That immediately upon robberies and felonies committed, fresh suit shall be made from town to town; and if the country will not answer for the bodies of such offenders within the space of forty days, (b) the inhabitants of the whole hundred where the robbery shall (c) be done, with the franchises, being within a precinct of the same, shall be answerable for the robberies done, (1) and also the damages."

† But these statutes being thought oppressive in subjecting the hundred to an action, notwithstanding its utmost exertions to apprehend the offender, and also to force the surrounding hundreds, as well as the party robbed, to contribute their assistance to attain the ends of public justice, it is enacted by the 27 Eliz. c. 18. "That the inhabitants of every hundred wherein negligence, fault, or defect of pursuit and fresh suit, after hue and cry made, shall happen to be, shall answer and satisfy by the one moiety of the damages, as shall by force of the said statutes be recovered against the hundred in which any robbery or felony shall be committed." (d)—"That no hue and cry, or pursuit by the country, or inhabitants of any hundred, shall be allowed and taken to be a lawful hue and cry upon, or pursuit after, any the said felons or offenders, except the same be done and made by horsemen and footmen."—"That no person robbed shall maintain any action upon these statutes, unless he shall, with as much convenient speed as may be, give intelligence of the felony to some of the inhabitants of some town, village, or hamlet, near unto the place where such robbery shall be committed; and also, first, within twenty days next before such action brought, be examined upon oath, before some justice of the peace of the county, inhabiting in the hundred where the robbery was committed, or near the same, whether he knew the felons or robbers, or any of them; and if upon such examination it be confessed that he does know them, he shall, before action brought, enter into bond before the said justices, effectually to prosecute the said robbers by indictment or otherwise."

But by 8 Geo. 2. c. 16. "No person shall maintain any action upon the above-recited statutes, unless he shall, over and above the intelligence required to be given by the statute of Elizabeth, give notice of the robbery committed on him to one of the constables of the hundred, or to some constable or officer of some town, parish, hamlet, village, or tithing, near unto the place where such robbery shall happen, or shall leave notice (e) in writing of such robbery at the dwelling-house (f) of such constable or officer, describing in such notice the felon or felons, and the time and place of the robbery; and also shall, within " the

(1) The robbery must be done openly, and with force and violence, 7 Co. 6. 7. Salkeld, 614. Styles, 427, and not in any house, Moor, 620. 3 Leon, 262. Cro. Jac. 496. Cro. Eliz. 753. Sed vide 7 Mod. 160. 157. But it is not necessary

to be in a highway, 7 Mod. 159; in a private way, or in a coppice, is sufficient, 2 Salk. 614. Carth. 71. Wilson, 412. 437. Lord Raymond, 828. 11 Modern, 8. Strange, 1011, or on Sunday, Cro. Jac. 496. Strange, 406.

" the space of twenty days^(a) next after the robbery committed, ^(a) March, 11. Cro. Car. 211.
 " cause public notice to be given thereof in the *London Gazette*, ^(b) and the time ^(b) 2 Wilson, 105, 109, 113.
 " therein likewise describing the felon or felons, ^(c) and the place of such robbery, together with the goods ^(c) 3 Lev. 328. Sid. 15, 209.
 " and effects whereof he was robbed; and shall also before any such ^(d) 371, 458.
 " action commenced, go before the chief clerk, secondary, or ^(d) Andr. 116.
 " filazer of the county where the robbery happened, or the clerk ^(d) Andr. 116.
 " of the pleas wherein such action is intended to be brought, or
 " their respective deputies, or before the sheriff of the county
 " where the robbery shall happen, and enter into a bond (*gratis*)
 " to the high constable, who is authorised to support or defend
 " such action of the hundred, in the penal sum of £100, with ^{1 Term Rep. 71.}
 " two sufficient sureties for securing the due payment of his costs
 " in case he should be nonsuited, &c."

† By 8 Geo. 2. c. 16. s. 3. " No hundred, or franchise therein, ^{March, 10, 11}
 " shall be chargeable by virtue of these statutes, if one or more of ^{1 Sid. 11.}
 " the felons be apprehended within forty days^(e) next after such ^(e) Done. 701.
 " public notice given in the *London Gazette*."

† By 8 Geo. 2. c. 16. s. 11. " Every constable or officer to
 " whom notice shall be given as aforesaid, and every constable of
 " the hundred, and every constable, borsholder, headborough, or
 " tithingman, of any town, parish, village, hamlet, or tithing, within
 " the hundred, or the franchises within the precinct thereof,
 " wherein such robbery shall happen, shall, with the utmost ex-
 " pedition, make, and cause to be made, fresh suit and hue and
 " cry after the felon or felons, on pain of forfeiting five pounds."

† But by Geo. 2. c. 16. s. 12. " No action, suit, or information, ^{10 Modern, 193.}
 " shall be brought, unless within six months next after the matter ^{Hobart, 139.}
 " or thing done; in which action an inhabitant of any hundred ^{Moon, 878.}
 " may be a witness." ^{Brownlow, 156.}
^{Siderfin, 139.}

† By 22 Geo. 2. c. 24. No person whatever shall recover
 against any hundred more than £200, unless the person so robbed
 shall, at the time of the robbery, be together in company, and
 be in number two at least, to attest the truth of the same; nor by
 30 Geo. 2. c. 3. and 4 Geo. 3. c. 2. s. 118. unless three persons
 be present, if the plaintiff is receiver of the land-tax.

ARRESTS of offenders by private persons permitted by law, are
 either by their own authority; or by a warrant from a justice of
 peace.

Arrests of this kind by their own authority are either in respect
 of treason or felony; or in respect of inferior offences.

Arrests of this kind in respect of treason or felony, are either
 for the suspicion of such crimes already done, or supposed to
 have been done; or to prevent their being done.

As to such arrests for such suspicion, I shall endeavour to
 shew,

1. What are sufficient causes of suspicion.
2. By whom the person arrested must be suspected.
3. Whether any such cause will justify an arrest, where no trea-
 son

son or felony at all hath been committed, or dangerous wound given.

4. In what manner an arrest for suspicion is to be justified in pleading.

Sect. 8. As to the first particular, *viz.* What are sufficient causes of suspicion, I shall take notice of some of the principal of them, which are generally agreed to justify the arrest of an innocent person for felony.

(a) 2 H. 7. 15. *Sect. 9.* FIRST, The common fame (a) of the country. But it seems, (b) that it ought to appear upon evidence, in an action brought for such an arrest, that such fame had some probable ground.

1 Hale, 588.
2 Hale, 81.
5 H. 7. 4, 5.
11 E. 4. 4.
Dyer, 236.
Bridge, 62. 7 E. 4. 20. Summary, 91. Keilw. 81. Pulton, 13. (b) 2 Inst. 52. Crom. 98, 99. S. P. C. 97. Bracton, 113. And see the case of *Lodwich v. Catchpole*, Cald. 291.

(c) 7 E. 1. 20. *Sect. 10.* SECONDLY, The living (c) a vagrant, idle, and disorderly life, without having any visible means to support it.

17 E. 4. 5.
Summary, 91.
Pulton, 13.
(d) 7 E. 4. 20. *Sect. 11.* THIRDLY, The being in company (d) with one known to be an offender, at the time of the offence; or generally (e) at other times keeping company with persons of scandalous reputations.

Pulton, 3.
Summary, 91.
(e) 2 Inst. 52.
Crom. 99. *Sect. 12.* FOURTHLY, The being found in such circumstances as induce a strong presumption of guilt; as coming (f) out of a house wherein murder has been committed, with a bloody knife in one's hand; or being found in possession (g) of any part of goods stolen, without being able to give a probable account of coming honestly by them.

(f) 11 E. 4. 4.
12 Co. 92.
(g) 7 E. 1. 20.
C. Ellz. 901.
C. Jac. 190.
Pulton, 36.
Summary, 91.
Moor, 600.

(h) Crom. 98, 99.
F. Cor. 21. *Sect. 13.* FIFTHLY, The behaving one's self in such manner as betrays a consciousness of guilt; as where (h) a man being charged with a treason or felony says nothing to it, but seems tacitly by his silence to own himself guilty; or where a man accused of any such crime, upon hearing that a warrant is taken out against him, doth abscond.

(i) 29 Eliz. 871. *Sect. 14.* SIXTHLY, The being pursued (i) by an *hue and cry*.

29 E. 3. 39.
F. Tres. 252.
5 H. 7. 5.
21 H. 7. 28.
Summary, 91. As to the second particular, *viz.* By whom the person must be suspected upon such an arrest for suspicion.

(A) 10 H. 7. 17. *Sect. 15.* It seems to be (k) agreed, that the law hath so tender a regard to the liberty and reputation of every person, that no causes of suspicion whatsoever, let the number and probability of them be ever so great, will justify the arrest of an innocent man, by one who is not himself induced by them to suspect him to be guilty, whether he make such arrest of his own head, or in obedience to the commands of a private person, or even of a constable. (2)

As

(2) It appears to be decided by the case of *Samuel v. Payne and others*, on a motion for a new trial in *Easter Term*, 20 Geo. 3. that constables and their assistants are justified in arresting a man upon a given charge of felony even although the goods charged to have been stolen are not found by them upon the search-warrant, and the jury find that no

felony was committed. The strict rule of law, "that if a felony has *actually* been committed, any man, upon reasonable probable grounds of suspicion, may justify apprehending the suspected person to carry him before a magistrate, but that if no felony has been committed, the apprehension of a person cannot be justified by any body," was considered

As to the third particular, viz. Whether any such cause of suspicion will justify an arrest where no treason or felony at all hath been committed, or dangerous wound given.

Sect. 16. It is holden in some (a) books, that none of the above-mentioned causes will, in any case, justify the arresting a man for the suspicion of a crime, where in truth no such crime hath been committed either by him or any other person whatsoever. But howsoever this rule may in general be true, it seems very hardly maintainable in the case of an arrest of an innocent person upon a hue and cry levied against him, in such a place where his character is unknown, and with such other circumstances, that the people of the county have no reason to presume it groundless; for in such cases, it would be a great inconvenience to discourage persons from following a hue and cry with that vigour and diligence which the law expects and the public good requires, by making them liable to an action if it should in the event prove to have been levied without sufficient cause, which they cannot take time to examine without delaying their pursuit: and since the person injured by such an ill-grounded hue and cry has a good action against him that raised it, there seems to be no necessity that he should also have a remedy against another. And this opinion seems to be the more plausible, for that among the (b) books (c) cited to maintain the contrary, (d) that which alone doth directly affirm it, seems to go upon an argument manifestly inconclusive; for it says, that an hue and cry is not a sufficient authority to arrest a man unless a felony be done, because the words of the statute of Westminster the first, c. 9. are, "that all men shall be ready upon hue and cry to arrest felons," but where no felony is done, there can be no felon, &c. To this it may be replied, that this argument, if it prove any thing, proves that none but felons can be arrested on a hue and cry, which seems to be manifestly false; for it is agreed by all the books, that if a felony be actually committed, an innocent person, on whom a hue and cry for it is levied, may lawfully be arrested: also there seems to be no doubt, but that he who barely attempts to rob a man, or who dangerously wounds him, may safely be pursued and taken by a hue and cry, and yet there is no pretence to call such a person a felon. (e)

Sect. 17. And if it be granted lawful to arrest a man on a hue and cry where no felony hath been committed, from the like grounds it seems also to follow, that it is lawful to arrest a man on the warrant of a justice of peace, where no felony hath been committed.

considered as inconvenient and narrow; because if a man charge another with felony, and require an officer to take him into custody and carry him before a magistrate, it would be most mischievous that the officer should be bound first to try, and, at his peril, exercise his judgment on the truth of the charge. He that makes the charge should alone be answerable. The officer does his duty in carrying the accused before a magistrate, who is authorised to examine and commit or discharge. The authorities cited were, Ward's case, Clayton,

44. pl. 76. 2 Hale, 81, 89, 91. 2 Hawkins, c. 12 and 13. But the learned reporter adds, that none of them come up to the present case, and that it is, therefore, the first determination of the point, Douglas, 359, 360. B. R. East, 23 Geo. 3. And in the case of Ledwick and Catchpole, it was decided that a constable or other peace officer may justify an arrest for felony, on probable evidence that a felony has been actually committed, although no positive charge be made. Caldecot's Cases, 291.

(a) 2 Inst. 173.
C. Jac. 191.
2 Hale, 78.
Summary, 91.
2 H. 7. 3.
27 H. 8. 23.
8 E. 4. 3.
3 Inst. 118.
F. Tres. 252.
29 E. 3. c. 39.
2 R. A. 559.
Doug. 360.

(b) 29 E. 3.
c. 39.
11 E. 4. c. 4.
2 H. 7. c. 15.
(c) 2 Inst. 173.
(d) 5 H. 7. c. 5.

(e) Now by
1 Geo. 4. c. 54.
an assault with
intent to rob is
felony. Vide
Bk. 1. p. 113.

committed. But this point shall be more fully considered in the next chapter.

As to the fourth particular, *viz.* In what manner an arrest for such suspicion is to be justified in pleading.

(a) Ante, sect. 15.

(b) 2 Inst. 52. Finch, 340.

17 E. 4. 5.

1 E. 4. 20.

Bridgman, 62.

2 Hale, 78.

7 H. 4. 35.

(c) But by

24 Geo. 2. c.

44. officers are

now admitted to

plead the

general issue

and to give the

special matter.

in evidence.

(d) 8 E. 4. 3.

27 H. 8. 23.

C. Jac. 194.

Finch, 340.

(e) 7 E. 4. 20.

F. Faux Imprisi, 5.

Sect. 18. It seems to be certain, that whoever would justify the arrest of an innocent person by reason of any such suspicion, must not only shew that he suspected the party (a) himself, but must also set forth the (b) cause which induced him to have such a suspicion, that it may appear to the court to have been a sufficient ground for his proceeding. (c) Also it seems (d) certain, that regularly he ought expressly to shew, that the very same crime for which he made the arrest, was actually committed. But (e) if a man have several causes of such suspicion, he is not bound to insist upon some one of them only, but may allege them all, for that the replication *de son tort demesne* answers the whole; as (f) where a man arrests another, who is actually guilty of the crime for which he is arrested, it seems that he need not, in justifying it, set forth any special cause of his suspicion, but may say in general, that the party feloniously did such a fact, for which he arrested him, &c.

2 Hale, 81. 17 E. 4. 5. Bridgman, 62. Finch, 394. 4 H. 7. 1, 2. (f) 10 E. 4. 17.

(g) 9 E. 4. 26.

See Bk. 1. tit.

"Alfray."

Sect. 19. As to the arresting of offenders by private persons of their own authority, permitted by law for the prevention of treason or felony only intended to be done; it (g) seems, that any one may lawfully lay hold on another, whom he shall see upon the point of committing a treason or felony, or doing any act which would manifestly endanger the life of another, and may detain him so long till it may reasonably be presumed that he hath changed his purpose. And upon this ground it (h) seemeth to be the better opinion, that not only a constable, but any private person, who shall see another expose an infant in the street, and refuse to take it away, may lawfully apprehend and detain him till he shall consent to take care of it.

(h) Pop. 12, 13.

Owen, 98.

Moor, 284.

2 Hale, 88.

(i) See Bk. 1.

c. 63. sect. 13,

14. 17.

Sect. 20. As to the arrest of offenders by private persons of their own authority, permitted by law for inferior offences, it (i) seems clear, that regularly no private person can of his own authority arrest another for a bare breach of the peace after it is over; for if an officer cannot justify such an arrest without a warrant from a magistrate, surely *a fortiori* a private person cannot. Yet it is holden by (k) some, that any private person may lawfully arrest a suspicious night-walker, and detain him till he make it appear that he is a person of good reputation. Also it hath been (l) adjudged, that any one may apprehend a common notorious cheat going about the country with false dice, and being actually caught playing with them, in order to have him before a justice of peace, for the public good requires the utmost discouragement of all such persons; and the restraining of private persons from arresting them without a warrant from a magistrate, would often give them an opportunity of escaping. And from the reason of this case it seems to follow, that the arrest of any other offenders by private persons, for offences in like

(k) Latch. 173.

Vide the case of the Queen v.

Tooley, Ld.

Rav. 1296.

4 H. 7. 18.

Popham, 208.

2 Hale, 89.

Qu. 4 H. 7.

1. b. 2.

5 H. 7. 5.

2 Inst. 52.

(l) 1 Jon. 249.

C. Car. 234.

2 R. Ab. 546.

like manner scandalous and prejudicial to the public, may be justified.

Sect. 21. As to arrests of such offenders by private persons having a warrant from a justice of peace permitted by law, there is no doubt but that where the law authorises justices of peace to direct their warrants to such persons, it doth implicitly authorise the execution of them by them.

said, will not justify any one in the execution of it.

Crom. 147.
14 H. 8. 16.
But the warrant
of a justice
where he has
not power to
grant one, it is
Strange, 1002.

As to the **THIRD GENERAL POINT** of this chapter, *viz.* In what cases the arrests of offenders by private persons are rewarded by law, I shall give a short account of the statutes concerning this matter, in relation—To robbers in highways—To counterfeiters and clippers of the coin—To shoplifters and other offenders of like nature—To burglars and felonious breakers of houses—To offenders on the black act—To discharging the hundred—To stealing sheep, &c.—To felons convict—To smugglers—and, To theftbooters.

Sect. 22. And **FIRST**, As to robbers in highways. By 4 and 5 Will. and Mary, c. 8. it was enacted, “Whoever shall apprehend and take one or more thief or robber in any highway or road in England or Wales, and prosecute him or them till he or they be convicted of any robbery committed in or upon any highway (3), passage, field, or open place, shall receive from the sheriff of the county where such robbery and conviction shall be, without paying any fee for the same, for every such offender so convicted Forty Pounds within one month after such conviction and demand thereof made, by tendering a certificate to the said sheriff under the hand or hands of the judge or justices before whom such felon or felons shall be convicted; and in case any dispute shall arise between the persons so apprehending any the said thieves and robbers touching their right to the said reward, the said judge or justices so respectively certifying, shall by their said certificate direct and appoint the said reward to be paid in such shares and proportions as to them shall seem just and reasonable. And if any such sheriff shall die or be removed before the expiration of one month after such conviction and demand made, the next sheriff shall pay the same within one month after demand and certificate brought as aforesaid: and the sheriff making default in paying the said sum, shall forfeit double as much.”

Reward for apprehending robbers.

Sect. 23. By 4 and 5 Will. and Mary, c. 8. “If any person shall be killed by any such robber in endeavouring to apprehend, or making pursuit after him, the executors or administrators, &c. of such person shall receive forty pounds from the sheriff, &c. upon certificate delivered under the hands and seals of the judge or justices of assize for the county where the fact was done, or the two next justices of the peace, of such person being so killed, which certificate the said judge, or justices, upon

Gratuity in case of death.

(3) By 6 Geo. 1. c. 23. sect. 8. the streets of London and Westminster, and other cities, towns, and places, shall be deemed and taken to be high-

ways to all intents and purposes, within the intent and meaning of this act.

" upon sufficient proof before them made, are immediately required to give without fee or reward."

A further reward.

Sect. 24. By 4 and 5 Will. and Mary, c. 8. " Every person who shall so take, apprehend, prosecute, or convict such robber as aforesaid, shall have, as a further reward, the horse, furniture, and arms, money and other goods of such robber, that shall be taken with him; any their Majesties right or title, bodies politic or corporate, or the right or title thereunto of the lord of any manor or franchise, or of him or them lending or letting the same to hire to any such robber notwithstanding: Provided that this shall not be extended to take away the right of any person to such horses, furniture and arms, money or other goods, from whom the same were before feloniously taken."

Reward for apprehending coiners.

Sect. 25. SECONDLY, As to counterfeiters and clippers of the coin. By 6 and 7 Will. 3. c. 17. " Whoever shall apprehend any person who shall counterfeit any of the current coin of this realm, or for lucre clip, wash, file, or otherwise diminish the same, or shall cause to be brought into the kingdom any clipt, false, or counterfeit coin, and prosecute such person to conviction, shall have from the sheriff of the county where such conviction shall be, forty pounds upon the judge's certificate, &c."

(a) Vide Bk. 1. ch. 17. sec. 64.
(b) Vide Bk. 1. ch. 18. sec. 4.
(c) Vide Bk. 1. p. 71 and 72.

† By 15 Geo. 2. c. 28. s. 7. (for preventing the counterfeiting the coin) " Whoever shall apprehend any person or persons who have committed any of the offences hereby made high treason (a) or felony (b), or who shall have made or counterfeited any of the copper money as mentioned in the act (c), and shall prosecute such offenders until he, she or they shall be thereof convicted, such prosecutor and prosecutors shall have and receive from the sheriff or sheriffs of the county or city where such conviction shall be made, for every such offender so convicted of treason or felony, the sum of forty pounds; and for every person so convicted of counterfeiting any of the copper money, the sum of ten pounds, without paying any fee for the same, within one month after such conviction and demand thereof made upon the judge's certificate, &c."

Shoplifters.

N. B. If a horse be stolen out of the stable or other curtilage in the night-time it is burglary; if in the day-time, it is larceny from the house; and in this way, whoever convicts an offender in horse-stealing, is intitled to the reward.

Sect. 26. THIRDLY, As to shoplifters, &c. By 10 and 11 Will. 3. c. 23. " Whosoever shall take and prosecute to conviction any person who by night or day shall in any shop, warehouse, coach-house, or stable, privately and feloniously steal any goods, wares or merchandizes, of the value of 5s. (though such shop, &c. were not broken, and though no person were in such shop, &c.) or shall assist, hire, or command any person to commit such offence, shall have a certificate thereof gratis from the judge or justices, expressing the parish or place where such felony was committed; and if any dispute shall happen about the right to such certificate, the judge or justices shall direct and appoint the said certificate into so many shares to be divided among the persons therein concerned, as to the said

" said judge, &c. shall seem reasonable, (a) which certificate (a) The practice is to make the prosecutor or person to whom the certificate is given pay a proportionate share of its value to the other witnesses produced on the part of the Crown.

" (before any benefit has been made of it) may be once assigned over, and no more, and the original proprietor or assignee shall by virtue thereof be discharged from all parish and ward-offices, within the parish or ward wherein the felony was committed; and the said certificate shall be enrolled by the clerk of the peace of the county for the fee of one shilling: and in case any person happen to be slain by any such felons by endeavouring to apprehend them, his executors, &c. shall have the like reward, &c."

Sect. 27. FOURTHLY. As to burglars and felonious breakers of houses. By 5 Ann. c. 31. " Every person who shall take any one guilty of burglary, or the felonious breaking and entering any house in the day-time, and prosecute them to conviction, shall receive, above the reward given by the above-mentioned statute of 10 and 11 Will. 3. the sum of £40 within one month after such conviction;" concerning which the same rules in effect are prescribed, as are provided by the above-mentioned statute of 4 and 5 Will. and Mary, c. 8, concerning the reward of £40 to be paid to those who shall apprehend a highwayman.

Housebreakers.

† **Sect. 28. FIFTHLY.** As to offenders on the black act. By 9 Geo. 1. c. 22. s. 12. " If any person or persons shall apprehend or cause to be convicted, any of the offenders mentioned in the act, and shall be killed, or wounded so as to lose an eye, or the use of any limb, in apprehending or securing, or endeavouring to apprehend or secure any of the said offenders, upon proof thereof made at the general quarter sessions of the peace for the county or place where the offence was or shall be committed, or the party killed, or receive such wound, by the person or persons so apprehending and causing the said offender to be convicted, or the person or persons so wounded, or the executors or administrators of the party killed, the justices of the said sessions shall give a certificate thereof to such person or persons so wounded, or to the executors or administrators of the party so killed, by which he or they shall be entitled to receive of the sheriff of the said county the sum of £50, to be allowed the said sheriff in passing his accounts in the Exchequer; which sum of £50 the said sheriff is hereby required to pay within thirty days from the day on which the said certificate shall be produced and shewn to him, under the penalty of forfeiting the sum of £10 to the said person or persons to whom such certificate is given; for which sum of £10, as well as the said sum of £50, such person may bring an action upon the case against the sheriff, as for money had and received to his or their use."

Offenders on the black act.

By 10 Geo. 3. c. 32. sect. 4. all the provisions of this act, " for making satisfaction and amends, and for the encouragement of persons to apprehend offenders," are extended to the destroyers of sea-banks, &c. cutting hop-binds; and setting fire to coal-pits. Vide b. 1. p. 199. 238. 224.

† **Sect. 29. SIXTHLY,** As to discharging the hundred upon hue and cry. By 8 Geo. 2. c. 16. s. 9. " Whoever shall apprehend such felon or felons, as described by, and within the time limited in, the act, whereby the hundred is actually discharged, shall on due proof thereof upon oath before two justices, be entitled to a reward of £10."

Reward for discharging the hundred.

Stealing cattle

† *Sect. 30. SEVENTHLY, As to stealing sheep or other cattle. By 14 Geo. 2. c. 6. explained by 15 Geo. 2. c. 34. " All and " every person and persons who shall apprehend and prosecute " to conviction, any offender or offenders guilty of any of the of- " fences mentioned in these acts, shall have the sum of ten pounds, " to be paid within one month after such conviction, by the " sheriff where the offence was committed, without any deduc- " tion whatsoever, he or they tendering a certificate, signed by " the judge, before the end of the sessions or assizes, certifying " such conviction, and where the offence was committed, and " that such offender was apprehended and prosecuted by the " person or persons claiming the said reward; and on default of " payment within one month, the sheriff shall forfeit double the " sum to the party or his representatives."*

Reward for ap-
prehending
those who re-
turn from trans-
portation.

† *Sect. 31. EIGHTHLY, As to felons convict. By 16 Geo. 2. c. 15. 8 Geo. 3. c. 15. 24 Geo. 3. c. 56. and 25 Geo. 3. c. 46. " Whoever shall discover, apprehend, and prosecute to " conviction of felony without benefit of clergy, any felon or " other offender ordered for transportation, or who shall have " agreed to transport himself, who shall be afterwards found at " large in Great Britain, without some lawful excuse, before the " expiration of his or their term, shall be intitled to a reward of " £20 for every such offender so convicted as aforesaid, and shall " have the like certificate and like payments as any person may " be intitled to for apprehending, prosecuting, and convicting of " highwaymen (a)."*

(a) Vide supra,
section 22.

Reward for ap-
prehending
smugglers.
Vide 8 Geo. 2.
c. 18. sect. 8.
9 Geo. 2. c. 35.
sect. 16.

† *Sect. 32. NINTHLY, As to smugglers. By 19 Geo. 2. c. 34. s. 6. " If any officer or officers of his Majesty's revenue, or " other persons being employed in the seizing, conveying or se- " curing any wool, or other goods forfeited on account of their " being prohibited or accustomed goods, or on account of the " duties chargeable thereon not having been paid or secured, " or by virtue of any law made to prevent the exportation of " wool or other goods, or in endeavouring to apprehend any " offender against this act, shall be beat, wounded, maimed, or " killed by any offender against this act, or the said wool or other " goods so seized shall be rescued by persons so armed as the " act describes; in all such cases respectively, the inhabitants " of every rape or lath, in such counties as are divided into rapes " or laths, and in every other county the inhabitants of every " hundred where such acts shall be committed, in England, shall " make full satisfaction and amends for all the damages which " such officers or persons shall respectively suffer by such " beating, wounding and maiming respectively, and by the " loss of such goods so seized and rescued, and shall also " pay the sum of £100 for each person so killed, to the execu- " tors or administrators of such officer or other person so killed " as aforesaid; and such respective officers and other persons, " and their executors or administrators, shall be, and are hereby " enabled to sue for and recover such their damages, so as the " sum to be recovered for any such beating, wounding, or maim- " ing, shall not exceed £40, nor for the loss of the goods £200, " against the inhabitants of the said rape or lath in such counties*

Actions to be
brought within
a year. sect. 9.

" as

“ as are divided into rapes and laths, and in every other county
 “ the inhabitants of every hundred, who by this act shall be made
 “ liable to answer all or any part thereof.”—Notice of the offence must be given to two or more inhabitants near to the place where it happens; and, within eight days, the party must declare, by examination upon oath, before a justice of the peace, whether he knows the offender, pursuant to the directions of 8 Geo. 2; and if the offender be apprehended and convicted within six months no satisfaction shall be made.

These damages are to be rateably taxed upon the inhabitants, and levied as by 8 Geo. 2. c. 16.

† Sect. 33. By 19 Geo. 2. c. 34. s. 10. “ All and every person
 “ and persons who shall apprehend and take, or discover so that
 “ he may be taken, any person in England who shall have been
 “ advertised in the manner the act directs, and shall not have
 “ surrendered him or themselves within the forty days (a), and
 “ cause him to be brought before the lord chief justice of the
 “ king’s bench, or before any one of the justices of the said
 “ court, or any one of his Majesty’s justices of the peace for London or Middlesex (who is hereby required to commit such
 “ person to the prison of Newgate for such felony), shall have
 “ and receive, for every such person who shall be so apprehended, the sum of £500, to be paid within one month after
 “ execution shall be awarded against such offender so apprehended and committed as aforesaid by the commissioners of
 “ the customs or excise respectively, who are hereby required to
 “ receive the applications of all such who are concerned in
 “ such discovering or apprehending such offender, and determine
 “ who are entitled to the said reward, and their respective shares
 “ and proportions thereof; and the same shall be divided amongst
 “ such persons as aforesaid, in such shares and proportions as
 “ to the said commissioners respectively, or to the major part of
 “ them shall seem reasonable.”

(a) Vide the second section of the act.

† Sect. 34. And it is also further enacted, “ That if any such
 “ offender against whom no such order of council shall have
 “ been made, shall himself so discover or apprehend any other
 “ offender, against whom such order shall have been made, he
 “ shall be discharged and acquitted of such his own offence, and
 “ all other the like offences then before committed, and for which
 “ no prosecution shall have been then commenced, and shall also
 “ have his share of the reward.”

Offender discovering.

† Sect. 35. And it is further enacted, “ That if any person or
 “ persons shall happen to lose a limb, or an eye, or be otherwise
 “ grievously maimed or wounded in the apprehending or endeavouring to apprehend, or making pursuit after such offender
 “ or offenders, all and every person or persons so wounded and
 “ maimed as aforesaid, shall upon application to the commissioners of the customs or excise respectively as aforesaid, have
 “ and receive the sum of fifty pounds, over and above any other
 “ reward that he or they may be intitled to as an apprehender
 “ by virtue of this act; and in case any person or persons shall
 “ happen to be killed in the taking or apprehending, or endeavouring to apprehend, or in making pursuit after any such
 “ offender or offenders, that then the executors or administrators
 “ of

Gratuity in case of death or hurt.

“ of such person or persons so killed as aforesaid, upon applica-
 “ tion to the commissioners as aforesaid, and laying sufficient
 “ proof before them of such person being killed as aforesaid,
 “ shall have and receive the sum of one hundred pounds. All
 “ which rewards before mentioned shall be paid to the sever-
 “ ral and respective persons who shall become intitled thereto as
 “ aforesaid, by the receiver-general of the customs, or cashier of
 “ the excise respectively, upon an order directed to them for that
 “ purpose by the commissioners of the customs or excise.”

† *Sect. 36.* And it is further enacted by the said statute, par. 11.
 “ That if any of the said offender or offenders in England, at any
 “ time before order in council made by as by the act is directed
 “ (a), shall discover two or more accomplices therein to the
 “ commissioners of the customs or excise respectively, and ap-
 “ prehend them, or cause them to be apprehended, so as they,
 “ or two of them at least, may be brought to justice, and con-
 “ victed of such offence, he or they shall have and receive fifty
 “ pounds for every offender, and shall be clearly acquitted and dis-
 “ charged of his, her, or their offence, and all other the like of-
 “ fences before committed for which no prosecution shall have
 “ been then commenced.”

(a) Vide the
 second section
 of the act.

Reward for
 apprehending
 theft-booters.

† *Sect. 37.* TENTHLY, As to taking money to help persons to
 stolen goods. By 6 Geo. 1. c. 23. s. 9. and 10. “ Whoever
 “ shall discover, apprehend, and prosecute to conviction of fe-
 “ lony without benefit of clergy, any person or persons for the
 “ said offence of taking money or other reward directly or indi-
 “ rectly to help any person to their stolen goods (such offender
 “ not having apprehended the felon who stole the same, and
 “ brought him or her to trial for the same, and given evidence
 “ against him or her as required by law), shall be intitled to a
 “ reward of fifty pounds for every such offender so convicted as
 “ aforesaid, and shall have a like certificate, and like payments
 “ made without fee or reward, as any person may be intitled unto
 “ for apprehending and convicting highwaymen.”

But these rewards, which the party prosecuting to conviction
 was entitled to demand, were found by experience in certain
 cases to lead to mischievous consequences; and therefore, by
 statute 38 Geo. 3. c. 70. reciting so much of the statutes 4 and 5
 W. and M. c. 8. 6 and 7 W. 3. c. 17. 14 Geo. 2. c. 34. 15 Geo.
 2. c. 28. 10 and 11 W. 3. c. 23. 5 Anne, c. 31. as gives the
 rewards above set forth, and also reciting, “ that it had been
 found by experience that the hope or expectation of obtaining
 such reward had instigated evil-disposed persons to entrap the
 unwary and ignorant into the commission of offences, for which
 they had afterwards been apprehended and prosecuted to con-
 viction by such conspirators:” and further reciting by s. 4. “ That
 whereas many persons are deterred from prosecuting persons
 guilty of felony, upon account of the expense and loss of time
 attending such prosecutions, whereby the ends of justice are fre-
 quently defeated;” it is therefore enacted, “ That from and after
 “ the passing of that act it shall and may be lawful for the court
 “ before

The court to
 grant expenses
 of prosecution.

“ before whom any person shall be prosecuted or tried for any
 “ grand or petit larceny or other felony, and every such court is
 “ hereby authorised and empowered, at the request of the prose-
 “ cutor, or any other person or persons who shall become bound
 “ in any recognizance to his majesty, his heirs and successors, to
 “ prosecute or give evidence, or who shall be *subpanaed* to give
 “ evidence, against any person or persons accused of any grand
 “ or petit larceny or other felony, and who shall appear to pro-
 “ secute and give evidence, or who shall appear to the said court
 “ to have been active in the apprehension of any person or
 “ persons accused of any of the offences in the said herein-be-
 “ fore recited acts mentioned, or any of them, to order the
 “ sheriff or treasurer of the county in which the offence shall
 “ have been committed, to pay unto such prosecutor and wit-
 “ nesses, and person or persons concerned in such apprehension
 “ as aforesaid, respectively, as herein-after mentioned, as well the
 “ costs, charges, and expenses which such prosecutor shall be
 “ put to in preferring the indictment or indictments against the
 “ person or persons so accused, as also such sum and sums of
 “ money as to the said court shall seem reasonable and sufficient
 “ to reimburse such prosecutor and witnesses, and person or per-
 “ sons concerned in such apprehension as aforesaid, for the
 “ expenses they shall have been put severally to in attending
 “ before the grand jury to prefer such indictment or indictments,
 “ and in otherwise carrying on such prosecution, and also com-
 “ pensate such prosecutor and witnesses, and person or persons
 “ concerned in such apprehension as aforesaid, respectively, for
 “ their loss of time and trouble in such apprehension and prose-
 “ cution as aforesaid.”

By sect. 2. the certificate granted by 10 and 11 Will. 3. is not to be transferable.

By sect. 3. the rewards given to the executors of persons killed in apprehending burglars or robbers is saved.

By sect. 8. no person is entitled to costs unless bound by recognizance or *subpanaed*, or had written notice from the prosecutor or his attorney to attend the court.

CHAP. XIII.

OF ARRESTS BY PUBLIC OFFICERS.

ARRESTS of offenders by public officers, are either by virtue of process from some court of record, or without such process. 4 Comm. 286.

Arrests of this kind by virtue of such process, shall be considered hereafter in their proper place.

Arrests

Arrests by public officers without such process, are either,
 1. By watchmen. 2. By constables. 3. By bailiffs of towns;
 or, 4. By justices of peace.

Sect. 1. But before I consider the nature of each of these in particular, I shall take it for granted, that wherever any such arrest may be justified by a private person, in every such case *à fortiori* it may be justified by any such officer.

As to arrests by watchmen, I shall first premise in what manner watch is to be kept in every town, and then shall shew the power of the watchmen.

Sect. 2. AND FIRST, As to the keeping watch in every town, it is enacted by the statute of Winchester, c. 4. "That from thenceforth all towns be kept as it had been used in times past, that is, to wit, from the day of Ascension unto the day of St. Michael, in every city six men shall keep at every gate, in every borough twelve men, in every town six or four, according to the number of inhabitants of the town, and shall watch the town continually all night, from the sun-setting to the sun-rising."

Sect. 3. And it is further enacted by 5 Hen. 4. c. 3. "That the watch to be made upon the sea-coasts through the realm, shall be made by the number of the people in the places, and in manner and form, as they were wont to be made in times past, and that in the same case the statute of Winchester be observed and kept; and that in the commissions of the peace this article be put in, that the justices of peace have power thereof to make inquiry in their sessions from time to time, and to punish them which be found in default after the tenor of the said statute."

Sect. 4. It hath been resolved, that a stranger who is not an inhabitant of a town (a) cannot be compelled by virtue of the said statute of Winchester to keep watch in it. But it seems to be agreed, that every inhabitant is bound to keep it in his turn, or to (b) find another sufficient person to keep it for him; from whence it follows, that he is indictable for a refusal; But it is (c) not agreed that he may be committed by the constable till he consent to do his duty.

2 Hale, 96. 98.

(d) That is, to the common gaol.

Sect. 5. As to the power of watchmen, it is further enacted by the said statute of Winchester, c. 4. "That if any stranger do pass by the watch, he shall be arrested until morning. And if no suspicion be found, he shall go quit; and if they find cause of suspicion, they shall forthwith deliver him to the sheriff (d). and the sheriff may receive him without damage, and shall keep him safely until he be acquitted in due manner. And if they will not obey the arrest, they shall levy hue and cry upon them, and such as keep the town shall follow with hue and cry with all the town and the towns near, and so hue and cry shall be made from town to town, until that they be taken, and delivered to the sheriff as before is said: And for the arrestments of such strangers none shall be punished."

Sect.

Sect. 6. It is holden that this statute was made in affirmance of the common law, and that every private person may by the common law arrest any suspicious night-walker, and detain him till he give a good account of himself, as hath been more fully shewn in the precedent chapter, section twenty.

Popham, 90;
Litch, 173
2 Hale, 37.
Dalton, 101
4 Comm. 261.
Comb. 213.
By 5 Ann

c. 31. if a watchman be killed in apprehending a burglar, his representatives are entitled to 40

As to such arrests by constables, I shall endeavour to shew, How far they may be justified by their own authority; and, How far by virtue of a warrant from a justice of peace.

AND FIRST, As to the justifying of such arrests by the constable's own authority.

Sect. 7. It seems difficult to find any case wherein a constable is empowered to arrest a man for a felony committed or attempted, in which a private person might not as well be justified in doing it. But the chief difference between the power and duty of a constable and a private person, in respect of such arrests, seems to be this, that the (a) former has the greater authority to demand the assistance of others, and is liable to the severer fine for any neglect of this kind, and has no sure way to discharge himself of the arrest of any person apprehended by him for felony. (b) without bringing him before a justice of peace in order to be examined, as shall be more fully shewn in the sixteenth chapter; whereas a private person, having made such an arrest, needs only to deliver his prisoner into the hands of the constable.

Ante sect. 13.
(a) 3 Inst. 159.
Lamb. Con-
stable, 12
17 1 1 2 3 4
3 H 7 1 a.
2 H 7. 15 b
(b) Summary,
91. 112.
10 1. 4. 17. 6.
2 Hale, 81.
Douglass, 360

Sect. 8. But it is said, that a constable hath authority not only to arrest those whom he shall see actually engaged in an affray, but also to detain them till they find sureties of the peace, as hath been more fully shewn in the (c) First Book, whereas a private person seems to have no other power in a bare affray, not attended with the danger of life, but only to stay the affrayers till the heat be over, and then deliver them to the constable, and also to stop those whom he shall see coming to join either party: But it is difficult to find any instance wherein a constable hath any greater power than a private person over a breach of the peace out of his view; and it seems clear, that he cannot justify an arrest for any such offence, without a warrant from a justice of peace, &c.

(c) In "Affray"

SECONDLY, As to the justifying such arrests by constables, by virtue of a warrant from a justice of peace.

Sect. 9. It seems (d) clear, that such an arrest unlawfully made by a constable without a warrant, cannot be made good by a warrant taken out afterwards. Also it hath been (e) holden, that if a constable, after he hath arrested the party by force of any such warrant, suffer him to go at large, upon his promise to come again at such a time and find sureties, he cannot afterwards arrest him by force of the same warrant. However, if the party return and put himself again under the custody of the constable, it seems, that it may be probably argued, that the constable may lawfully detain him, and bring him before the justice in pursuance of the warrant; for if a person taken by virtue of a civil

(d) Dyer, 244.
Fitz. Bar. 248.
Crompt. 149
2 Keble, 705
Dalton, c 117
(e) Crom. 148
2 Keble, 206
Dalton, c 117.
13 E 4. 9. a.

(a) 1 Dan. Abr.
633. 635.
Hobart, 202.
1 Levinz, 21.
C. Car. 75.
2 Keble, 206.

process, and voluntarily suffered by the sheriff to escape, may afterwards, upon his return to the prison, be kept by the sheriff by virtue of the same process, unless the plaintiff rather chuse to take advantage of the escape against the sheriff; surely *à fortiori*, upon an arrest for a crime, in which case it is to be presumed that the public good requires that the party be brought to justice, it shall likewise be lawful to detain a person returning to the officer after such an escape: However, as the law seems (a) not to be settled in relation to such an escape after an arrest by virtue of a civil process, so neither doth it seem to be clear in relation to an escape after an arrest by force of such a warrant from a justice of peace.

(b) 14 H. 8. 16.
Crompt. 147.
148.
(c) Crompt. 149.
Strange, 1002.
4 Comm. 288.

Sect. 10. But it seems clear, that a constable cannot justify any arrest by (b) force of a warrant from a justice of peace, which expressly appears in the face of it to be for an offence whereof a justice of peace hath no jurisdiction, or to bring the (c) party before him at a place out of the county for which he is a justice.—But it seems that he both may and ought to execute a general warrant to bring a person before a justice of peace, to answer such matters as shall be objected against him, on the part of the king, for that the officer ought to presume that the justice hath a jurisdiction of the matter which he takes (d) cognisance of unless the contrary appear; and it may often endanger the escape of the party to make known the crime he is accused of.

(d) Dalton,
c. 117.
1 Hale, 377.
2 Hale, 111.
Crompt. 147, 148.
4 Burr. 1763.
Cro. Jac. 81.

Summary, 93.
3 Inst. 177.
4 Comm. 288.
10 St. Tr. 326.
Yet see a precedent of this kind, Dalt. 114.

But it seems to be very questionable, whether a constable can justify the execution of a general warrant to search for felons, or stolen goods, because such warrant seems to be illegal in the very face of it, for that it would be extremely hard to leave it to the discretion of a common officer to arrest what persons, and search what houses he thinks fit: And if a justice cannot legally grant a blank warrant for the arrest of a single person, leaving it to the party to fill it up, surely he cannot grant such a general warrant, which might have the effect of an hundred blank warrants. (2)

Dalton, c. 117.
Crompton, 147,
148.
Dalton, c. 118.

Sect. 11. Yet, perhaps, it is the better opinion at this day, that any constable, or even private person, to whom a warrant shall be directed

14 H. 8. 16. See c. 12. s. 15. Cont. 4 Inst. 177. Sum. 93. 94. Skinner, 568. Strange, 1002.

(2) Mich. Term, 1763, *Wilkes v. Wood*, in trespass for assisting the King's messengers to enter and ransack the house of the plaintiff, by virtue of a general warrant from the secretary of state, Lord Camden, in his charge to the jury, appears to have explicitly avowed his opinion of the illegality of general warrants. The plaintiff obtained a verdict; but whether any measures were taken to elude the effect of it, is not reported. *Loft 18.* 11 State Trials, 323.—In Easter, 1764, the same learned judge confessed a bill of exceptions which had been filed against his opinion, in the case of *Money v. Leach*; and upon the argument in Mich. Term, 1765, Lord Mansfield and the whole court declared that general warrants to seize the person, unless in the cases specially authorised by acts of parliament, are illegal and void; that the magistrate alone should exercise his discretion, and give certain directions in the warrant to the officer; that the few instances in which they had been issued, arose from the practice of a particular office, not authorised by general usage; and that even antiquity

itself could not sanctify a usage which was fundamentally bad. 1 Black. 562. 3 Burr. 1692. 1742. 11 State Trials, 307. 321. But this cause went off upon another ground, and no decision was pointedly made upon the question. 11 State Trials, 312. On 22d April, 1756, however, the House of Commons passed a Resolution condemning general warrants, in the case of libels; and lest this limitation should impliedly authorise the use of them upon other occasions, the House, three days afterwards, passed another vote, by which they were declared to be universally illegal. Subsequent to these Resolutions, Mr. Wilkes commenced an action against the Earl of Halifax, who had issued a warrant to seize the "authors of a periodical paper called the North Briton, No. 45," and upon which Mr. Wilkes had been apprehended and confined. He obtained a verdict with considerable damages; and since that event the courts of law have been silent upon this important subject. 11 State Trials, 323.

directed from a justice of peace to arrest a particular person for felony, or any other misdemeanor *within his jurisdiction*, may lawfully execute it, whether the person mentioned in it be in truth guilty or innocent, and whether he were before indicted of the same offence or not, and whether any felony were in truth committed or not. For however the justice himself may be punishable for granting such a warrant without sufficient grounds, it is reasonable that he alone should be answerable for it, and not the officer, who is not to examine or dispute the reasonableness of his proceeding; and therefore it seems that the old books (cited in the foregoing chapter, sect. 15, 16.) which say generally, that no one can justify an arrest upon a suspicion of felony, unless he himself suspect the party, and unless the felony were in truth committed, ought to be intended only of arrests made by a person of his own head, or in obedience to the command of a constable, or other such like ministerial officer, and not of such as are made in pursuance of the warrant of a justice of peace. For inasmuch as it seems to have been the constant and allowed practice of late, (a) to make out warrants on the suspicion of felony, before any indictment hath been found against the person suspected; and the same seems to be countenanced by 1 and 2 Ph. and Mary, c. 13. and 2 and 3 Ph. and Mary, c. 10. which direct in what manner persons brought before justices of peace upon suspicion, shall be examined in order to their being committed or bailed; and since the ancient opinion, (b) that a justice of peace cannot make out a warrant against a man for felony who has not been indicted before, hath been contradicted (c) by constant experience; and since in the very same report (d) in which this rule is laid down, that a justice of peace cannot make a warrant against a person who has not been indicted, it seems nevertheless to be agreed, that such a warrant is a good justification for the officer; and since none of the books (e) cited by Sir Edward Coke to maintain the contrary opinion, mention the case of an arrest by force of a warrant from a justice of peace, but generally relate only to arrests by private persons of their own authority, or by the command of a constable; and since, too, the case, (f) which is fullest to the purpose, wherein it is resolved that an arrest of a person by the command of a bishop, for saying that he was not bound to pay tithes, could not be justified by force of the statute (g) which authorised bishops to arrest persons for heresy; for which this reason is given among others, that the bishop himself could not justify such an arrest, and consequently could not authorise another to make it; it may be answered, that the resolution in that case doth not wholly depend upon this reason, but rather perhaps upon these, that the bishop's command was by parol only, and not by writing; and that the statute gave him no jurisdiction over points not heretical; and that the power of imprisoning persons for mere matters of opinion ought to be strictly construed.

(a) Dalton says this power is derived to the justices by virtue of the first assignamus in their commission, and by force of 5 Edw. 3. c. 14.
Dalton, 118. 121.
4 Inst. 376
6 Modern, 170.
Cro. Eliz. 130.
1 Leon. 187.
(b) 4 Inst. 177.
15 H. 8. 16.
(c) 6 Mod. 179.
(d) 14 H. 8. 16.
1 Hale, 149.
B. Faux Imp. pris. 33.
Vide 2 Hale, 159.
Ante, sect. 15.
(e) 2 H. 7. 3. 15.
1 Hale, 379.
583.
2 Hale, 79, 107. 110.
4 H. 7. 2. a.
5 H. 7. 4. 5.
10 H. 7. 17.
20 H. 7. 12.
7 E. 4. 20.
8 E. 4. 3. b.
9 E. 4. 26. b.
10 E. 4. 17. b.
11 E. 4. 4. b.
13 E. 4. 9. a.
17 E. 4. 5.
7 E. 4. 35.
Dyer, 236.
(f) 10 H. 7. 17.
(g) 2 H. 4. c. 15.

And farther, since the person injured by an arrest on a justice's warrant, hath a good action against the justice who granted it, if he did it maliciously of his own head, in order to oppress or defame the party, without any probable ground of suspicion,

Cro. Eliz. 150.
1 Leonard, 187.
Vide 24 Geo. 2. c. 44.
Vide ante, p. 82. sect. 80.

there is no necessity of giving a farther remedy against the officer who obeys the warrant.

And farther, since it is in general a great discouragement to officers, to subject them to actions for endeavouring to serve the public, by paying obedience to the precepts of those whose officers they are; it would certainly be very difficult at this day to maintain an action against them for any arrest of this kind, unless the warrant appear to be for a matter whereof the justice has no jurisdiction.(3)

C. Jac. 81.

It seems, indeed, to be holden in Boucher's case, in Croke's Second Report, that where an officer arrests a man by force of a warrant from a magistrate, *pro certis causis*, without shewing any cause in particular,(4) he cannot justify himself in an action brought against him for such arrest, without setting forth the particular cause in his plea; and yet in this very report it seems to be allowed that such a *general warrant* is good; and if so, it seems strange that the officer should not be justified by setting forth the truth of his case;(5) since, if there were no good cause to justify the granting of the warrant, the magistrate ought to answer for it, not the officer.

THIRDLY, As to such arrests by bailiffs of towns.

Sect. 12. It is enacted by the above-mentioned statute of Winchester, c. 4. "That in great towns, being walled, the gates shall be closed from the sun-setting until the sun-rising, and that no man do lodge in the suburbs, nor in any place out of the town, from nine of the clock until day, without his host will answer for him: and the bailiffs of towns every week, or at the least every fifteenth day, shall make inquiry of all persons being lodged in the suburbs, or in foreign places of the towns; and if they do find any that have lodged or received any strangers or suspicious persons against the peace, the bailiffs shall do right therein." And surely it cannot be doubted but that by force hereof such bailiffs may lawfully arrest and detain any such stranger, being found under probable circumstances of suspicion, till he shall give a good account of himself.

FOURTHLY, As to such arrests by justices of peace.

Summary, 93.

Sect. 13. I shall first take it for granted, that wherever an arrest of this kind by a private person, or inferior officer, acting of their own authority, is either permitted or enjoined by the law, in every such case, *a fortiori*, such an arrest by a justice of peace in person, is also permitted or enjoined.

ARRESTS by the command of justices of peace, as such, are either by *parol*; or by *warrant*.

And

(3) A warrant properly penned (even though the magistrate who issues it should exceed his jurisdiction) will, by 24 Geo. 2. c. 44. at all events indemnify the officer who executes it ministerially. 4 Comm. 288.

(4) A warrant to apprehend all persons guilty of

a crime therein specified, will not justify the officer who acts under it. 4 Comm. 288.

(5) If a ground of justification be found in a special verdict, the defendant has no right to avail himself of that finding, unless such ground is avowed in the plea. Lord Camden. 11 St. Tr. 921.

And FIRST, as to such arrests by parol.

Sect. 14. It seems that any such justice ^{may} lawfully, by word of mouth, authorise any one to arrest another, who shall be guilty of any actual breach of the peace in his presence, or shall be engaged in a riot in his absence, as hath been more fully shewn in the first book, tit. "Riots, &c." Moor, 409.
Dalton, c. 117.
4 Comm. 280

As to such arrests by the warrant of a justice of peace, I shall endeavour to shew, in what cases a warrant for such an arrest may lawfully be made by such a justice; in what form it ought to be made; and, how it is to be executed. 4 Comm. 287.

As to the FIRST POINT, I shall consider,

1. For what offences such a warrant may be granted.
2. Upon what evidence.

And FIRST, As to the offences for which a warrant may be granted by a justice of peace.

Sect. 15. There seems to be no doubt but that it may be lawfully granted by any justice of peace, for treason, felony, or *præmunire*, or any other offence against the peace, as hath been more fully shewn in the chapter concerning justices of peace. Sup. c. 11. sect.
57. 39. 63.

Also it seems clear, that wherever a statute gives to any one justice of peace a jurisdiction over any offence, or a power to require any person to do a certain thing ordained by such statute, it impliedly gives a power to every such justice to make out a warrant to bring before him any person accused of such offence, or compellable to do the thing ordained by such statute; for it cannot but be intended, that a statute giving a person jurisdiction over an offence, doth mean also to give him the power incident to all courts, of compelling the party to come before him. And it would be to little purpose to authorise a man to require another to do a thing, if it were to be understood that the person authorised had no power to compel the party to come before him. Dalton, c. 117.
12 Co. 130, 131.
4 Comm. 287.

Sect. 16. But it seem that anciently no one justice of peace could legally make out a warrant for an offence against a penal statute, or other misdemeanor, cognisable only by a sessions of two or more justices; for that one single justice of peace hath no jurisdiction of such offence, and regularly those only who have jurisdiction over a cause can award process concerning it. Yet the long, constant, universal, and uncontrolled practice of justices of peace seems to have altered the law in this particular, and to have given them an authority in relation to such arrests, not now to be disputed. Dalton, c. 117.
B. Peace, 6.
6 Modern, 179,

Sect. 17. But I do not find any good authority, that a justice can justify sending a *general warrant* to search all suspected houses in general for stolen goods, (6) as hath been more fully shewn in the tenth section. Summary, 30.
10 St. Tr. 428.
11 St. Tr. 307.
326.

SECONDLY,

(6) In November, 1762, the Earl of Halifax, secretary of state, issued a warrant "to search for John Entick, the author, or one concerned in writing the Monitor." The messengers seized

Mr. Entick and his papers. On trespass, the jurors found a special verdict, and in Mich. 6 Geo. 3. Lord Camden delivered the judgment of the court, That a warrant to seize and carry away papers in the

SECONDLY, As to the evidence on which such a warrant is to be granted.

2 Hale, 108,
109.
6 Mod. 379.
Qu. Dalt. 117.
Con. 14 H. 8.
16.
4 Comm. 287.

Sect. 18. It seems probable that the practice of justices of peace, in relation to this matter also, is now become a law, and that any justice of peace may justify the granting of a warrant for the arrest of any person upon strong grounds of suspicion for a felony, or other misdemeanor, before any indictment hath been found against him. Yet inasmuch as justices of peace claim this power rather by connivance than any express warrant of law, and since the undue execution of it may prove so highly prejudicial to the reputation as well as liberty of the party, a justice of peace cannot well be too tender in his proceedings of this kind, and seems to be punishable not only at the suit of the king, but also of the party grieved, if he grant any such warrant groundlessly and maliciously, without such a probable cause as might induce a candid and impartial man to suspect the party to be guilty.

Cro. Eliz. 130.
1 Leonard, 18.
1 Black, 562.
And see the
case of Ledwick
v. Catchpole,
Culdecot's
cases, 291.

4 Inst. 177.
Summary, 93.
Sup. sect. 10.
c. 12. sect. 15.

Sect. 19. And since both Coke and Hale seem to disapprove of such warrants granted upon suspicion, and the old books seem generally to disallow all arrest for the suspicion of felony made by any other person whatsoever, except the very person who hath the suspicion, it is certainly a safe way of proceeding for him who hath the suspicion, to make the arrest in his proper person, and to get a warrant from a justice of peace to the constable to keep the peace.

C. Eliz. 130.
1 Leonard, 187.

1 D. Abr. 179.
Curthow, 492.

Sect. 20. And perhaps there may be this difference between the warrant of a justice of peace for such causes which he has not authority to hear and determine as judge without the concurrence of others, and such warrant for an offence which he may so determine without the concurrence of any other, that in the former case, inasmuch as he rather proceeds ministerially than judicially, if he act corruptly, he is liable to an action at the suit of the party, as well as to an information at the suit of the king: but in the latter case he is punishable only at the suit of the king, for that regularly no man is liable to an action for what he doth as judge.

4 Burn, 382.

As to the **SECOND POINT**, viz. In what form such a warrant is to be made; I shall lay down the following rules:

(a) 1 Hale, 577.
2 Hale, 111.
Dalt. c. 117.
3 Inst. 76.
14 H. 8. 16.
(b) Dalton, c.
117. 121.

Sect. 21. **FIRST,** That (a) it ought to be under the hand and seal of the justice who makes it out.

Sect. 22. **SECONDLY,** That it (b) ought to set forth the year and day wherein it is made, that, in an action brought upon an arrest made by virtue of it, it may appear to have been prior to such arrest.

Sect.

the case of a seditious libel is illegal and void.—His Lordship said, that warrants to search for stolen goods had crept into the law by imperceptible practice; that it is the only case of the kind to be met with; and that the law proceeds in it with great caution. For 1st, There must be a full charge, upon oath, of a theft committed. 2dly, The owner must swear that the goods are lodged in such a place. 3dly, He must attend at the execution of

the warrant to shew them to the officer, who must see that they answer the description. And lastly, The owner must abide the event at his peril; for if the goods are not found, he is a trespasser; and the officer, being an innocent person, will be always a ready and convenient witness against him. 11 State Trials, 321. Vide also 2 Hale, 113. 151.

Sect. 23. THIRDLY, That it is (c) *safe*, but perhaps not necessary, in the body of the warrant to shew the place where it was made; yet it seems necessary to set forth the county in the margin at least, if it be not set forth in the body.

(c) Dalton, c. 117. 121.
Lamb. 85, 86.
Crompton, 147.
232, &c.
4 Burn, 383.

Sect. 24. FOURTHLY, That it may be made either in the name of the king, or of the justice himself, as appears from the precedents above referred to.

Sect. 25. FIFTHLY, (d) That if it be for the peace or good behaviour, it is advisable to set forth the special cause upon which it is granted; but if it be for treason or felony, or other offence of an enormous nature, it is said, that it is not necessary to set it forth; and it seems to be rather discretionary than necessary to set it forth in any case.

(d) Dalt. c. 117.
Sup. sect. 10.
2 Hale, 111.

Sect. 26. SIXTHLY, (e) That such a warrant may be either general, to bring the party before any justice of peace of the county; or special, to bring him before the justice only who granted it.

(e) Dalt. c. 117.
1 Roll, 375.
5 Coke, 59.
B. Pence, 9.

Sect. 27. SEVENTHLY, (f) That it may be directed to the sheriff, bailiff, constable, or to any indifferent person by name, who is no officer; for that the justice may authorise any one to be his officer, whom he pleases to make such; yet it is most advisable to direct it to the constable of the precinct wherein it is to be executed (g), for that no other constable, and *à fortiori* no private person, is compellable to serve it.

(f) Dalt. c. 117.
Crompt. 147.
14 H. 8. 16.
B. Pence, 6.
Salk. 176, 381.
Ld. Ray. 1192.
(g) Salk. 176.
1 Hale, 582.
2 Hale, 110.

As to the **THIRD POINT**, viz. In what manner such warrant is to be executed, I shall lay down the following rules:

Sect. 28. FIRST, That a bailiff, or a constable, if they be sworn, and commonly known to be officers, and act within their own precincts, need not shew their warrant to the party, notwithstanding he demand the sight of it; but that these and all other persons whatsoever making an arrest, ought to acquaint the party with the substance of their warrants, and that all private persons to whom such warrants shall be directed, and even officers, if they be not sworn and commonly known, and even these, if they act out of their own precincts, must shew their warrants, if demanded. + And therefore it is enacted by 27 Geo. 2. c. 20. that in all cases where any justice of the peace is required or empowered by any statute to issue a warrant of distress for the levying any penalty inflicted, or sum of money thereby directed to be paid, "the officer executing such warrant, "if required, shall shew the same to the person whose goods "and chattels are distrained, and shall suffer a copy thereof to "be taken."

8 E. 4. 14.
14 H. 7. 9.
6 Coke, 54.
9 Coke, 69.
1 Hale, 583.
2 Hale, 116.

Vide also 24
Geo. 2. c. 44.

Sect. 29. SECONDLY, That the sheriff having such warrant directed to him, may authorise others to execute it; but that every other person to whom it is directed, must personally execute it; yet it seems, that any one may lawfully assist him.

Dalton, c. 117.
8 E. 4. 14.

Sect. 30. THIRDLY, That if a warrant be generally directed to all constables, no one can execute it out of his own precinct; but if it be directed to a particular constable by name, he may execute it any where within the jurisdiction of the justice.

Carthew, 508.
Salkeld, 176.
1 Hale, 581.
2 Hale, 110.
Ld. Rayn. 546.
4 Comm, 288.

CHAP. XIV.

WHERE DOORS MAY BE BROKEN OPEN IN ORDER TO MAKE AN ARREST.

AND now I am to consider in what cases it is lawful to break open doors, in order to apprehend offenders.

(a) 27 Ass. 35.
4 Inst. 177.
5 Co. 91, 92.
Dalton, c. 78.
2 Hale, 103.
116, 117.
Summary, 90.
F. Execu. 25. 2.
Foster, 320.

And to this purpose I shall premise, that the law doth never allow of such (a) extremities but in cases of necessity; and therefore, that no one can justify the breaking open another's doors to make an arrest, unless he first signify (1) to those in the house the cause of his coming, and request them to give him admittance.

Foster, 321.
2 Hale, 117.

Sect. 2. But where a person authorised to arrest another who is sheltered in a house, is denied quietly to enter into it, in order to take him, it seems generally to be agreed, that he may justify breaking open the doors in the following instances :

(b) 27 Ass. 35.
12 Co. 131.
4 Inst. 131.
(c) Moor, 606.
668.
(d) Dalton,
c. 78.
Crompton, 170.
Foster, 136.
(e) Moor, 606.
668.

Sect. 3. FIRST, Upon a (b) *capias* grounded on an indictment for any crime whatsoever: or upon a (c) *capias* from the (d) King's Bench or Chancery, to compel a man to find sureties for the peace or good behaviour: or even upon a warrant from a justice of peace for such purpose.

C. Eliz. 908.
Melvinton, 28.
Dalton, c. 78.
(f) 2 Jones,
233, 234.
But in this case
the officer must
shew the war-
rant if required.
Vide c. 13. sect.
28.

Sect. 4. SECONDLY, Upon a (e) *capias utlagatum*, or *capias pro fine*, in any action whatsoever.

(g) Dalt c. 22
and 78.

Sect. 5. THIRDLY, Upon the (f) warrant of a justice of peace, for the levying of a forfeiture in execution of a judgment or conviction for it grounded on any statute which gives the whole, or but part of such forfeiture to the king, and authorises the justice of peace to give such judgment or conviction for it.

(h) Summary,
90, 93.

Sect. 6. FOURTHLY, Where a (g) forcible entry or detainer is either found by inquisition before justices of peace, or appears upon their view.

1 Hale, 588,
589.

Sect. 7. FIFTHLY, (h) Where one known to have committed a treason or felony, or to (i) have given another a dangerous wound, is pursued, either with or without a warrant, by a constable or private person. But where one lies under a probable suspicion only, and is not indicted, it seems the better (k) opinion at this day, that no one can justify the breaking open doors in order to apprehend him.

Dalton, c. 78.
13 E. 4. 9.

(i) 13 E. 3. 7.
(k) Summ. 91.
4 Inst. 117.

Sect. 8. SIXTHLY, Where an (l) affray is made in a house in the view or hearing of a constable; or where those who have made an affray in his presence fly to a house, and are immediately pursued by him, and he is not suffered to enter, in order to suppress

Con. 13 E. 4. 9.
B. Cor. 159.

Dalt. c. 78.
F. Barr. 110.

Foster, 321.
Vide 1 Hale,

583. contra.
(l) Sum. 134.

2 Hale, 95. Crompt. 170. Dalton, c. 78. B. F. Imprison. 6.

(1) No precise form of words is required to be used in giving notice. It is sufficient if the party is made acquainted that the officer does not come

as a mere trespasser, but claims to act under a proper authority, provided the officer had in fact a legal warrant. Foster, 137.

press the affray in the first case, or to apprehend the affrayers in either case.

Sect. 9. SEVENTHLY, Wherever a (a) person is lawfully arrested, for any cause, and afterwards escapes, and shelters him in a house. (a) 6 Mod. 173, 174. 211. Skinner, 8. Salkeld, 79. 1 Hale, 459. 2 Roll, 138. Ld. Raym. 1028. Forster, 320.

Sect. 10. Also it is enacted by 3 and 4 Jac. 1. s. 35. "That upon any lawful writ, warrant, or process awarded to any sheriff or other officer, for the taking of any popish recusant, standing excommunicated for such recusancy, it shall be lawful, if need be, to break open any house."

Sect. 11. But it hath been resolved, that where justices of peace are, by virtue of a statute, authorised to require persons to come before them, to take certain oaths prescribed by such statute, the officer cannot lawfully break open the doors of the persons who shall be named in any warrant made in pursuance of such statute, in order to be brought before the justices to take such oath, because such warrant is not grounded on a precedent offence; neither doth it appear, that the party either is or will be guilty of any: But it seems clear, that if an officer enter into any house to serve any such warrant, and the doors of the house be locked upon him, being in such house, he or his friends may justify breaking them open, in order to regain his liberty; for that even in the execution of civil process, the law allows of the breaking open doors in the like circumstances. Palm. 52, 53. Cro. Jac. 655. Foster, 319.

CHAP. XV.

OF BAIL.

AND now I am to consider in what manner, and in what cases, offenders are to be bailed.

Summary, 98.
Crompt. 154.
2 Hale, 120,
121.

As to which it is to be observed, that wherever a person is brought before a justice of peace upon an accusation of treason or felony, he must be either bailed or committed, unless it manifestly appear that no such crime was committed, or that the cause for which alone the party was suspected, was totally groundless; in which cases *only* it is lawful to discharge him without bail.

For the better understanding of the nature of bail, I shall consider the following points.

1. The nature of bail and mainprize in general.
2. What shall be said to be sufficient bail.
3. The offence of taking insufficient bail.
4. The offence of granting it where it ought to be denied.
5. The offence of denying, delaying, or obstructing it where it ought to be granted.
6. In what cases it is grantable.
7. In what form it is to be taken.
8. What shall forfeit his recognizance.

And **FIRST**, As to the nature of bail and mainprize in general, I shall endeavour to shew, First, In what respects they agree; and, Secondly, In what they differ.

(a) 2 Hale, 124.
Dalton, c. 114.
Lambard, 340.
4 Inst. 180.
(b) 1 Rich. 3. 3.
3 H. 7. 3.
(c) Summary,
96
Dalton, c. 114.

* **Sect. 2.** As to the first particular, it seems that the words "bail" and "mainprize," are often used promiscuously in our (a) law-books and (b) acts of parliament, as signifying one and the same thing. And it is (c) certain, that bail and mainprize agree in this notion, that they save a man from imprisonment in the common gaol, by his friends undertaking for him before certain persons for that purpose authorised, that he shall appear at a certain day, and answer the crime with which he is charged, and be justified by law.

(d) 4 Inst. 170,
180.
(e) F. Mainp.
12, 13.
B. Mainp. 89.
Coke, B. and
Mainp. c. 3.
and the books
cited under let-
ters f. g. h.
Summary, 98.
F. Mainp. 12, 13.
6. 27. pl. 39.

Sect. 3. As to the second particular, the chief, if not the (d) only difference between bail and mainprize seems to be this, that a man's mainperners are (e) barely his sureties, and cannot justify the detaining or imprisoning of him themselves, in order to secure his appearance; but that a man's bail are looked upon as his (f) gaolers of his own choosing, and that the (g) person bailed

Con. 4. H. 6. 8. pl. 21. 32 H. 6. 4. pl. 3. (f) 1 Hale, 325. 2 Hale, 35. 124, 125.
Summary, 98. F. Mainp. 12, 13. (g) S. P. C. 64. 21 H. 7. 33. pl. 26. 22 H. 6. 59. pl. 18. 39 H.
6. 27. pl. 39. 32 H. 6. 4. pl. 3. Sup. c. 6. sect. 4.

bailed is in the eye of the law, for many purposes, esteemed to be as much in the prison of the court by which he is bailed, as if he were in the actual custody of the proper gaoler. But I do not find this point clearly settled in relation to any other court besides the King's Bench, as hath been more fully shewn ch. 6. sect. 4. However it seems certain, in every bailment, that if the party bailed be (a) suspected by his bail as likely to deceive them, he may be detained by them, and enforced to appear according to the condition of the recognizance, or may be (b) brought by them before the justice of peace, by whom he shall be committed, unless he find new sureties.

(a) F. Maup.
12, 13.
Dalton, c. 114.
B. Maup. 99.
6 Modern, 231.
247.
2 Hale, 127.
(b) Summary,
96.
Dalton, c. 114.

As to the SECOND POINT, viz. What shall be said to be sufficient bail.

Sect. 4. It seems to be (c) agreed, that no person ought in any case to be bailed for felony by less than two sureties; and it is (d) said to be the practice of the King's Bench, not to admit any person to bail upon a *habeas corpus* on a commitment for treason or felony without four sureties. (1) Also (e) it seems to have been anciently an established rule, that none under the degree of subsidy-men should be admitted to bail any person for a capital crime: But the manner of granting taxes by way of subsidy having been of late for many years disused, this rule at present seems to be of little use. But the only sure way of proceeding in this case, is to take care that every one of the bail be of ability sufficient to answer the sum in which they are bound, which (f) ought never to be less than forty pounds for a capital crime, but may be as much higher as the justices in discretion shall think fit to require, upon consideration of the ability and quality of the prisoner, and the nature of the offence. And if it shall seem doubtful, whether the persons who offer themselves to be sureties, be able to answer such sum, it is (g) said, that the person who is to take the bail, may examine them on their oaths concerning their sufficiency. And if a person who has power to take bail be so far imposed upon as to suffer a prisoner to be bailed by insufficient persons, it is said, that either he, or any other person who hath power to bail him, may require the party to find better sureties, and to enter into a new recognizance with them, and may commit him on his refusal, for that insufficient sureties are as no sureties.

(c) 2 Hale, 121.
Summary, 97.
Dalton, c. 114.
10 Coke, 101.
(d) Sty. Reg.
110.
2 Stra. 854.
(e) Dalton, c.
70 and 114.
Summary, 97.
(f) Dalton, c.
114.
Summary, 97.
(g) Dalt. c.
114.
Crim. 194.
2 Hak, 125.
Summary, 96.
Dalt. c. 70 and
114.

Sect. 5. But justices must take care, that under pretence of demanding sufficient surety, they do not make so excessive a demand, as in effect amounts to a denial of bail; for this is looked on as a great grievance, and is complained of as such by 1 Will. and Mary, sess. 2. by which it is declared, "that excessive bail ought not to be required."

As to the THIRD POINT, viz. The offence of taking insufficient bail.

Sect. 6. It seems clear, that wherever a sheriff, in pursuance of

(1) In felony four persons are required for bail, but for any inferior offence two are sufficient. In both cases the number of the bail must be men-

tioned in the notice, otherwise the Court will reject the whole. Lord Mansfield, Rex v. Bolton, Mich. 23 Geo. 3. M. S. Leach.

Vide sup. c. 6.
sect. 10, 11, &c.
Dalton, c. 114.
Summary, 97.

of the statute of Westminster, c. 15. or justices of peace, in pursuance of the subsequent statutes, grounded on the said statute of Westminster the first, and set forth more at large in the following part of this chapter, shall admit any person to bail for felony, with insufficient sureties, who shall not afterwards appear according to the condition of the recognizance, the justices of assize may, by force of 27 Edw. 1. c. 3. commonly called the statute *de finibus levatis*, impose such fine on such sheriff or justices of peace, as to such justices of assize in their discretion shall seem proper. But if a prisoner, who is bailed by insufficient sureties, do appear according to the condition of the recognizance, it seems that those who admitted him to bail are safe, inasmuch as the end of the law is answered, and the appearance of the prisoner as effectually procured by such sureties, as if they had been never so sufficient.

As to the FOURTH POINT, *viz.* The offence of granting bail where it ought to be denied.

S. P. C. 33. 77.
25 E. 3. 39.
F. Escape, 4.
F. Corone, 246.
Summ. 97. 113.
1 Hale, 596, 597.

Sect. 7. There is no doubt but that the bailing of a person who is not bailable by law, is punishable either at common law, as a negligent escape, as shall be more fully shewn in the chapter concerning Escapes, or as an offence against the several statutes concerning bail.

Sect. 8. And first it is enacted by the statute of Westminster the first, c. 15. "That if the sheriff, or any other, let any go at large by surety, that is not replevisable, if he be sheriff, or constable, or any other bailiff of fee which hath keeping of prisons, and be thereof attainted, he shall lose his fee and office for ever. And if the undersheriff, constable, or bailiff of such as have fee for keeping of prisons, do it contrary to the will of his lord, or any other bailiff being not of fee, they shall have three years imprisonment, and make fine at the king's pleasure."

Vide sup. c. 6.
sect. 11, 12, &c.

Sect. 9. Also it is enacted by 27 Edw. 1. commonly called the statute *de finibus levatis*, c. 3. "That the justices assigned to take assizes, &c. when they deliver the gaols, &c. shall inquire if sheriffs, or any other, have let out by replevin prisoners not replevisable, or have offended in any thing contrary to the form of the said statute of Westminster the first, and whom they shall find guilty they shall chasten and punish in all things, according to the form of the said statute."

Vide supra, c.
6. sect. 13, 14.

Sect. 10. And it is further enacted by 4 Edw. 3. c. 2. "That at the time of the assignment of keepers of the peace, mention shall be made, that such as shall be indicted, or taken by them, shall not be left to mainprize by the sheriffs, nor by none other ministers, if they be not mainpernable by law; nor that none who are indicted shall be delivered but by the common law. And that the justices assigned to deliver the gaols, shall have power to inquire of sheriffs, gaolers and others, in whose ward such persons indicted, shall be, if they make deliverance, or let to mainprize, any so indicted, which be not mainpernable; and to punish the said sheriffs, gaolers, and others, if they do any thing against the said act."

Sect.

Sect. 11. And it is enacted by 1 and 2 Philip and Mary, c. 13. "That no justice or justices of peace shall let to bail or mainprize any person or persons which, for any offence or offences, by them, or any of them, committed, be declared not to be replevied or bailed, or be forbidden to be replevied or bailed, by the above-mentioned statute of Westminster the first, c. 15. And that the justices of gaol-delivery of the place where such justices of the peace shall be guilty of such offence, upon due proof thereof, by examination before them, shall, for every such offence, set such fine on every such justice, as the same justices of gaol-delivery shall think meet, &c."

Sect. 12. It hath been resolved, that it is no excuse for justices of peace admitting a person to bail who was in truth committed for a cause not bailable by law, that they did not know that he was committed for such cause, and that no other cause of his commitment was mentioned in his *mittimus* but the suspicion of felony; for that they ought, at their peril, to have informed themselves of the cause for which the party was committed, that they might be satisfied that he was bailable by law.

Popham, 60.
Dalton, c. 114.

2 Strange, 1216.

As to the FIFTH POINT, *viz.* The offence of denying, delaying, or obstructing bail, where it ought to be granted.

Sect. 13. This seems to be a misdemeanor, not only by the statute, but also by the common law, and punishable thereby as an offence against the liberty of the subject, not only by action at the suit of the party wrongfully imprisoned, but also by indictment at the suit of the king.

Vide 14 H. 7. 7.
Summary, 97.
Dalt. c. 114.

Sect. 14. But it seems clear that he who has power to bail another is not bound to demand of him to find sureties, and to forbear committing him till he shall refuse to find them; but may well justify his commitment, unless the party himself shall offer his sureties.

Summary, 97.
Dalt. c. 114.
14 H. 7. 10.
B. Peace, 7.
B. Mamp, 29.

Sect. 15. The principal statutes relating to this offence are the above-mentioned statute of Westminster the first, c. 15; the statute *in quibus*, 27 Edw. 1. c. 3. and 31 Car. 2. c. 2. commonly called the *habeas corpus act*; by the first whereof it is enacted, "That if any with-hold prisoners replevisable, after that they have offered sufficient surety, he shall pay a grievous amercement to the king. And if he take any reward for the deliverance of such, he shall pay double to the prisoner, and also shall be in the great mercy of the king." And by the latter of the said statutes it is enacted, "That justices of assize shall inquire if sheriffs, or any other, have offended in any thing contrary to the said statute of Westminster, and whom they shall find guilty they shall punish in all things according to the form of the said statute."

3 Comm. 136.

Sect. 16. Also it is recited by the above-mentioned statute of 31 Car. 2. that great delays have been used by sheriffs, gaolers, and other officers, to whose custody the king's subjects had been committed for criminal, or supposed criminal, matters, in making return of writs of *habeas corpus*, by standing out an *alias* and *pluries*, and sometimes more; and by other shifts to avoid their yielding

yielding obedience to such writs, contrary to their duty, and the known laws of the land, whereby many subjects have been long detained in prison, in such cases where by law they were bailable, &c. And thereupon it is enacted, "That whensoever any person shall bring any *habeas corpus*, directed unto any person whatsoever, for any person in his custody, and the said writ shall be served upon the said officer, or left at the gaol or prison with any of the under-officers, under-keepers, or deputy of the said officers or keepers, that the said officer or officers, his or their under-officers, under-keepers, or deputies, shall, within three days after such service thereof, (unless the commitment were for treason or felony, plainly and specially⁽²⁾ expressed in the warrant of commitment,) upon payment or tender of the charges of bringing the said prisoner, to be ascertained by the judge or court that awarded the same, and endorsed on the said writ, not exceeding *twelve-pence* per mile, and on security given by his own bond to pay the charges of carrying back the prisoner, if he should be remanded, and that he will not make any escape by the way, make return of such writ, and bring, or cause to be brought, the body of the party so committed, or restrained, unto, or before, the lord chancellor, or lord keeper, the judges or barons of the court from which the said writ shall issue, or such other persons before whom the said writ is made returnable, according to the command thereof; and shall then likewise certify the true causes of his detainer or imprisonment, unless the commitment be in a place beyond twenty miles distance, &c.; and if beyond the distance of twenty, and not above one hundred miles, then within the space of ten days; and if beyond the distance of one hundred miles, then within the space of twenty days."

3 Comm. 136.

Sect. 17. And by 31 Car. 2. c. 2. s. 3. it is farther enacted, "That all such writs shall be marked in this manner, *per statutum tricesimo primo Caroli secundi, regis*; and shall be signed⁽³⁾ by the person that awards the same."

(a) 10 Modern,
429.
Strange, 142.
308.
2 Burrow, 765.

And by 31 Car. 2. c. 2. "If any person shall be, or stand, committed or detained as aforesaid, for any crime, ~~unlawful~~ for treason or felony, plainly expressed in the warrant^(a) of commitment, in the *vacation time*, it shall be lawful for such person so committed or detained, (other than persons convict, or in execution by legal process,) or any one on his behalf, to complain to the lord chancellor, or lord keeper, or any justice of either bench, or baron of the exchequer, of the degree of the coif; and the said lord chancellor, &c. justice, or baron, on view of the copy of the warrant of commitment, or otherwise on oath that it was denied, or authorised and required, on request in writing by such person, or any in his behalf, attested, "and

(2) Not for treason or felony in general, but treason for counterfeiting the king's coin, or felony for stealing the goods of such a one to such an amount, and the like. Therefore if a constable, upon his own authority, carry an offender to gaol, which he may do by 4 Edw. 3. c. 20. without any warrant of commitment from a justice of peace, he would have a right to be bailed upon this act, whatever

the offence may be.—1 Barn, 151. But in Lord Montgomery's case, 10 Mod. 334. it is said, that a commitment for treason generally is good.

N. B. The King's Bench may bail though the *habeas corpus* act is suspended. Vide 3 Modern, 93. Salkeld, 103. 2 St. Tr. 386.

(3) If the writ is not signed, it need not be obeyed. *Rex v. Roddam*, Cowper, 67.

"and subscribed by two witnesses, (4) who were present at the delivery of the same, to grant an *habeas corpus* under the seal of the court whereof he shall be one of the judges, to be directed to the officer, in whose custody the party shall be returnable *immediate* before the said lord chancellor, &c. justice, or baron."

"And it is further enacted, that on service thereof as aforesaid, the officer, &c. in whose custody the party is, shall, within the times respectively before limited, bring him before the said lord chancellor, justice, or baron, before whom the said writ is returnable; and in case of his absence, before any other of them, with the return of such writ, and the true causes of the commitment and detainer. (5)

"And that thereupon, within two days after the party shall be brought before them, (6) the said lord chancellor, justice, or baron, before whom the prisoner shall be brought as aforesaid, shall discharge the said prisoner from his imprisonment, taking his recognizance, with one or more sureties, in any sum according to their discretions, having regard to the quality of the prisoner and nature of the offence, for his appearance in the King's Bench the Term following, or in such other court wherein the offence is properly cognizable, as the case shall require; and then shall certify the said writ, with the return thereof, and the recognizance, into such court; unless it be made appear to the said lord chancellor, &c. that the party so committed is detained upon a legal process, order, or warrant, out of some court that hath jurisdiction of criminal matters; or by some warrant signed and sealed with the hand and seal of any of the said justices or barons, or some justice or justices of the peace, for such matters or offences, for the which by law the prisoner is not bailable." (a)

(a) 2 Inst. 55.
2 Hale, 113.
Vaugh. 156.
3 Com. Dig.
458.
1 Wilson, 151.
3 Wilson, 188.
Strange, 414.
794, 982.
Lord Raym.
1351.
Burr. 460, 606,
1991, 1115.
1431.

Sect. 18. But it is provided, par. 4. "That if any person shall have wilfully neglected, by the space of two whole Terms after his imprisonment, to pray a *habeas corpus* for his enlargement, he shall not have a *habeas corpus* to be granted in vacation time in pursuance of this act."

Sect. 19. And it is further enacted, par. 5. "That if any officer, &c. shall neglect, or refuse, to make the returns aforesaid, or to bring the body of the prisoner, according to the command of the said writ, within the respective times aforesaid, or shall not, within six hours after demand, deliver a true copy of the commitment, &c., he shall forfeit for the first offence £100, for the second £200, and be made incapable to hold his office, &c."

No privilege
will excuse a
peer from obey-
ing the writ.
1 Burrow, 613.
Vide also
Strange, 167.
339, 915.
Ld. Raym. 580;
603.

Sect. 20. And it is further enacted, par. 6. "That no person who shall be set at large upon any *habeas corpus*, shall be again imprisoned

(4) One witness, and an affidavit that the other is sick, is sufficient. Comb. 6.

(5) For the certainty required in the return, vide Douglas, 159. Wilson, 154. Lord Raym. 586. 618. Fort. 272. Strange, 404. 915. Andrews, 281.

(6) If a person is too infirm to be brought into court, the court will order the party to be attended, &c. Vide 2 Burrow, 1099. 3 Burrow, 1363.

“imprisoned for the same offence by any person whatsoever,
 “other than by the legal order and process of such court wherein
 “he shall be bound by recognizance to appear, or other court
 “having jurisdiction of the cause, on pain of £500.”

Salkeld, 103.
 Comber, 6.
 Lucas, 429.
 1 Show. 190.
 3 Com. Dig.
 455.

Sect. 21. And it is further enacted, par. 7. “That if any person
 “who shall be committed for treason or felony, plainly and spe-
 “cially expressed in the warrant of commitment, upon his prayer
 “or petition in open court, the first week of the Term, or the
 “first day of the sessions of *oyer* and *terminer*, or general gaol-
 “delivery, to be brought to his trial, shall not be indicted some
 “time in the next Term, sessions of *oyer* and *terminer*, or gene-
 “ral gaol-delivery, after such commitment, the justices of the
 “said court shall, upon motion in open court, the last day of the
 “Term or sessions, set at liberty the prisoner upon bail; unless
 “it appear upon oath that the witnesses for the king could not
 “be produced the same Term, &c. And if such prisoner, upon
 “his prayer, &c. shall not be indicted and tried the second Term,
 “or sessions, he shall be discharged from his imprisonment.”

Sect. 22. And it is further enacted, par. 10. “That it shall be
 “lawful for any prisoner, as aforesaid, to move and obtain his
 “*habeas corpus*, as well out of the Chancery or Exchequer, as the
 “King’s Bench or Common Pleas: and if the said lord chancel-
 “lor or lord keeper, or any judge or judges, baron or barons, for
 “the time being, of the degree of the coif, of any of the courts
 “aforesaid, in the vacation time, (7) upon view of the copy of a
 “warrant of commitment or detainer, or on oath made that such
 “copy was denied, shall deny any writ of *habeas corpus*, by this
 “act required to be granted, being moved for as aforesaid, they
 “shall severally forfeit to the party grieved, the sum of five hun-
 “dred pounds.”

Sect. 23. But it is provided, par. 18. “That after the assizes
 “proclaimed for that county where the prisoner is detained, no
 “person shall be removed from the common gaol upon any
 “*habeas corpus* granted in pursuance of this act, but upon such
 “*habeas corpus* shall be brought before the judge of assize in
 “open court, who thereupon shall do what to justice shall apper-
 “tain.”

But it is provided, nevertheless, par. 19. “That after the
 “assizes are ended, any person detained may have his *habeas*
 “*corpus*, according to the direction of this act.”

4 Comm. 137.
 Burrow, 856.
 1437.
 Rex v. Bevan,
 B. R. Mich.
 Term, 1789.
 b. 1. c. 72. sect.
 6, and b. 2.
 c. 1. sect. 17.

Sect. 24. It is observable that this statute makes the judges
 liable to an action at the suit of the party grieved in one case
 only, which is the refusing to award a *habeas corpus* in vacation
 time; and seems to leave it to their discretion in all other cases,
 to pursue its directions in the same manner as they ought to exe-
 cute all other laws, without making them subject to the action of
 the party, or to any other express penalty or forfeiture: and this
 is

(7) A notion prevailed, that all writs of *habeas corpus* granted in vacation expired on the commencement of the Term; but Lord Mansfield, III. 31 Geo. 2. declared the unanimous opinion of the court, that such notion was ill founded, that

a person might be brought into court upon a *habeas corpus* issued in vacation; and that to require a new writ would be attended with delay and expense, without the least reason or utility. 1 Burrow, 460. 542. 606. 608.

is most agreeable to the general reason of the law, which regularly will not suffer a judge to be liable to an action for what he does as judge.

As to the SIXTH POINT, viz. In what cases bail is grantable, I shall endeavour to shew,

1. Where it is grantable by a sheriff.
2. Where by a justice of peace.
3. Where by justices of gaol-delivery.
4. Where by the courts of Westminster-Hall.

As to the FIRST POINT, I shall consider, where bail is grantable by a sheriff *ex officio*; and, where by virtue of a writ.

Sect. 25. As to the first particular, it is holden by some, (a) that, by the common law the sheriff might, by virtue of his office, as principal conservator of the peace, bail any person arrested on suspicion of felony, or for any other offence which is bailable. (a) Dalis. 11. Preamble to 13 Edw. 1. c. 15. Reg. 83. 169. S. P. C. 74. F. Corone, 297. Cont. 2 Inst. 190.

Sect. 26. Also it hath been holden, (b) that a constable had the like power by the common law: and it may (c) probably be inferred, from the recitals of the writs of mainprize in the Register, that, by the common law, the sheriff had power to bail persons indicted of larceny in a (d) court-leet, and also persons indicted as (d) accessaries to a felon, and persons appealed by (e) approvers, after the death of the approvers, &c. But it seems that the sheriff (f) had no power *ex officio*, to bail any person indicted of any crime before justices of peace. And it is certain, (g) that neither the sheriff nor constable could, in any of the cases abovementioned, take bail by recognizance but only by obligation. And some (h) have holden, that the statutes which empower justices of the peace to admit persons to bail on an accusation of felony, and particularly prescribe in what manner they shall do it, have taken away all power of this kind from the sheriff and constable; yet others seem to be of another opinion, because the said statutes are wholly in the affirmative. (b) Dalis. 11. Cont. 2 Inst. 190. (c) Reg. 269. (d) Reg. 270. (e) Reg. 269. (f) Reg. 133. 270, 271. (g) Sup. 8. sect. 4, 5. Dalison, 11. (h) Dalison, 11.

Sect. 27. But it seems certain (i) that, by the common law, the sheriff might bail any person who was indicted before him, at his torn, for felony, or any other crime that is bailable: because he might both award process and also give judgment against the person so indicted: and it is a general (k) rule, that whoever is judge of the offence may bail the offender. But it is holden, that at this day the sheriff has lost his power (l), by reason of 1 Edw. 4. c. 2. set forth more at large c. 10. s. 74, by which it is enacted, "That the sheriff shall not proceed on any such indictment, but shall remove it to the next sessions of the peace." (i) Sum. 106. 2 Hale, 148, 149. 2 Inst. 190. Register, 269. (k) Lamb, 342. 348. S. P. C. 74. 2 Inst. 190. (l) Vide 6 Mod. 179. Strange, 479. and the case of Bengough v. Rossiter, 4 Term Rep. 505.

Sect. 28. As to the second particular, it seems, that bail is grantable by a sheriff by virtue of the following writs, viz.

1. That of *odio et atia*.
2. That of *mainprise*; and,
3. That of *homine replegiando*.

But having already, in Book 1. c. 11. s. 20 & 24. incidentally shewn the nature of THE FIRST of these writs, which seem to be in great measure obsolete at this day, I shall refer the reader to what is there said concerning it.

Sect. 29. SECONDLY, Of the writ of *mainprise* little notice is taken in the late books; yet the law relating to it seems to be still in force in many cases; and consequently in such cases, those who are bailable, and have been refused the benefit of bail, may still by virtue thereof be delivered out of prison (upon their finding sureties (a) to the sheriff that they will appear and answer to the crimes alleged against them, before the justices in the writ mentioned, &c.) as those (b) who are imprisoned for a slight suspicion of felony, or indicted of larceny (c) before the steward of a leet, or of trespass (d) before justices of peace, and many other (e) persons, all which it will be needless to enumerate.

(a) Reg. 269.
270.

(b) F. N. B.
250.

3 Comm. 128.
1 Hale, 141.

Reg. 269.

Coke on Bail
and Mainprise,

ch. 3. and 10. (c) F. N. B. 250. Register, 269. 2 Inst. 290. (d) F. N. B. 250, 251. Register, 130.
270, 271. (e) F. N. B. 250, 251. Register, 269, &c.

Sect. 30. But as to that which is said in general, both by Sir Matthew Hale (f) and Sir Edward Coke, (g) in relation to this matter, from which it may seem to have been the opinion of those authors, that no writ of *mainprise* is grantable at this day, it may be answered, that this is to be understood (h) only of the writ of *mainprise* for persons indicted before the sheriff in his torn, in relation to whom he has no judicial power at this day, and consequently no power to bail them, *ex officio*; from whence it follows that the writ of *mainprise* for such persons, being grounded on a suggestion that the sheriff had unjustly refused before to admit them to bail, cannot now be proper, because he cannot be said to have unjustly refused to do a thing which he had no power to do. But this can be no manner of reason why the writ of *mainprise* should not be still grantable in other cases.

(f) Sum. 104.
(g) 2 Inst. 190.

(h) F. N. B.
250.
4 Inst. 182.
Coke, B. and
Mainp. c. 10.
Vide sup. 10.
sect. 72. 74.

2 Hale, 142.

F. N. B. 66,
67, 68.
Reg. 78, 79.

F. N. B. 68.
2 Hale, 141.

Vide sup. sect.
26.

(i) 1 Sid. 210.
Skin. 61. 76.
227. 231.
Carth. 286.
Farresly, 9.
3 Comm. 129.
4 Modern, 183.

Sect. 31. THIRDLY, As to the writ of *homine replegiando*, there seems to be no doubt but that at the common-law the sheriff might deliver any persons out of prison by virtue of this writ, except in those special cases mentioned in the statute of Westminster the First, c. 15. which is set forth more at large in the next section: and if he had returned, that the plaintiff had been cloigned out of the county by the defendant, he might afterward, by virtue of a *capias in withernam* against such defendant, whether he were a peer or commoner, have taken and imprisoned him till the plaintiff should be replevied. But the writ of *homine replegiando* has been much disused of late, in such cases wherein justices of peace have been authorized to admit persons to bail; yet whether the statutes which gave such authority to justices of peace, being wholly in the affirmative, do take away the sheriff's power in the cases mentioned in those statutes, may deserve to be considered. However, there can be no doubt but that in other cases the writ of *homine replegiando*, (i) and *capias in withernam*, are very proper and effectual remedies.

Sect. 32. But for the better understanding the sheriff's power in this particular, I shall set down, and endeavour to explain so much of the said statute of Westminster the First, c. 15, as relates to it, which is enacted as followeth:—"Forasmuch as ^{2 Hale, 127. to 136.} sheriffs, and others who have taken and kept in prison persons detected of felony, and incontinent have let out by replevin such as were not replevisable, and have kept in prison such as were replevisable, because they would gain of the one party, and grieve the other: And forasmuch as before this time it was not determined which persons were replevisable, and which not; but only those that were taken for the death of a man, or by commandment of the king, or of the justices, or for the forest: It is provided, and by the king commanded, that such prisoners as before were outlawed, and they which have abjured the realm, provers, and such as be taken with the manner, ^(a) and those which have broken the king's prison, ^(a) See sect. 41. thieves openly defamed and known, and such as be appealed by provers, so long as the provers be living (if they be not of good name), and such as be taken for house-burning feloniously done, or for false money, or for counterfeiting the king's seal, or persons excommunicate, taken at the request of the bishop, or for manifest offences, or for treason touching the king himself, shall be in no wise replevisable by the common writ, nor without writ: But such as be indicted of larceny by inquests taken before sheriffs, or bailiffs by their office, or of light suspicion, or for petit larceny, that amounteth not above the value of twelpence, if they were not accused of some other larceny ^{2 Inst. 190.} aforetime, or accused of receipt of thieves or felons, or of commandment, or force, or of aid in felony done, or accused of some other trespass, for which one ought not to lose life or member, and a man approved by a prover after the death of the prover (if he be no common thief, nor defamed), shall be henceforth let out by sufficient surety, whereof the sheriff will be answerable, and that without giving aught of their goods."

For the better exposition hereof, I shall distinctly consider,—First, That part of the preamble which declares, what persons had always been agreed not to be replevisable.—Secondly, That part of the purview which shews what other persons shall not be replevisable;—and, Thirdly, That which shews what persons shall be replevisable.

Of those who by the preamble are declared to have always been agreed to be irreplevisable, there are four kinds.—1. Those ^{2 Hale, 129. to 132.} who are taken for the death of a man.—2. Those who are taken by the commandment of the king.—3. Those who are taken by the commandment of the justices.—4. Those who are taken for the forest.

As to the first of these particulars, viz. Concerning those who are taken for the death of a man.

Sect. 33. It is observable that the statute declares generally, that those imprisoned for the death of a man have always been ^{2 Hale, 129. 2 Inst. 186.} taken to be irreplevisable, without making any distinction be-

2 Inst. 315.
2 Hale, 138

(a) Reg. 77.
F. N. B. 66.
(b) 25 Ed. 3. 42.
41 Assize, pl. 14.
37 Assize, pl. 12.
29 Assize, pl. 44.
1 Roll. 268.
44 Edw. 3. 38.
21 Ed. 4. 71.

tween such homicide as malicious, and that which happens by misadventure, or in self-defence. And it is further to be observed, that the statute of Gloucester, c. 9. provides, "That where a man kills another by misfortune, or in his defence, or in other manner without felony, he shall be put in prison till the next coming of the justices in eyre, or justices assigned to the gaol-delivery, &c." And agreeably hereto we find, that all persons in general, who are taken for the death of a man, are excepted out of the writ (a) *de homine replegiando*: And that even the superior (b) courts, which are not restrained by these statutes, have yet been always cautious of bailing persons imprisoned for any homicide, except in such special cases as shall be set forth more at large in this chapter.

(c) Sect. 63.

Sect. 34. Also it seems agreed, that justices of peace who have power at this day to bail a man arrested for a light suspicion of homicide, cannot bail any such person for manslaughter, or even excusable homicide, if it manifestly appear that he was guilty of the fact, let it be ever so plain that it cannot amount to murder, as shall be shewn more at large in the following part of this chapter (c).

(d) See Rex
v. Chetwynd,
9 St. Trials,
542.

Sect. 35. And it is enacted by 3 Hen. 7. c. 1. "That if it happen, that any person, named as principal or accessory, be acquitted (d) of any murder at the king's suit, within the year and day, that then the same justices before whom he is acquitted, shall not suffer him to go at large, but either remit him to prison or bail him, after their discretion, till the year and day be passed."

As to the second particular, viz. That concerning those who are taken by the commandment of the king.

2 Inst. 186, 187.
S. P. C. 72.
1 Roll. 134.
Dalton, c. 114.
Register, 77.

S. P. C. 72.

Sect. 36. It seems that the words of the statute concerning them are to be understood of such only as are imprisoned either by the king's personal command, or by the command of his privy council, which is looked upon to be as it were incorporated with him and to speak with his mouth; and accordingly we find the exception in the writ of *homine replegiando*, relating to persons imprisoned by the king, thus expressed in the Register, "*nisi capti sunt per speciale præceptum nostrum*;" by which it seems to be implied, that this exception is not to be applied generally to every command whatsoever of the king. To which it may be added, that if it were to be understood in so large a sense, it would extend even to those who are taken by a *capias* in a personal action, for that every such *capias* is the commandment of the king; but it seems certain, that a defendant taken by such a *capias* is replevisable by the common law. But persons imprisoned by the special command of the king, or of his privy council, are so far from being replevisable by the sheriff, that they have formerly (e) been adjudged not to be bailable even by the court of king's bench. However, at this day the law is otherwise declared and settled by parliament, as shall be shewn more at large in the following part of this chapter.

(e) 1 And. 298.
1 Roll. 134.
192. 219.
1 Leonard, 70.
B. Mainpr. 37.
Con. Moor, 839.
2 Hale, 131.

As to the third particular, viz. That concerning persons imprisoned by the command of the justices.

Sect. 37. It is observable, that the exception in the writ of *homine replegiando*, in the Register (*a*), concerning persons so imprisoned, is restrained to those who are taken by the special command of the king's chief justice. But by Fitzherbert (*b*), Staundford (*c*), Coke (*d*), and Dalton (*e*), the words of the statute relating to persons so imprisoned, seem to be understood in a large sense of any of the king's justices in general, as of those of assize, as well as of those of the courts of Westminster Hall. But it seems that they are not to be understood generally of persons imprisoned by any command whatsoever of such justices, for that those who are imprisoned by their ordinary command, not by way of punishment, but in order only to be safely kept, are said to be replevisable by the sheriff, in cases not prohibited by the statute, and therefore it seems, that they must be taken in a most restrained sense of those only who are imprisoned by the absolute command of such justices by way of punishment, as for a misdemeanor done in their presence, or for other contempts, or such like matters, which lie rather in their discretion than in their ordinary power; and it seems, that a commitment by the chief justice, without shewing any cause whatsoever, shall be intended to be but for some such matter; and there can be no doubt but that a person under such a commitment is replevisable by the sheriff. Also it hath been holden, that a person so committed is not bailable upon a *habeas corpus*: but how far persons committed by the absolute command of one court, are bailable by another, shall be more fully considered in the following part of this chapter.

As to the fourth particular, viz. That concerning those who are imprisoned for the forest, who also are excepted out of the writ (*f*) of *homine replegiando*.

Sect. 38. It seems, that the said exception is to be understood as well as of forests in the hands of subjects, (*g*) as of those in the hands of the king; but it seems, that it is to be understood strictly of proper forests only, and not to be extended (*h*) by equity to chases or parks. And as to imprisonments for offences in forests, the law has been much mitigated by later statutes; for it is recited by 1 Edw. 3. c. 8. "That divers persons had been undone by the chief keepers of forests, &c. against the form of the great charter (*i*) of the forest, and against the declaration (*k*) made by king Edward I. by which he granted, that trespasses done in his forest, of vert and venison, should be presented at the next swainmote, before the foresters, &c. and that such presentments made before such foresters, &c. should by the oaths of knights, and other discreet and lawful men, &c. by the common assent of all the said ministers, be solemnly written, and with their seals ensealed: And that if any indictment should be in any other manner made, that the same should be void." And thereupon it is ordained, "That from thenceforth no man shall be taken nor imprisoned for vert or venison

(a) Reg. 77.

(b) F. N. B. 60.

(c) S. P. C. 73.

(d) 2 Inst. 187.

(e) Dalt. c. 114.

S. P. C. 73.

Dalt. c. 114.

F. N. B. 251.

S. P. C. 73.

Dalt. c. 114.

24 Ed. 3. 33.

1 Roll. 131.

(f) Reg. 77.

4 Inst. 314.

(g) 1 Inst. 2.

233.

(h) Reg. 80.

F. N. B. 67.

Plowden, 124.

(i) 9 H. 3.

10 and 16.

(k) 34 Ed. 1.

commonly

called Ordina-

tio Forestarum.

"venison, unless he be taken within the *mainour*, or else indicted after the form before specified: And then the chief warden shall let him to mainprise till the eyre of the forest, without any thing taken for his deliverance. And if the said warden will not so do, he shall have a (a) writ out of the chancery, &c. to be at mainprise till the eyre. And if the warden shall not obey such writ, the plaintiff shall have a (b) writ to the sheriff to attach the said warden before the king, at a certain day, &c. And the sheriff (the verderers being called to him) shall deliver him that is so taken, by good mainprise, in the presence of the verderers, and shall deliver the names of the mainpernors to the same verderers, to answer in the eyre before the justices, &c." And it is further enacted, by 7 Rich. 2. c. 4. "That no man shall be imprisoned by any officer of the forest without due indictment, or being taken with the *mainour*, or trespassing in the forest, &c."

(a) F. N. P. 67.
Register, 80.
(b) F. N. B. 67.
Register, 80.
4 Inst. 290.
Register, 80.
F. N. B. 67.
45 Ed. 3. 7.
2 Hale, 132.
to 135.

Sect. 39. And NOTE, That persons so indicted, or taken with the *mainour*, being imprisoned by such officers, have their election either to be mainprised by twelve mainpernors, by virtue of *homine replegiando*, given by the said statute of 1 Edw. 3. c. 8. or to be bailed upon a *habeas corpus*, by the judges of Westminster Hall, &c. And if a person be imprisoned for any offence relating to the forest, without having been first indicted for it, or taken with the *mainour*, there seems to be no doubt but that he may have an action of false imprisonment, and may also be mainprised or bailed in the manner above-mentioned.

And now I am to consider that part of the purview of the above-recited statute of Westminster the First, c. 15. which shews what other persons are not replevisable, of which there are two sorts.

FIRST, Such as are excluded from the benefit of a replevin, in respect of the notoriety of their offence.

SECONDLY, Such as are excluded from it in respect of the heinousness of the crime alleged against them.

Persons excluded from the benefit of a replevin, in respect of the notoriety of their offence, are of two kinds:

First, Those who, by an express or implied judgment, sentence or conviction, or their own confession, appear to be guilty.

Secondly, Those who are under violent presumptions of guilt.

(c) S. P. C. 74.
Summary, 101.
Dalton, c. 114.
1 Roll. 268.
15 H. 7. 9.
Kelynge, 90.
3 Bulst. 113,
114.
(d) Vide infra,
sect. 44.
(e) Dyer, 179.
1 Bulst. 87, 88.
15 H. 7. 9.
(f) 3 Bulst. 114.
1 Roll. 268.
4 Inst. 178.

Sect. 40. And First, Of those who by judgment, sentence, conviction, or confession, appear to be guilty, some are excluded from the benefit of a replevin by the express words of the statute; as "those who are outlawed, or have abjured the realm; persons excommunicate, taken at the request of the bishop, and provers." And all other (c) persons who are condemned, or convicted of felony, or any other (d) heinous crime whatsoever, whether by their own confession, or by verdict general or special; (e) and also all those (f) who on their examination own themselves guilty of a felony alleged against them, and are charged in their mittimus with a felony so confessed, seem to be excluded

excluded from it by parity of reason, and the manifest intent of the statute; for (a) bail is only proper where it stands indifferent whether the party be guilty or innocent of the accusation against him, as it often does before his trial; but where that indifferency is removed, it would, generally speaking, be absurd to bail him: And agreeably hereto the statute of 2 Hen. 5. c. 2. provides, even as to civil causes, "that if upon a writ of *certiorari*, or *corpus cum causâ*, out of chancery, it shall be returned, that the prisoner "is condemned by judgment given against him, he shall be remanded, &c." Also 23 Hen. 6. c. 10. which ordains, that sheriffs, &c. shall let out of prison persons in their custody by force of any writ, &c. in personal actions, or on indictments of trespass, by sufficient sureties, &c. expressly excepts "all such "as shall be in their ward by condemnation, execution, &c." And therefore it cannot be but reasonable to intend, that the said statute of Westminster the First put the cases of persons outlawed and excommunicate as examples only; meaning thereby to intimate, that all other persons under the like circumstances should be in like manner irreplevisable: yet it is certain, that the court of king's bench may, in their discretion, in some special cases, bail a person upon an outlawry of felony; as (b) where he pleads that he is not of the same name, and therefore not the same person with him that was outlawed; or alleges (c) any other error in the proceedings. Also it seems, that the court of king's bench, or justices of gaol-delivery, may bail (d) a person convicted of manslaughter, or as some say, of any other felony, for which he afterwards gets the king's pardon. And (e) there seems to be no doubt at this day, but that they may also bail any person who is guilty before them of homicide in self-defence, or by misadventure. Also it is certain, that if a person appear to be imprisoned for an excommunication, in a cause of which the spiritual court hath no cognisance, he may be delivered either upon a *habeas corpus*, or by quashing or superseding the writ of *excommunicato capiendo*.

SECONDLY, Of those who are under violent presumptions of guilt, and in that respect are excluded by the statute from the benefit of a replevin, there are several kinds.

Sect. 41. I. Those who are taken with the *mainour* (or rather the *mainer*, that is, with the thing stolen, as it were in their hands, and by parity of reason, those who are taken freshly upon a hue and cry.

Summ. 101, 102. Carthew, 79. 2 Inst. 188. 1 Hale, 187. 348. 2 Hale, 133. 156. Vide c. 18. s. 1. & 4.

Sect. 42. II. Those who have broken the king's prison, and by the same reason, those who have broken any other prison, which the law presumes that no innocent person will do.

Sect. 43. III. Those who are appealed by provers, who regularly are not bailable, because the approver, by confessing his own guilt, induces a strong presumption against those whom he accuses of the same crime of which he owns himself guilty; yet by the express words of the statute, "If the person appealed by "an approver be of good reputation, he may be bailed, even in "the life of the approver; and, unless he be a notorious felon, "he

(a) 2 Inst. Dyer, 179. Summary, 100.

See the books above cited, Summary, 101. S. P. C. 74. 2 Inst. 188.

(b) 5 H. 7. 16.

(c) 19 H. 6. 2.

(d) B. Mainp. 94. Summary, 101. 105.

(e) Summary, 101. 105. F. N. B. 246. F. Corone, 297. 354. *contra*, & S. P. C. 74. *quere*.

Summ. 101, 102. Carthew, 79. 2 Inst. 188. 1 Hale, 187. s. 1. & 4.

Summary, 102. 2 Inst. 188. Register, 269.

(a) 25 Ed. 3.

42.

Summary, 102.

F. Mainp. 1.

2 Inst. 188.

(b) 25 Ed. 3.

42. pl. 27.

F. Mainp. 2.

(c) Sum. 192.

(d) F. Cor. 387.

(e) B. Cor. 81.

211.

17 Assize, 4.

11 Assize, 27.

"he may be bailed after his death." And, by parity of reason, he may also be bailed if the approver waive (a) his appeal, or be vanquished, (b) unless there be some other cause to detain him in prison, as the appeal of some other approver, &c. And if a person disabled by law to become an approver, as one attainted, (c) &c. appeal another of high treason, it seems that the person so appealed ought to be bound (d) to his good behaviour towards the king: but (e) if such person had appealed him of felony only, it seems that he ought to have been wholly discharged, if there had been no other accusation against him.

(f) Sum. 102.

Sect. 44. IV. Thieves openly known and notorious, who, as it seems, ought not to be bailed for any fresh felony, whereof there is probable evidence against them. But how far persons accused of any crime shall be so far esteemed likely to have committed it, from their former scandalous behaviour, as to be presumed guilty upon slight evidence, seems in great measure to be left to the discretion (f) of the person who has power to bail them; who, upon consideration of the circumstances of the whole matter, and the probabilities of both sides, if he find it reasonable strongly to presume them to be guilty, ought not bail but commit them.

(g) Dalt. c. 114.

(h) B. Mainp.

62.

42 Assize, 5.

(i) Coke, B. &

Mainp. c. 5

27 Assize, 12.

(k) Keilw. 165.

F. Execu. 147.

13 H. 7. 21.

Rastal, 380.

(l) Sum. 168.

(m) 6 H. 7. 1.

Sect. 45. V. Persons taken for open and manifest offences, which seems to be understood of inferior crimes of an enormous nature, under the degree of felony, as dangerous riots, (g) favouring of high treason, (h) scandalous extortions, conspiracies, (i) by justices, &c. violent and exorbitant rescoues (k) of persons arrested by virtue of the king's writs, misprision (l) of treason, *præmunire*, (m) maim, and such like heinous offences, whereof no one who is notoriously guilty seems to be bailable by the intent of this statute; for notwithstanding, in the latter part of it, it be said generally, that those who are accused of a trespass, to which a man shall not lose life or member, are replevisable; yet upon the construction of the whole it seems reasonable to qualify the generality of that expression with this limitation, that such accusation ought to be either on a light suspicion; or, if it be on plain and unquestionable evidence, that the offence ought to be inconsiderable; for if all persons whatsoever shall be replevisable for offences not touching life or member, let their guilt be never so notorious, the abovementioned general unlimited clause, that those who are taken for open offences shall be irreplevisable, must be restrained to felonies and offences touching member, which seems contrary to the most obvious reasonable purport of it, and also to common practice, and that allowed general rule, that bail is only then proper where it stands indifferent whether the party were guilty or innocent; *sed quere*. Yet it seems to be in great measure left to the discretion of the person who has power to admit others to bail, to judge in what cases their crime is so flagrant and enormous, that they ought not to have the benefit of it.

Sup. sect. 44.

Of those who are excluded by the purview of the said statute from the benefit of a replevin, in respect of the heinousness of the crime alleged against them, there are four kinds.

1. Those

1. Those who are taken for arson.
2. Those who are taken for false money.
3. Those who are taken for falsifying the king's seal.
4. Those who are taken for treason which touches the king himself.

Sect. 46. All such persons being expressly declared to be irreplevisable, it seems clear, that they can in no case be delivered out of prison by the sheriff, either by virtue of the said writ of *homine replegiando*, or without it: yet if a person at large be accused before a sheriff, on a light suspicion, of any of these, or of any other of the abovementioned crimes, which always have been agreed to be irreplevisable, as of homicide, &c. it seems by no means to follow either from the words or intention of the statute, that the sheriff is bound to keep him in prison till he be delivered by due course of law, but in such case it seems to be more reasonable that he take surety of him to appear in a proper court to answer such accusation; for it seems extremely harsh, and contrary to the first principles of the law, which favours nothing more than the liberty of the subject, to put an officer under a necessity of depriving a man of his liberty upon every accusation of such a crime, be it never so weakly grounded. And the words of the statute, declaring persons to be irreplevisable for such crimes, seem clearly applicable to such only as are under an actual imprisonment, and not to those who are barely accused; for that none can be properly said to be replevied, but those who, being actually imprisoned, are, upon finding pledges, delivered out of custody; from which it follows, that persons not imprisoned are not within the statute: nay, the law is so far from obliging a sheriff to imprison a man upon every accusation whatsoever of such crimes, that it subjects him, as well as any other person, to an action of false imprisonment, if he do it without a reasonable ground; as hath been more fully shewn in the chapter concerning Arrests. But if a person be actually under an arrest, either of a magistrate or of a private person, for any of the above-mentioned crimes, it seems clear, from the express words of the statute, that the sheriff cannot replevy him; and it seems, that at the common law he ought to have safely detained the party so arrested till he could have obtained his legal deliverance, and that the person so arrested had no remedy but by indictment or action of false imprisonment against those who arrested and delivered him to the sheriff on a groundless suspicion. But how far the law may at this day be altered in this point, by the universal and allowed practice of sheriffs receiving no person into their custody for any crime without the warrant of some magistrate, shall be more fully considered in the next chapter.

Sect. 47. It is certain, that the court of king's bench still may, and always might, bail persons in custody for any of these crimes, notwithstanding this statute; yet in discretion it seldom uses this power but in very special cases, as shall be shewn in the following part of this chapter.

And now I am to consider that part of the purview of the said statute, which shews what persons are replevisable.

For

2 Inst 189.
40 Assize, 33.
2 Hale, 129.
134. 148.
5 Modern, 323.

2 Hale, 134,
135.

For the better understanding whereof, I shall endeavour to explain,

1. The branch relating to persons accused as principals.
2. That which concerns those who are charged as accessaries.

As to the FIRST BRANCH, relating to persons accused as principals.

2 Inst. 190.

S. P. C. 74.
Summary, 106.
Dalt. c. 114.
29 Assize, 14.
16 Ed. 4, 5.
Coke, B. and
Mainp. c. 5.

Reg. 270, 271

Sect. 48. Those who are indicted of larceny by inquests taken before sheriffs, or bailiffs, by their office, that is, before sheriffs in their tourns, and lords in their leets, are expressly declared to be replevisable; and according to some opinions, those who are indicted or appealed in any other court, of any other felony, not expressly declared by the statute to be irreplevisable, as robbery or burglary, &c. are replevisable by the sheriff *ex officio*, without writ, within the equity of this clause: yet the authorities which are brought to warrant this opinion, relate only to the bailment of persons by superior courts, upon indictments or appeals of such crimes before such courts, and do by no means prove that such persons are replevisable by the sheriff *ex officio*, without writ: and it is observable, that the writs of mainprise in the Register, for persons indicted only of trespass, before justices of peace, expressly declare that such persons cannot be delivered out of prison without the king's special command; from whence it seems to follow, that such persons are not within the common benefit of a replevin by the sheriff, without some such special command. And if persons indicted of trespass only, before justices of peace, are not within the ordinary remedy of a replevin by the sheriff without a writ, surely it cannot be thought that persons indicted of higher crimes, and before superior courts, can be any way intitled to it. However, inasmuch as the said statute of Westminster the first expressly allows persons indicted of larceny before the sheriff the ordinary remedy of a replevin, and expressly excludes some other particular felonies, and says nothing of others, it seems a reasonable construction of the statute, that the sheriff might, by virtue of it, either with or without writ, replevy those who were indicted before himself, or at a court-leet, of those other felonies not expressly excepted, as well as those indicted of larceny only. And the statute leaving such a latitude to the sheriff in relation to the persons so indicted before himself, or at a court-leet, it hath been usual for superior courts (who, though they be not within the statute, have yet always had a great regard to the rules prescribed by it) to use the same liberty in relation to such crimes, and sometimes greater, for such special reasons, and in such special cases, as shall be set forth more at large in the following part of this chapter. Yet, notwithstanding the statute seems generally to allow the benefit of a replevin to all those who are indicted of larceny, &c. without any limitation; yet it hath been always construed to intend only, that such persons indicted of a grand larceny as are of good reputation, shall be replevisable; and therefore if there be strong presumptions of their guilt, it seems that they ought not to be bailed; but this is in great measure to be left to discretion.

Register, 269.
2 Inst. 190.
Summary, 100.
16 Ed. 4, 5.
S. P. C. 74.

Sect. 49. SECONDLY, Those who are imprisoned for a light suspicion,

suspicion, are likewise declared by the statute to be replevisable. Yet, notwithstanding the words are general, it hath always been taken to be the intent of them, that the persons so imprisoned ought to be of a good reputation. Also it seems clear, that the statute means only such persons as are imprisoned for crimes not expressly excepted by it from the benefit of a replevin; and therefore that this branch cannot extend to persons imprisoned for the treasons mentioned in the statute, arson or homicide, but only to those taken for larceny, robbery, burglary, and such like felonies, &c.

Sect. 50. THIRDLY, Those who are imprisoned for petit larceny, which does not amount to above the value of twelve-pence, are also declared by the statute to be replevisable, "if they have not been accused of some other larceny before;" and it seems to be agreed, that there is no necessity that such persons be of good reputation: yet upon the construction of the whole statute, if such persons be taken with the manner, or confess the fact, &c., or their crime be otherwise open and manifest, it seems that they ought not to be bailed; but if there be any colour or probability for their innocence, it seems most agreeable to the intention of the statute to bail them.

Sect. 51. FOURTHLY, Persons accused of other trespass, for which a man ought not to lose life or member, are declared by the statute to be replevisable, yet, perhaps, the generality of this clause is restrained by that other clause which declares, that persons taken for open and manifest offences shall not be replevied, as hath been more fully shewn sect. 45.

Sect. 52. FIFTHLY, The appellee of an approver is also expressly declared to be bailable after the death of the approver, unless he be a notorious felon.

But having already incidentally shewn, sect. 43, in what cases such an appellee is replevisable, I shall refer the reader, for this matter, to what is there said concerning it.

As to the **SECOND BRANCH**, concerning those who are charged as accessories.

Sect. 53. The statute is in the following words:—"Those who are accused of the receipt of thieves or felons, or of commandment, or of force, or of aid of felony done, shall be replevisable, &c." It is observable, that notwithstanding the statute mentions only those who are accessory by receiving felons, or by commandment, force or aid, yet all those who are accessory to a felony any other way, (a) as by persuasion, or any other procurement or abetment, have always been taken to be within the equity of it; and most of the books (b) relating to this matter seem generally to hold, that all accessories, whether to homicide or any other felony, are bailable till the principal be convicted or attainted; and that they are bailable, even after such conviction or attainder, upon their (c) pleading to the indictment, and do not express any limitation or restriction, that they be of good fame, or but slightly suspected, &c. And in the case (d) of 25 Edw. 3. 44. pl. 14. wherein a person appealed of murder, as having holden the deceased in his arms while the other killed him, was

Reg. 83. 269.
F. N. B. 250.
2 Inst. 190.

2 Inst. 190.
Register, 269.
F. N. B. 250.
Vide sup. sect. 43

(a) Reg. 270.
S. P. C. 71.
F. N. B. 250.
Summary, 100.
(b) S. P. C. 71.
B. Mainp. c. 11.
22. 54. 58.
Summary, 100.
2 Hale, 135.
Coke, B. and
Mainp. c. 5.
Dyer, 120.
25 Ed. 3. 42.
40 Ed. 3. 12.
50 Ed. 3. 15.
29 Assize, 44.
40 Assize, 8.
(c) S. P. C. 71.
Summary, 100.
2 Hale, 135.
B. Mainp. 58.
64.
40 Ed. 3. 42.
43 Ed. 3. 17.
40 Assize, 8.
Cont. 27 Ed. 3.
94.
not (d) F. Cor. 155.

not let to mainprise; the reason given for it by the reporter is, because the defendant was in a manner a principal; for that otherwise, being an accessory only, he ought to have been let to mainprise by the intent of the statute. Yet I find it made a *quare* in the Year Book of 21 Edw. 4. (a) Whether accessories are to be let to bail of course? And perhaps it may be more reasonable to intend, in the above cited case of 25 Edw. 3. that such person was denied the benefit of mainprise by reason of the notoriety of his guilt; for it seems clear, both from the Register, (b) Fitzherbert, (c) and Dalton, (d) that accessories to felonies are not to be bailed unless they be of good reputation; and if the want of a good reputation, which is at most but a very slight inducement to presume them guilty of a particular crime, be a good cause to exclude them from the benefit of mainprise, which is given them by the general words of the statute, it seems strange the strong and unquestionable evidence of their guilt should not much more exclude them from it; especially considering that it is an allowed rule, (e) that bail is only proper where it stands indifferent whether the person accused were guilty or innocent. And since later statutes have, in many cases, excluded accessories before the fact from the benefit of clergy, it seems absurd to say, that persons notoriously guilty of being accessories to the crimes which exclude them from the benefit of clergy, shall be admitted to bail; whereas, if they had been committed to prison on the like evidence of guilt, as principals, for felonies within the benefit of clergy, or even for inferior offences of an enormous nature, they could not have had the like privilege: and therefore, since the general words of the statute concerning the replevising of accessories, are agreed to receive the above-mentioned limitations, that they ought to be of good reputation, and also to plead first to the indictment, if the principal be attainted; why should it not be reasonable to admit this further restriction, that their guilt be not notorious? which seems admitted to be implied in most of the other clauses of the statute, which yet are penned in as general words as that relating to accessories. But this matter seems at this day to be put beyond all question, by 31 Car. 2. c. 2. s. 21. by which it is recited, "That many times persons charged with petit treason or felony, or as accessories thereunto, are committed on suspicion only, whereupon they are bailable or not, according as the circumstances making out that suspicion are more or less weighty, &c." And thereupon it is enacted, "That no person so charged, shall be removed or bailed by virtue of that act, in other manner than he might before." From which it seems clearly to follow, that where there are strong presumptions of guilt against a person so charged, he neither was bailable before that statute, nor is now bailable by virtue of it. (f)

(f) See Rex v. Judd, 2 Term. Rep.

As to the SECOND POINT, viz. In what cases bail is grantable by justices of peace, I shall endeavour to shew,

1. How far it is grantable by construction of the statutes, and commission which gives justices of peace a jurisdiction over certain crimes, without saying any thing concerning the power of granting bail.

2. How

2. How far it is grantable by the statutes specially relating to the power of granting bail.

As to the FIRST POINT,

Sect. 54. It seems that wherever justices of peace have jurisdiction of a crime, they may bail the person indicted before them of such crime, upon such circumstances for which other courts may bail the person so indicted before them; for that it seems to be a good general rule, that so far as any persons are judges of any crime, so far they have power of bailing a person indicted before them of such crime. And, upon this ground, it seems clear, that any two justices of peace, whereof one is of the *quorum*, may, of common right, bail persons indicted before the sessions of justices of peace, for that any two such justices may hear and determine the indictment. (a) Also it hath been holden, that any one justice of peace hath the like power in relation to persons so indicted, because every such justice, being a judge of the court which is to determine the offence, seems consequently to have a discretionary power of judging whether it be bailable, and of admitting the party to bail. And this seems to be implied by the statute of 1 Rich. 3. c. 3. which, giving one justice of peace power of bailing persons arrested for felony, "in like form as if" such persons had been indicted at sessions," clearly supposes, that if such persons had been indicted at sessions, they might have been bailed by any one justice: and if any one justice of peace had such power of bailing the persons so indicted at sessions, before the statutes specially relating to the power of justices of peace in granting bail, it seems that he still has the same power in relation to persons so indicted of any bailable crime under the degree of felony; because the said statutes seem not to restrain him in any such case, under the degree of felony, from any power which he lawfully might claim before. Also it seems to be agreed, that any one justice of peace might always in his discretion either bail or imprison one who has given another a dangerous wound, according as it shall appear from the whole circumstances, that the party is most likely to live or die, for that every such justice being a principal conservator of the peace, the offence at present being only an enormous breach thereof, and no felony, seems properly to come under his consuance.

Coke, R. and
Mainp. 6
Lamb. 347, 348.

(a) See the
books above
cited.
Crompton, 197.
234, 235.
Summary, 105.

2 Hale, 137.

B. 1. tit. "Affray."

As to the SECOND POINT, *viz.* How far bail is grantable by justices of peace, by virtue of the statutes specially relating to their power of granting bail.

Sect. 55. It is recited by 1 Rich. 3. c. 3. "That divers persons had been daily arrested and imprisoned for suspicion of felony, sometime of malice, and sometime of a light suspicion, and so kept in prison, without bail or mainprise, to their great vexation and trouble:" and thereupon it is enacted, "That every justice of peace in every shire, city, or town, may, by his or their discretion, let such prisoners and persons so arrested to bail or mainprise, in like form as though the same prisoners or persons were indicted thereof of record, before the same justices at their sessions."

2 Hale 137.

Sect. 56. But it is recited by 3 Hen. 7. c. 3. "That by colour of

2 Hale, 137.

of the said statute of 1 Rich. 3. diverse persons which were not mainpernable, were oftentimes let to bail and mainprise by justices of peace, against the due form of law, whereby many felons had escaped, to the great displeasure of the king, and annoyance of his liege people; and thereupon it is enacted, "That the justices of peace in every shire, city, and town, or two of them at least, whereof one to be of the *quorum*, have authority and power to let any such prisoners or persons mainpernable by law, that have been imprisoned within their several counties, city, or town, to bail or mainprise, unto their next general sessions, or unto their next general gaol-delivery of the same gaols, in every shire, city, or town, as well within franchises as without, where any gaols be, or hereafter shall be: and that the said justices of peace, or one of them, so taking any such bail or mainprise, do certify the same at the next general sessions of the peace, or the next general gaol-delivery of any such gaol, in every such county, city, or town, next following after any such bail or mainprise so taken; on pain to forfeit to the king for every default thereupon recorded, ten pounds: and that the aforesaid act, giving authority and power in the premises, to any justice of the peace by himself, be in that behalf utterly void, and of none effect."

2 Hale, 137.

Sect. 57. And it is recited by 1 and 2 Ph. and Mary, c. 13. "That since the said statute of 3 Hen. 7. one justice of peace, in the name of himself, and one other of the justices, his companion, not making the said justice party nor privy unto the case wherefore the prisoner should be bailed, had oftentimes by sinister labour and means set at large the greatest and notablest offenders, such as be not replevisable by the laws of this realm, and yet the rather to hide their affections in that behalf, had signified the cause of their apprehension to be only for suspicion of felony, whereby the said offenders had and did daily escape punishment, &c." And thereupon it is enacted, "That from the first day of April then next coming, no justice or justices of peace shall let to bail or mainprise any such person or persons, who, for any offence or offences by them, or any of them, committed, be declared not to be replevisable, or be forbidden to be replevised or bailed by the above-mentioned statute of Westminster the first."

Sect. 58. And it is further enacted, par. 3. "That any person or persons arrested for manslaughter or felony, or suspicion of manslaughter or felony, being bailable by the law, shall not be let to bail or mainprise by any justices of peace, if it be not in open sessions, except it be by two justices of the peace at the least, whereof one to be of the *quorum*, and the same justices to be present together at the time of the said bailment or mainprise; which bailment or mainprise they shall certify in writing, subscribed or signed with their own hands, at the next general gaol-delivery to be holden within the county where the said person or persons shall be arrested or suspected."

Sect. 59. And it is further enacted, par. 4. "That the said justices, or one of them, being of the *quorum*, when any such prisoner is brought before them for any manslaughter or felony, before

" before any bailment or mainprise, shall take the examination of the said prisoner, and information of them that bring him, of the fact and circumstances thereof, and the same, or as much thereof as shall be material to prove the felony, shall be put in writing before they make the same bailment; which said examination, together with the said bailment, the said justices shall certify at the next general gaol-delivery to be holden within the limits of their commission."

Sect. 60. And it is further enacted, par. 5. " That the said justices shall have authority to bind all such by recognizance or obligation, as do declare any thing material to prove the said offences or felonies, to appear at the next general gaol-delivery to be holden within the county, city, or town corporate, where the trial thereof shall be, and then and there to give evidence against the party at the time of his trial, and shall certify as well the same evidence, as such bond or bonds in writing as he shall take, at or before the time of his said trial thereof to be had or made. And in case any justice of peace of *quorum* shall offend in any thing contrary to the true intent and meaning of this act, the justices of gaol-delivery, where such offence shall happen to be committed, upon due proof thereof, by examination before them, shall, for every such offence, set such fine on every of the same justices, as the same justices of gaol-delivery shall think meet, &c."

Sect. 61. But it is provided, par. 6. " That justices of peace, and coroners, within the city of London, and the county of Middlesex, and in other cities, boroughs, and towns corporate, shall, within their several jurisdictions, have authority to let to bail felons and prisoners, in such manner and form as they had been before accustomed; and also shall take examinations and bonds, as is aforesaid, upon every bailment by them made, and certify every such bailment, bond, and examination, at the next general gaol-delivery, &c."

From these statutes the following particulars appear most observable.

Sect. 62. **FIRST,** That it seems clearly to be implied by the above-mentioned statute of 1 Rich. 3. c. 3. which authorized any one justice of peace to bail a person on a slight suspicion of felony, in like manner as if such person had been indicted at sessions, that before that statute justices of peace could bail those only for felony who had been indicted of it before them. And by parity of reason it seems also to follow, that they had no power to bail persons for any other crime before such indictment, unless it were an offence directly tending to the breach of the peace; the bailing of persons for which seems properly to come under their consuance as conservators of the peace: and therefore it seems difficult to maintain the power of one justice of the peace to bail a person for any other crime, unless it be by some statute limited to the consuance of one justice, or the party have been indicted for it at sessions, because the commission, in giving a justice a general jurisdiction over any crime, shall be construed so far only as to give him a power to bail a person accused

Coke, Bail and Mainp. c. 6.
2 Hale, 137,
138.

Supra, sect. 54.

cused of it, as it makes him a judge of it, which he cannot be till he comes regularly before him by indictment; and the statutes above-mentioned, specially relating to the power of justices of peace in granting bail, expressly require the conusance of two justices.

Sect. 63. **SECONDLY,** That justices of peace have no power to bail any person not replevisable by the above-mentioned statute of Westminster the first, c. 15. from whence it seems to follow, that a person under the actual commitment or arrest of any other magistrate, or even of a private person, for any crime declared to be irreplevisable by that statute, as treason against the king's person, arson, &c. cannot be delivered from his imprisonment by the bailment of any justice of peace. Yet if a person at large be only accused of such crime, on a slight suspicion, before a justice of peace, it seems that the justice ought not to commit him, but to take surety of him to appear before a proper court, as hath been more fully shewn in relation to the sheriff, section 46. And inasmuch as the above-mentioned statute of 1 and 2 Ph. and Mary, c. 13. expressly mentions the bailing of persons for manslaughter, as well as for other felonies, there can be no doubt, but that justices of peace may, by force thereof, safely bail any person imprisoned on a slight suspicion of a fact, clearly appearing to be no higher an offence than manslaughter, and much more if it appear to amount to no more than homicide by misadventure, or in self-defence. Yet it seems to be agreed, that such justices must, at their peril, take care that the offence in truth amounted not to murder; and that they ought in no case to bail any person who manifestly appears to have been guilty of any of the homicides above-mentioned, either by his own confession, or the notoriety of the fact, not only because the above-mentioned statute of Westminster 1. c. 15. which is the pattern prescribed by 1 and 2 Ph. and Mary, for the direction of justices of peace in relation to bail, expressly excludes all persons from the benefit of it which are guilty of open and manifest offences; but also because the statute of Gloucester, c. 9. is express, that all persons who are guilty of homicide by misadventure or in self-defence, shall be kept in prison till the next coming of the justices itinerant, or of gaol-delivery.

Sect. 64. **THIRDLY,** That the chief import of these statutes is to shew in what manner persons are to be bailed by justices of peace, and not to declare what persons areailable by them; in relation to which matter, the old rules of the statute of Westminster the first, are generally still to be followed, which, extending only to criminal offences, punishable in the ordinary way by indictment before the sheriff, &c. give no power to bail persons taken on process in civil actions, or for contempts to superior courts, as by process of rebellion out of chancery. And therefore by a reasonable construction of all these statutes, justices of peace have no power in any such cases to admit any person to bail.

As to the **THIRD POINT**, viz. Where bail is grantable by the justices of gaol-delivery.

Sect.

2 Hale, 138,
139, 140.

Vide sup. s.
33, 34.
sed vide
2 Hale, 138.

1 Roll. 268.
Dalton, c. 114.
Summary, 99.
Iamhard, 346,
347.

Sup. sect. 44,
45.
2 Inst. 314, 315.

Dalton, c. 114.
Crompt. 154.
Sum. 103.

Sect. 65. It seems to be clearly settled (a) at this day, that such justices may bail any person convicted before them of homicide by misadventure or in self-defence, the better to enable him to purchase his pardon. And if a person convicted of manslaughter before such justices purchase his pardon, it seems that they may (b) bail him, even after their sessions is determined, till the next sessions of gaol-delivery, that he may come in then and plead his pardon, for that the power of such justices seems (c) to continue for such purposes after their sessions. Also (d) if a man be convicted of manslaughter before such justices, against plain evidence, it is said that they may bail him till the next sessions of gaol-delivery, in order to purchase his pardon in the meantime. But it seems, (e) that justices of peace have no power to bail a man in any of these cases, because they are tied up for the most part to the rules prescribed by the above-mentioned statute of Westminster the first. But this statute, not (f) extending to justices of gaol-delivery, seems to leave them a discretionary power in those cases wherein it restrains the sheriff from admitting persons to bail. And therefore if a defendant, in an appeal of death, plead an excommunication in disability of the plaintiff, it seems to be holden by Staundford, (g) that such justices may bail the defendant from day to day till the plaintiff shall be absolved, for that otherwise the defendant might lie in prison for ever, without any opportunity of coming to his trial. But it is observable, that the books (h) which are cited for the maintenance of this opinion, speak only of an appeal of robbery: yet if justices of gaol-delivery have such power of bailing persons in the case of death, on the circumstances above-mentioned, as it seems agreed in the cases above cited that they have, I do not find any reason why they may not, as well upon other such like circumstances, bail persons indicted or appealed before them of any other crime, in such manner as the court of King's Bench may do, as shall be more fully shewn under the next point.

As to the **FOURTH POINT**, viz. Where bail is grantable by the courts of Westminster-hall, I shall endeavour to shew :

I. Where it is grantable by the court of King's Bench.

II. Where by the other courts of Westminster-hall.

As to the first of these points, I shall consider,

1. Where bail is grantable by the court of King's Bench to a person imprisoned by the king's special command, or by the order of his privy council.

2. Where to a person committed by either house of parliament.

3. Where to one committed by the court of Chancery.

4. Where to one committed by an inferior court of record.

5. Where to one expressly excluded by the above-mentioned statute of Westminster the first, from the common benefit of a replevin by the sheriff.

As to the first of these particulars, viz. Where bail is grantable

- (a) *Crom.* 154.
 2 *Hale*, 129.
 151.
Summary, 101.
 104, 105.
F. Corone, 361.
Dalt. c. 14.
F. N. B. 246.
S. P. C. 15, 16.
Con. 25 Ed. 3.
 42.
S. P. C. 74.
F. Corone, 354.
B. Mainp. 1.
 (b) *Crom.* 153.
B. Mainp. 94.
Summary, 101.
 (c) *Vide sup.*
 c. 6. sect. 7.
 (d) *Crom.* 154.
 (e) *Summary*,
 104, 105.
Vide sup. sect.
 63. *Cont.*
Dalton, c. 114.
 (f) 2 *Inst.* 185,
 186.
 (g) *S. P. C.* 72.
 (h) *F. Mainp.* 6.
 3 *Assize*, 12.
Salkeld, 61.
 seems contrary.

able by the court of King's Bench to a person imprisoned by the king's special command, or by the order of the privy council.

(a) 5 Mod. 78.

1 Sid. 143.

1 And. 297.

1 Leonard, 70.

1 Burrow, 460.

Shebbeare's case, Palmer, 559.

(b) 1 Leon. 70]

1 And. 297.

2 Wilson, 151.

Wilkes's case.

(c) 33 H. 6 28.

1 And. 298.

1 Roll. 134.

192. 219.

Com. Mo. 839.

1 And. 158.

See the arguments on the *habeas corpus* concerning loans, 81, 82, &c.

(d) 1 Leon. 70, 71.

(e) See the arguments on the *habeas corpus* concerning loans, and Rushworth's Col. f. 158, &c.

(f) 21 Ed. 3. 4.

28 Ed. 3. 3.

42 Ed. 3. 3.

Sect. 66. I do not find but that wherever (a) a commitment by the privy council hath specially expressed the crime for which the party hath been committed, this court has always admitted him to bail, on the like circumstances on which, in discretion, it will grant bail on other commitments. (b) And wherever it has appeared, that persons have been imprisoned by colour of a usurped authority, pretended to be derived from any patent whatsoever, contrary to law, it seems that the said court hath always discharged the persons so imprisoned, without bail. But there have been formerly many opinions, (c) that persons committed by the special command of the king, or of his privy council, without expressing any other cause of the commitment, were not bailable by any court whatsoever, without some intimation of the king's consent to such bailment, by letter from the privy council, or otherwise. And a distinction (d) was taken by some between a commitment by one of the privy council, and a commitment by the whole body; and that the former ought indeed to set forth some other cause of the commitment besides the command of the person who made it; but that the latter needed not any.

Sect. 67. But this matter came afterwards to be very solemnly debated in the famous case (e) of Sir John Corbet and others, who, being imprisoned by a warrant from the privy council, about the third year of the reign of King Charles the First, moved the court of King's Bench to admit them to bail upon their *habeas corpus*; whereupon it was returned, that they were detained in the prison of the Fleet by the special command of the king, signified to the warden by a warrant of some of the members of the privy council; in which warrant no other cause of the imprisonment was contained but such special command: and it was strongly urged on behalf of the prisoners, that such imprisonment is against the statute of Magna Charta, c. 29. which provides, "That no freeman shall be taken or imprisoned, and that the king will not pass upon him, nor condemn him, but by the judgment of his peers, or the law of the land;" and also against many other statutes (f) made in affirmance of Magna Charta, by which it is ordained, "That no man shall be taken by petition, or suggestion, made to the king or to his council, unless it be by indictment or presentment, or by process by original writ; and that no man shall be imprisoned, &c. without being brought to answer by due process of law; nor be put to answer without presentment before justices, or matter of record, or by due process, and writ original." And it was argued, that the liberty of the subject would be precarious, and lie at the king's mercy, if persons who happen to incur his displeasure, for what perhaps the law esteems no crime, should by means of such a commitment be liable to be for ever imprisoned, without any possibility of redress; and that it seems inconsistent with natural justice to expose a man to so severe a punishment for a supposed crime alleged against him, without giving him an opportunity of clearing himself by a lawful trial. And it was further urged, that according to the opinion of Sir John Markham, in the time

of King Edward the Fourth, the king could not so much as arrest a man upon suspicion of treason or felony, as any of his subjects may; for that if the king should do wrong, the party could have no action against him. Also it was insisted, that the preamble of the statute of Westminster the first, c. 5. which declares, "That persons imprisoned by the king's command have always been taken to be irreplevisable," must be intended only of a replevin by the common writ *de homine replegiando*, or by the sheriff *ex officio* without writ, for that it speaks only of a replevin by sheriffs and others, and therefore shall not be taken to extend to superior courts. And it was never thought that the court of King's Bench was restrained by it from bailing persons imprisoned for homicide; and yet all such are equally declared by the statute to be irreplevisable. Many precedents, also, were alleged, whereby it appeared, that persons committed by the king's special command, had been discharged upon writs of *habeas corpus*.

Sect. 68. But on the other side it was argued, that such commitment could not reasonably be intended to be against the purview of the statutes above cited, inasmuch as the said statute of Westminster the first, c. 15. which was made in the very next reign after that in which the statute of Magna Charta was made, it was declared to be a settled and undoubted point, that persons committed by the command of the king, which, as it seems to be agreed, is to be understood of the king's special, absolute, and extrajudicial command, are not replevisable: and it cannot be imagined that so high a regard should be paid to such a commitment, if it were thought to be illegal, and contrary to Magna Charta. And it was insisted, that commitments of this kind have often been allowed by the (a) courts of justice, and are mentioned by authors (b) of the best credit since the above cited statutes, without any the least objection to their legality, and as depriving the party imprisoned by them from the common benefit of the writ of replevin. And it was also strongly urged, that there are often secret causes not fit to be divulged, which may make it necessary for the safety of the state, in some particular circumstances, to restrain some persons from their liberty for a certain time, and that the king, who is entirely entrusted with the management of state affairs, shall be presumed always to act for the public good; and that it is immodest for any of his courts to question the justice of his proceedings of this kind, which the law seems wholly to have left to his wisdom, or to suffer a suggestion that he abuses his prerogative to cover oppression; and that the subject is in no danger of perpetual imprisonment on this account, for that the court of King's Bench hath always used a discretionary power over such commitments, as well as all others, and therefore upon special circumstances of hardship, may admit persons under such commitments to bail; but that where there was nothing extraordinary in the case, it hath been the general course of the court not to do it without a special order from the council for it, as appeared from the examination of most of the precedents relating to this matter. And therefore in the case above-mentioned, the court of King's Bench was

Vide sup. sect. 36.

(a) Vide sup. sect. 66.
(b) S. P. C. 72. 7.
F. N. B. 6.

Rush. Col. part 1. fol. 510.

1 Roll. 219.
See the arguments on the *habeas corpus* above mentioned, p. 81.

Rush. Col. part
1. 428. 473.
499, &c.

Rush. Col. p. 1.
fol. 613.
(a) *Supra*, sec.
66.

unanimous in opinion, that Sir John Corbet, and the other gentlemen so committed by the king's special command, as is above-mentioned, had no right, *primâ facie*, to demand the benefit of bail, without the consent of the council, and therefore remanded them.

Sect. 69. But this matter being afterwards considered in parliament, and it being the general opinion, that the chief reason why those gentlemen incurred the king's displeasure was their refusal to pay the loans, which, as they insisted, were demanded of them without sufficient authority; and it being evident, that if there were no certain legal remedy for the liberty of the subject against such a strain of the prerogative, no man could be safe in maintaining his property, either in parliament or out of it, against a disputed demand from the crown, but would be liable to discretionary imprisonment, and that under colour of law, without any certain redress from the law; it was thought necessary on this occasion to draw up the famous Petition of Right, which was afterwards assented to by the king, wherein, among other things, the lords and commons complain to the king, "That against the tenor of the above (a) cited statutes, divers subjects had then of late been imprisoned, without any cause shewed; and when for their deliverance they had been brought before justices by writs of *habeas corpus*, there to undergo and receive as the court should order, and their keepers commanded to certify the causes of their detainer, no cause had been certified, but that they were detained by his majesty's special command signified by the lords of his privy council, and yet were returned back to several prisons, without being charged with any thing to which they might make answer according to the law: And thereupon the said lords and commons, among other things, humbly pray, That no freeman, in any such manner as is before-mentioned, be imprisoned, or detained, &c."

Vide C. Car.
507. 579. 593.
2 Hale, 134,
145.
Vide s. 16.
notes.

Sect. 70. And it seems to have been generally agreed, since the time of this petition, that wherever any commitment by the privy council hath not expressed, with some convenient certainty, the crime alleged against the party, he ought to be bailed upon his *habeas corpus*.

See Lord Camden's opinion upon the effect of this statute, as to its giving an implied power to secretaries of state and privy counsellors to commit, &c.
11 State Tr. 319.

Sect. 71. And for the greater security of the liberty of the subject against commitments by the command of the king, or of his privy council, it is further provided and enacted, by 16 Car. 1. c. 10. s. 8. "That if any person shall be committed, restrained of his liberty, or suffer imprisonment by the command or warrant of the king's majesty, in his own person, or by the command or warrant of the council board, or of any of the lords or others of his majesty's privy council; that, in every such case, every such person, upon demand or motion to the judges of the King's Bench or Common Pleas, in open court, shall without delay, upon any pretence whatsoever, for the ordinary fees usually paid for the same, have forthwith granted unto him a writ of *habeas corpus*, to be directed generally unto all and every sheriff, gaoler, minister, officer, or other person in whose custody the party committed or restrained shall be, and such
"sheriff,

" sheriff, &c. shall, at the return of the said writ, and according to the command thereof, on due and convenient notice thereof given unto him, at the charge of the party who requires or procures such writ, and on security by his own bond given, to pay the charges of carrying back the prisoner, if he shall be remanded by the court, &c. which charges shall be ordered by the court, bring or cause to be brought the body of the party before the judges of the court, from whence the same writ shall issue, in open court, and shall then likewise certify the true cause of such his detainer or imprisonment; and thereupon the court, within three court-days after such return made and delivered (a), in open court, shall proceed to examine and determine whether the cause of such commitment appearing upon the said return, be just and legal or not, and shall thereupon do what to justice shall appertain, either by delivering, bailing, or remanding the prisoner: And if any thing shall be otherwise wilfully done, or omitted to be done by any judge, justice, officer, or other person aforementioned, contrary to the true meaning hereof, that then such person so offending shall forfeit to the party grieved, his treble damages, &c."

(a) See 1 Sid. 78.

1 Keble, 303.

Sect. 72. But it is provided, par. 9. " That the above-recited clause shall extend only to the warrants and directions of the council-board, and to the commitments, restraints, and imprisonments of any person or persons, made, commanded or awarded, by the king's majesty, his heirs or successors, in their own person, or by the lords and others of the privy council, and every one of them."

As to the second particular, viz. Where bail is grantable by the court of King's Bench to a person imprisoned by either house of parliament.

Sect. 73. There can be no doubt but that the highest regard is to be paid to all the proceedings of either of those houses, and that wherever the contrary does not plainly and expressly appear, it shall be presumed that they act within their jurisdiction, and agreeably to the usages of parliament, and the rules of law and justice: And therefore, wherever it stands indifferent upon the return of a *habeas corpus*, whether a commitment by either of those houses were strictly legal or not, and the parliament be still sitting, I can find no precedent that the prisoner hath been bailed by the court of King's Bench. And it cannot, but be expected, that those houses would be apt to resent an attempt of this kind, which might seem to carry with it an implicit reflection on their honour, as unjustly depriving a subject of his liberty, and putting him under a necessity of demanding justice from another court, by unreasonably refusing to restore him to it; which surely shall never be intended, where their proceedings are capable of a more favourable construction. And, therefore, in Lord Shaftesbury's case, who, upon his *habeas corpus* in the King's Bench, was returned to have been committed by the House of Lords for a high contempt committed against that house, the court would not take notice of any exceptions against the form of the commitment, as that it was too general, and did not

Regina v. Paty, Id. Ray. 1105.
 Chauncy's case, 12 Rep. 83.
 Bushell's case, Id. Vaugh. 135.
 Id. Shaftesbury's case, 1 Mod. 144.
 Dr. Shebbeare's case, 1 Burrow, 460, and the cases cited in the following note.

See the case of Joy and Topham, 8 St. Tr. 5, 6.

not express the nature of the contempt, or in what place it was committed, &c. for that it shall be presumed, that it was such for which the lords might lawfully make such an order, and no other court shall prescribe to them in what form they ought to make it. But if it be demanded, in case a subject should be committed, by either of those houses, for a matter manifestly out of their jurisdiction, what remedy can he have? I answer, that it cannot well be imagined that the law, which favours nothing more than the liberty of the subject, should give us a remedy against commitments by the king himself, appearing to be illegal, and yet give us no manner of redress against a commitment by our fellow-subjects, equally appearing to be unwarranted. But as this is a case which, I am persuaded, will never happen, it seems needless over nicely to examine it. (1)

Skinner, 56.
163. 527.

Sect. 74. However it seems agreed, that a person committed for a contempt, by the order of either house of parliament, may be discharged by the court of King's Bench after a dissolution or prorogation of the parliament, whether he were committed during the sessions or afterwards, for that all the orders of parliament are determined by a dissolution or prorogation; and all matters before either house must be commenced a-new at the next parliament, except only in the case of a writ of error: and if the subject should be deprived of his liberty till the next parliament, which perhaps may not meet again in many years, no one could say when his imprisonment would end.

1 Keb. 871.
887, 888.
1 Sid. 245.
1 Levinz, 165.
1 Modern, 155.
157.

Shower, 100.

Sect. 75. But it is holden in Shower's Reports, that a lord committed by the House of Lords, on an impeachment of treason, and afterwards pardoned, cannot be discharged by the court of King's Bench, because the impeachment being in a superior court, the pardon must be pleaded there; and the commitment being by the lords, the King's Bench cannot take cognisance of it. Yet it seems to have been taken for granted, in the Lord Stafford's case, that the court of King's Bench may, in their discretion, bail a lord upon an impeachment of high treason, which in that case they refused to do, not as a matter out of their power, but as a thing which they were not bound to do, and improper

Raym. 381.
Skinner, 56.
163, 163.

(1) The doctrine contained in this section has been confirmed in several memorable instances. In Easter Term, 24 Geo. 2. the Honourable Alexander Murray was committed to Newgate, by the house of commons for a contempt of privilege. A *habeas corpus* issued; and Wright, Denison, and Foster, were clear that the court of King's Bench had no jurisdiction in the case; for that both houses of parliament, in concurrence with every court of record, even the lowest, has an exclusive right to commit for a contempt. Lord Holt also thought the right existed for contempts committed in the face of the house, 1 Wilson, 299.—In Easter Term, 3 Geo. 3. C. B. on Mr. Wilkes's case (vide *infra*, c. 16.), Pratt, C. J. and the whole court, declared they had no power to decide upon the privileges of parliament.—Lord Camden, in the case of Entick v. Carrington, Mich. 6 Geo. 3. 11 St. Tr. 317. says, the rights of that assembly (viz. house of commons) are original and self-created;

they are paramount to our jurisdiction, and above the reach of injunction, prohibition, or error. And in Easter Term, 11 Geo. 3. Brass Crosby, Esq. Lord Mayor of London, and a member of parliament, was brought to the Common Pleas, on a *habeas corpus* at common law, to be released from a commitment by virtue of the speaker's warrant for a contempt. De Grey, C. J. delivered the unanimous opinion of the court, that the houses of commons are the exclusive arbiters of their own peculiar privileges, 4 Inst. 47. Dyer, 59, that their power of committing is inherent from the very nature of their institution, 3 Jac. 1. c. 13. Ashby and White, 8 St. Tr. 90. Ld. Raymond, 938. that their adjudication is tantamount to a conviction, and their commitment equal to an execution; and that no court can discharge a prisoner committed in execution by another court, Cro. Car. 120. His Lordship was accordingly remanded, 2 Black. 755. 3 Wilson, 120.

proper on consideration of the whole circumstances. And though the reasons above cited from Shower's Reports seem proper to prove, that the court of King's Bench cannot discharge a prisoner from any impeachment in parliament whatsoever; yet they seem by no means to prove, that they cannot bail him. But it is observable, that it doth not clearly appear, from either of the above-mentioned reports, whether any parliament were sitting at the times of the motion for such discharge and bailment, or not; but it is certainly most likely to prevail in such a motion, when no parliament is sitting, nor likely soon to sit, and after the party hath been long in prison; because, in such a case, if he should not be bailed, he might be perpetually imprisoned for a crime, without any opportunity of making his defence.

As to the third particular, viz. Where bail is grantable by the King's Bench to a person committed by the court of Chancery.

See 76. Little is said in the books, except in the reign of King James the First, at the time when Sir Edward Coke was chief justice, when this matter was very much litigated, and occasioned great heats between the two courts, and several persons committed to the Fleet by the chancellor were bailed by the court of King's Bench, upon exceptions to the generality of the form of the commitments, as (a) not shewing the time of the commitment, or setting (b) forth only the command of the lord chancellor as the ground of the imprisonment, without mentioning any crime at all, or mentioning the crime in (c) general terms, as for a contempt to the court of Chancery, without shewing what the contempt was, or at what time committed: And one (d) Glanvil, who was generally committed by the command of the lord chancellor, without setting forth any cause of such command, seems to have been bailed upon examination of the merits of the decree, for disobeying whereof he was in truth committed; whereby it appeared that the decree related to a matter before adjudged at the common law, which was thought contrary to the purport of the (e) statutes of 27 Edw. 3. c. 1. and 4 Hen. 4. c. 23. But this proceeding being resented by the lord chancellor, the said Glanvil was afterwards recommitted by him for the same matter, and yet was afterwards, on another *habeas corpus*, bailed the second time by the court of King's Bench: but I have not met with any precedent of this kind of late years; and how far the long disuse of such like proceedings may have lessened the authority of the cases above-mentioned, may deserve to be considered. However, it cannot but be expected, that the superior courts will pay the highest regard to one another's proceedings, and be ready to presume, that they are agreeable to law, unless the contrary appear, or the case be very particular and extraordinary, which may perhaps reasonably induce them, in some circumstances, to make exceptions from those general rules which in common cases usually govern their discretion. But what case in particular may be said to be of so extraordinary a nature, it would be needless and presumptuous for me to endeavour to examine. But as to the case above-mentioned, which was formerly so much litigated, concerning the Chancery's giving relief against a judgment at law, since it seems

Carthew, 131,
133.
Salkeld, 503.
The Earl of
Castlemain was
committed by
the Commons,
1 W. and M.
for high treason,
and bailed by
King's Bench.
4 State Trials,
397.

(a) 1 Roll. 192.
218.

(b) Moor, 839.
1 Roll. 219.

(c) 1 Roll. 192.
218, 219.

(d) 1 Roll. 111.
219.

Moor, 839.
2 Bulst. 301.
C. Jac. 343.
like case.

3 Bulst. 115.
1 Roll. 277.

(e) Vide 1 Roll.
277.

3 Bulst. 115.

Dalison, 81.
3 Leonard, 18.

Vaughan, 130.
140. seems con-
trary.

Vide b. 1. c. 4.
s. 17.

1 Modern, 155.
Moor, 840.

Holt, 590.
3 Salk. 91.
284.
Vaughan, 157.
6 Modern, 73.
Raymond, 381.
2 Ld. Raym.
978.
12 Modern,
102. 155.
2 Hale, 112.

See Bushell's
case in Vaug-
han's Reports.

(a) See the pre-
cedent section,
and C. Jac. 219.
and Vaugh.
139, 140.

(b) C. Car. 579.

(c) 1 Sid. 144.
286. 330.

to be settled at this day, that the Chancery may, in some cases, give relief against the unequitable use of such a judgment, especially as to a point not relievable by law; whenever it stands indifferent whether the matter examined by Chancery, after a judgment at law, be of such a nature as is proper for relief in Chancery, or not, it is not probable that any other court of Westminster-hall will easily presume that it is not, when the chancellor, who is the proper judge, hath determined that it is: and agreeably hereto it hath been adjudged, that a commitment from Chancery for disobedience to a decree is good, without shewing what the decree was.

As to the fourth particular, viz. Where bail is grantable by the court of King's Bench to one committed by an inferior court of record.

Sect. 77. It seems, that this court, having the supreme controul of all inferior courts, may, in discretion, on consideration of the whole circumstances of any case whatsoever, bail any person who shall appear to have been unjustly or hardly deprived of his liberty by an inferior court. And therefore, wherever it shall clearly and expressly appear, that a person hath been committed by any such court, for a matter which either is in truth no crime at all, or if it be a crime, is not within the jurisdiction of such court, there can be no doubt but that it is a proper motion to the King's Bench to bail him. But in what other cases in particular one may hope for the like success in a motion of this kind, it seems difficult to determine (2); for that every such case depends upon its particular circumstances, which have great weight with the court in its determinations of this kind, in which it is in great measure left to its discretion. And therefore, though perhaps it may bail a man on a commitment by a mayor of a town, or justice of peace, or other inferior magistrate, for a contempt, without shewing the particular nature of it; yet it cannot be expected, that it will with the like readiness bail a man on such a general commitment by a court of higher (a) dignity, as a court of *oyer* and *terminer*, or any other court of Westminster-hall; to the honour of whose proceedings the greatest regard is always to be given; and on this ground chiefly, as I suppose, where a person on a *habeas corpus* was returned to have been committed by an order of the Exchequer, for not paying a fine of fifty pounds by the ecclesiastical commissioners imposed upon him, the court of King's Bench (b) refused to bail him, though it was not shewn wherefore the said fine was imposed. And as a great regard is always paid to the dignity of the court by which the party is committed, so is it likewise to the notoriety of the offence; and therefore, where a person convicted of buying and selling old money, before justices of *oyer* and *terminer*, was committed in execution for the fine, by an order of the court not strictly formal, yet the court of King's Bench refused (c) to bail him; for this reason chiefly, because he was in execution, and his commit-
ment

(2) In the case of an impressed apprentice, the King's Bench may issue a warrant to bring him up, without putting him to the circuit of a *habeas cor-*

pus. Lord Mansfield, 3 May, 1779. 2 Bult. 139, 140.

ment was defective only in point of form. Also where persons taken in execution for their fines to the king, set on them by a sessions of justices of peace, have not only brought their *habeas corpus*, but also their writ of error in the King's Bench, and assigned errors, yet the court has refused to bail them. - But I take it for granted, in those cases, which are but briefly reported, that appeared upon the whole record, that such fines were legally imposed. Also it seems, that the said court has sometimes been induced to deny persons committed by other courts by warrants not strictly formal, the benefit of bail, for the enormity, dangerous tendency, or obstinacy (a) of their offence, which if it had been attended with less aggravating circumstances might not have excluded them from it. Also the said court, in determining whether it be proper to bail a man committed by another court, usually considers all the other circumstances of the case, as the length (b) and hardship (c) of the imprisonment, and such like, in order to give such a determination upon the whole, as may be most agreeable to the honour and prerogative of the crown, and the liberty and safety of the subject.

Salkeld, 348.
5 Mod. 19, 20.
&c. March, 52,
53.

1 Sid. 288,
289. 320.

(a) 1 Bulst. 48
to 54.

1 Roll. 320,
337. 411.

(b) 1 Roll. 318,
337.

2 Bulst. 140.

(c) Latch. 18.

Sect. 78. But it seems to be agreed, that no one can in any case controvert the truth of the return to a *habeas corpus*, or plead or suggest any matter repugnant to it. Yet it hath been holden, that a man may confess and avoid such a return, by admitting the truth of the matters contained in it, and suggesting others not repugnant, which take off the effect of them. And upon this ground, where one Swallow, a citizen of London, was committed for refusing to accept the office of an alderman of the said city to which he had been elected, and the custom of the city justifying a commitment for such a refusal, and the election and refusal were set forth in the return to the *habeas corpus*, he filed a suggestion in the crown office, that he was an officer of the king's mint, and that all such officers were exempted from all city-offices, both by prescription and by the king's charter: and thereupon, the patent of the grant of his office, and also the patent of the exemption, being enrolled in the court, he was discharged.

1 Sid. 287, 288.

Sect. 79. Also the court will sometimes examine by affidavit the circumstances of a fact on which a prisoner brought before them by an *habeas corpus* hath been indicted, in order to inform themselves, on examination of the whole matter, whether it be reasonable to bail him or not. And agreeably hereto, where one Jackson, who had been indicted of piracy before the sessions of admiralty (d) on a malicious prosecution, brought his *habeas corpus* in the said court in order to be bailed, the court examined the whole circumstances of the fact by affidavits; upon which it appeared, that the prosecutor himself, if any one, was guilty, and carried on the present prosecution to screen himself; and thereupon the court, in consideration of the unreasonableness of the prosecution, and the uncertainty of the time when another sessions of admiralty might be holden, admitted the said Jackson to bail, and committed the prosecutor till he should find bail to answer the facts contained in the affidavits.

5 Mod. 523.

454. 455.

2 Jones, 222.

(d) In Trinity
Term, 4 Geo. 1.

As to the fifth particular, viz. Where bail is grantable by the court

court of King's Bench to one excluded by the above-mentioned statute of Westminster the first, from the common benefit of a replevin by the sheriff.

Sect. 80. It cannot be doubted, but that, notwithstanding neither (a) the judges of this nor of any other superior court of justice are strictly within the purview of that statute, yet (b) they will always, in their discretion, pay a due regard to the rules prescribed by it, and not admit a person to bail who is expressly declared by it to be irreplevisable, without some particular circumstance in his favour. And therefore it seems difficult to find an instance where persons attainted (c) of felony, or but convicted thereof by verdict general or (d) special, or notoriously (e) guilty of treason or manslaughter, &c. by their own confession or otherwise; have been admitted to the benefit of bail (3), without some special motive to induce the court to grant it: as where (f) a person taken by a *capias utlagatum*, on an appeal of felony, by the name of J. S. gentleman, pleads that his name is J. S. yeoman, and not gentleman, and so he is not the same person who was outlawed, in which case the court in discretion may bail him; for until the plea is determined, it appears not whether he were the person intended, or not: or where (g) a person outlawed alleges an error in the record, in which case also the court, *ex gratia*, may bail him, especially if the error be apparent: or where a man is convicted (h) of felony, upon evidence

(a) 2 Inst. 185, 186, 189.
 2 Hale, 189, 148.
 Summary, 104.
 Salkeld, 61.
 (b) 3 Bulst. 113.
 Roll. 169.
 Sup. s. 33.
 Latch. 12.
 S. P. C. 74, 75.
 Skinner, 683.
 5 Mod. 454, 455.
 (c) Kelynge, 90.
 (d) Dyer, 179.
 1 Bulst. 87, 88.
 (e) 1 Roll. 268.
 Raym. 361.
 3 Bulst. 113, 114.
 5 Mod. 455.
 Vide sup. sect. 33.
 1 Salkeld, 103.
 (f) 5 H. 7. 10.
 2 Inst. 188.
 Summary, 101.
 S. P. C. 74. (g) 19 H. 6. 2. S. P. C. 74. 2 Inst. 188. 1 Sid. 316. (h) Crom. 151.

(3) The court of King's Bench has power to bail in all cases whatsoever, Lord Mansfield, Cowper, 331; and the judges will in general exercise it in favour of a prisoner in every case not capital; in capital cases, where there is any circumstance to induce the court to suppose he may be innocent; and in every case where the charge is not alleged with sufficient certainty. 1 Bac. Abr. 222. notes. The court, therefore, will bail a person committed for high treason generally, if four Terms have elapsed and no prosecution commenced. Strange, 5. Or for treason done upon the high seas. Holt, 83. So also a man and his wife committed for felony, if the assizes have intervened and they have endeavoured to bring on the trial. Andr. 64. So also a person convicted upon an appeal of murder, subject to an argument on a plea in abatement, (three years having elapsed without either side bringing it on) provided the appellant will actually consent. Strange, 403. So also a person who was convicted of keeping an alehouse, &c. he having brought a *certiorari*. Strange, 531. So a person convicted on an indictment of murder, and afterwards in custody on an appeal, unless the judge certifies a dissatisfaction at the verdict. Strange, 854. So also a person appealed of murder who has not been indicted, provided there is any delay on the part of the appellant. Strange, 856, 859. So also a person committed for manslaughter, if it appear to be no more upon the depositions before the coroner. Strange, 911, 1242. So also in murder and pardon pleaded and allowed, the defendant shall not give even bail to answer the appeal though the year is beyond sea, for this

is not within 3 Hen. 7. Strange, 1203. So also in rape both principal and accessory will be bailed, if it appear they do not mean to abscond. 4 Burr. 2179. And the court is bound *ex debito justitie* to bail an accomplice intitled to the king's pardon. Cowper, 334. And although it be not necessary to state in a warrant of commitment for felony that the act was done *feloniously*, yet unless it sufficiently appear to the court that a felony has been committed, they are bound to admit the prisoners to bail, Rex v. Judd, 2 Term Rep. 255.

But this court will not look into the coroner's depositions to bail a gaoler committed for murder. Strange, 851. Nor will they bail an appellant for murder unless circumstances of delay appear on the part of the appellant. Strange, 854. Nor a person charged with a highway robbery, if the prosecutor attend and swear he is the man, notwithstanding a number of affidavits are produced to the contrary. Strange, 1138. Nor for assisting in the running of contraband goods, &c. Bunb. 143. Nor will the court order, at the instance of the prisoner, a medical man to attend the person wounded by the prisoner, in order to state his situation for the purpose of bail. Strange, 547. Nor will they bail after an indictment of murder upon an affidavit of the fact. 1 Salkeld, 104. Skinner, 683. See also Rex v. Homer, Caldecot, 295. that upon application to bail for felony, the court requests to see the depositions; and will thence, if they see just cause, without regarding the regularity or irregularity of the commitment, discharge, bail, or detain the prisoner.

dence by which it plainly appears to the court that he is not guilty of it; in which case even the justices of gaol-delivery may bail him: or where (a) it appears to the court that the prosecutor of an indictment, or the plaintiff in an appeal, hath unreasonably delayed his prosecution; as where two *nihilis* are returned upon two writs of *scire facias* awarded against a plaintiff in an appeal removed by *certiorari* into the King's Bench, and the prisoner hath lain a long time under confinement: or where (b) the defendant in an appeal hath pleaded an excommunication in disability of the plaintiff; in which case it is apparent that the plaintiff cannot proceed at present; and if the defendant should be kept in prison till the plaintiff be absolved, he might be a prisoner for life: or where (c) it appears to the court, that the defendant may be in danger of losing his life, either by famine (4) or a dangerous distemper, &c. if he continue longer in prison.

(a) 5 Modern, 454, 455.
1 Sid. 78.
1 Bulst. 85.
Palmer, 558, 559.
1 Kettle, 305, 306.
48 Ed. 3. 22.
(b) 3 Ass. 12.
13 Ed. 4. 8.
B. Munip. 42, 73.
S. P. C. 72.
(c) Latch, 12.
Cro. Jac. 506.
Co. Lit. 289.

As to the SECOND POINT, viz. In what cases bail is grantable by the other courts of Westminster-hall; I shall consider,

First, How far it is grantable by such courts to persons committed for causes under the degree of treason or felony.

Secondly, How far it is grantable to persons committed for treason or felony.

As to the FIRST POINT, viz. How far bail is grantable by the said courts to persons committed for causes under the degree of treason or felony.

Sect. 81. It seems (d) that the courts of Common Pleas and Exchequer, at any time during term, and the court of Chancery, either in term or vacation, may award a *habeas corpus* by the common law, for any person committed for any such cause, and thereupon discharge him, if it shall clearly appear by the return, that the commitment was against law (as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished), or bail him, if it shall be doubtful whether the commitment were legal or not, &c. However, it is certain at this day, that by force of the *habeas corpus* act, par. 3 and 10. set forth more at large sect. 17 and 22. any of the said courts, in term-time, and any judge of either bench, or baron of the Exchequer, being of the degree of the coif, in the vacation, may award a *habeas corpus* for any prisoner whatsoever who is bailable by the intent of that act, and thereupon bail him.

(d) 2 Inst. 53.
53. 615.
4 Inst. 290.
2 Hale, 147.
Vaughan, 154, 155, 156, 157.
2 Andr. 197.
Dalison, 81.
3 Leonard, 18.
2 Jones, 13, 14, 17.
2 Modern, 198, 306.

As to the SECOND POINT, viz. How far bail is grantable by the said courts to persons committed for treason or felony.

Sect. 82. It is observable, that the above-mentioned clauses of the said *habeas corpus* act extend not to persons committed for treason or felony, plainly and specially expressed in the warrant of commitment. Neither do I find any printed case, wherein persons committed for such crimes have been bailed either by

See Vaughan, 156, 157.
2 Jones, 14.
the

(1) The fact of indisposition, upon which the court will bail, must be a present indisposition, arising from the confinement, and not from any

constitutional or family distemper, or from the act of the prisoner. 10 Modern, 334. Vide also Strange, 49. 543. Holt, 85. Cowper, 338.

Register, 271.

the courts of Common Pleas or Exchequer. However it is certain, that in some cases persons committed for felony are bailable by the court of Chancery. But our law-books being generally silent in relation to these matters, I shall refer the reader for the more accurate knowledge of them to observation and experience.

2 Hale, 126, 127.

As to the SEVENTH GENERAL POINT of this chapter, viz. In what form bail is to be taken.

(a) 1 Bulst. 45.
(b) 2 Jon. 210.
(c) Levinz, 106.
Con.
1 Sid. 211.
(d) 4 Inst. 178.
1 Bulst. 45.
21 Il. 7. 20.
Con. 1 Sid. 210.
Vide 2 Jo. 222.
(e) Sum. 97.
Crom. 335.
2 Inst. 178.
Dalt. c. 127.
seems contrary.
(f) 1 Bulst. 45.
(g) 4 Inst. 178.
S. P. C. 65.
F. Mainp 13.
21 Il. 7. 20.
Summary, 97.
2 Hale, 125.
Con. F. Mainp.
12.
1 Black. 648.
Strange, 911.

Sect. 83. It seems to be the practice of the court of King's Bench in admitting a person to bail, who is actually (a) present in court, upon an indictment or appeal (b) of felony, or other crime, punishable with loss (c) of member, to take (d) a several recognizance to the king in a certain sum from each of the bail, that the prisoner shall appear at a certain day, &c. and also, that the bail shall be liable for the default of such appearance, &c. body for body. And it seems (e) to be left to the discretion of justices of peace, in admitting any person to bail for felony, to take the recognizance either in a certain sum, or else body for body. But (f) where a person is bailed by the court of King's Bench, before the return of a *capias* awarded against him for felony, or (as it seems to be implied in the book cited in the margin that he may be) in any court for a crime of an inferior nature, it seems, that the recognizance ought to be only in a certain sum of money, and not body for body. However it is certain (g) at this day, that persons bound body for body, are not liable, on the forfeiture of the recognizance, to such punishment to which the principal is to be adjudged, if found guilty, but only to be fined, &c.

As to the EIGHTH GENERAL POINT of this chapter, viz. What shall forfeit the recognizance.

(h) Dalt. c. 127.
S. P. C. 77.
4 Inst. 178.

(i) S. P. C. 77.

(k) 2 Inst. 150.
4 Inst. 178.
2 Hale, 126.

(l) Dalt. c. 127.
Vide 4 Bur. 75.
N. B. A feme covert cannot be bound by recognizance, because it cannot be executed.
Styles, 309.

Sect. 84. If on a bailment for felony, the usual (h) form, "*ad standum recto de feloniam prædictam et ad respondendum domino regi*," be made use of, and at the trial the party stand obstinately mute, it may reasonably be argued, that in strictness the recognizance is forfeited, for (i) that the expressions above-mentioned seem to import at least thus much, that the prisoner shall make some answer; and at the common law, before the statute (k) of Marlebridge, c. 28. if a person under bail had insisted on his privilege as a clerk, and refused to answer to the crime alleged against him, his sureties were to be amerced; and though the said statute has in that case excused the bail, yet an obstinate refusal to answer in other cases, may perhaps remain as it was at the common law. Mr. Dalton (l) indeed seems to be of another opinion, because the words above-mentioned are always used of course; but it seems strange, that words should be looked on as idle and insignificant because they are most usual and proper. However, if late practice and experience have been agreeable to the above-mentioned opinion of Dalton, as I apprehend they have, they will certainly be of great force to maintain it; and indeed it must be confessed, that if a man's bail, who are his gaolers of his own choosing, do as effectually secure his appearance, and put him as much under the power of the court as if he had

had been in the custody of the proper officer, they seem to have answered the end of the law, and to have done all that can be reasonably required of them: But howsoever the law may stand in relation to this case, it is certain, that if persons be bound by recognizance, that J. S. shall appear in the King's Bench the first day of such a term, to answer to such an information against him, and not depart till he shall be discharged by the court, and afterwards the attorney-general enter a *nolle prosequi* as to that information, and exhibit another, on which the defendant is convicted, and refuses to appear in court after personal notice, the recognizance is forfeited; for being express that the party shall not depart till he be discharged by the court, it cannot be satisfied unless he be forthcoming, and ready to answer to any other information exhibited against him while he continues not discharged, as much as to that which he was particularly bound to answer to. But in such case it seems, that the recognizance shall not be forfeited by the party's not appearing in court the first day of every term, after he hath pleaded to the information, as it may be before he hath pleaded.

Queen v. Red-
path, Easter,
11 Ann.
10 Mod. 158.
Fort. 358.

1 Burrow, 10.
54 398. 431.
3 Burrow, 1461.
4 Burrow,
2119. 2126.

† Sect. 85. But it is recited by 4 Gro. 3. c. 10. that many recognizances have been estreated into the court of Exchequer against persons for not appearing as parties or witnesses, or for not prosecuting indictments, or for otherwise not performing the conditions of such recognizances, many of which neglects have happened from the inattention of ignorant people; whereupon it is enacted, "That it shall be lawful for the barons of the Exchequer, upon affidavit and petition to be presented to them, by "or on the behalf of the person or persons imprisoned or liable "to be imprisoned on the forfeiture of any such recognizances, "to discharge such person or persons, by order from the said "barons, without any *quietus* (a) to be sued out for that purpose, "for which order no more than one pound and one shilling shall "be taken by the officer appointed to give out the same.—Pro- "vided that no discharge shall be given on such petition where "any debt is due to the crown, other than by the recognizances "so prayed to be discharged; nor in any cases of defrauding "his majesty's revenue by contraband trade, or assaulting the "officers of the customs or excise in the execution of their duty, "or any person or persons lawfully assisting them therein." (5)

(a) For the form
and method of
obtaining a
quietus, vide
Cro. Cir. Com.
61, 62.

CHAP.

(5) On a recognizance estreated for not being punctually complied with, if the party take his trial the next session, he may compound for a very small matter in the court of Exchequer, because the effect, though not the exact form, of the recognizance is complied with. 10 Modern, 278.—And if the money be levied, the court will order the prosecutor's costs to be paid, and the surplus returned. 4 Burrow, 2118.

Recognizances in cases of felony are to be certified to the general gaol-delivery. 1 and 2 Phil. & Mary, c. 13.—If a defendant indicted for perjury be acquitted, the bail shall be discharged from their recognizance, on motion, though the acquittal is not entered on record, for the acquittal appears on the *postea*. 1 Wilson, 315.—Neither the defendant nor

his bail can be called upon their recognizance without notice, except on the day on which the defendant is bound to appear. B. R. II. 237. And if the defendant do not appear upon that day, the court will not discharge the recognizance, although the attorney-general consent to it, but they will respite it till the next term. 11 Modern, 200. For the judges of oyer and terminer are the proper judges whether recognizances ought to be estreated or spared. 10 Modern, 278.—On conviction, if the offender be pardoned on condition of transportation, yet he may be surrendered in discharge of bail, *Strange*, 1217, by writ of *habeas corpus* on the crown side. But if he be actually on board the transport, the court will not issue the writ. 4 Burrow, 2034.

CHAP. XVI.

OF COMMITMENTS.

AND now I am to consider in what cases, and in what manner, offenders are to be committed.

For the better understanding whereof I shall examine,

1. What kind of offenders are to be committed.
2. By whom.
3. To what prison.
4. What is to be done previous to their commitment.
5. What ought to be the form of it.
6. At whose charges they are to be sent to prison.
7. To what court the commitment to be certified.
8. By what means the party may be discharged from such commitment.

As to the **FIRST POINT**, viz. What kind of offenders are to be committed.

Sect. 1. There is no doubt but that persons apprehended for offences which are not bailable, and also all persons who neglect to offer bail for offences which are bailable, must be committed. (1)

Sect. 2. And it is said, that wheresoever a justice of peace is impowered by any statute to bind a person over, or to cause him to do a certain thing, and such person being in his presence shall refuse to be bound, or to do such thing, the justice may commit him to the gaol, to remain there till he shall comply.

As to the **SECOND POINT**, viz. By whom such persons are to be committed.

Sect. 3. It seems to be agreed by all the old (a) books, that wheresoever a constable, or private person, may justify the arresting another for a felony or treason, he may also justify the sending or bringing him to THE COMMON GAOL; and that every private person has as much authority in cases of this kind as the sheriff or any other officer, and may justify such imprisonment by his (b) own authority, but not by the command of another. But (c) inasmuch as it is certain, that a person lawfully making such an arrest may justify bringing the party to the constable, in order to be carried by him before a justice of peace, inasmuch

(a) 10 H. 4. 7.
7 Ed. 4. 20.
3 Ed. 4. 26. 27.
30 Ed. 4. 6.
10 Ed. 4. 17,
18.
5 H. 7. 4. 5.
2 H. 7. 3.
11 Ed. 4. 4.
(b) 5 H. 7. 4. 5.
2 Hale, 81.
F. F. Impria. 8.
(c) 9 Ed. 4. 26, 27. 10 Ed. 4. 17. Summary, 91. 112. 2 Hale, 120. 1 Burn's Just. 369.

(1) A prisoner in the custody of the king's messenger, on a warrant from the secretary of state, who is brought into the king's bench by *habeas corpus* to be bailed, but has not his bail ready, cannot be committed to the same custody he came in; he must

be committed to the custody of the marshal, which will prevent the necessity of suing out a new *habeas corpus*, as he may be brought up from the prison of the court, by a rule of court, whenever he should be prepared to give bail. 1 Barrow, 460.

as the statutes of 1 and 2 Ph. and Mary, c. 13. and 2 and 3 Ph. and Mary, c. 10. which direct in what manner persons brought before a justice of peace for felony shall be examined by him in order to their being committed or bailed, seem clearly to suppose, that all such persons are to be brought before such justice for such purpose; and inasmuch as the statute of 31 Car. 2. commonly called the Habeas Corpus Act, seems to suppose, that all persons who are committed to prison are there detained by virtue of some warrant in writing, which seems to be intended of a commitment by some magistrate, and the constant tenor of the late books, practice, and opinions, are agreeable hereto: it is certainly most advisable at this day, for any private person who arrests another for felony, to cause him to be brought, as soon as conveniently he may, before some justice of peace, that he may be committed or bailed by him. Dalt. c. 118.

Sect. 4. But it is certain, that the privy council (2) or any one or two of them, or a secretary of state, (3) may lawfully commit persons for treason, and for other offences against the state, as in all ages (4) they have done.

As

(2) The two cases in Leonard (vide infra, Note 4) presuppose some power for this purpose, without saying what, and the case in Anderson plainly recognizes such a power in high treason. But as to the jurisdiction of privy counsellors in other offences, it does not appear to have been either claimed or exercised. The decisions, however, in the cases of the Queen v. Derby, Fortes. 141. (infra 4. 8.) and Rex v. Earbury, 8 Modern, 177. infra, 11. (even though it should be admitted that the practice which has subsisted since the revolution had been erroneous in its commencement), are established; and the court has no right to overturn them. Lord Camden, 11 State Trials, 323.

(3) In Entick v. Carrington, C. B. Mich. 6 Geo. 3. upon a special verdict, respecting the validity of a secretary of state's warrant to seize persons and papers in the case of libels, Lord Camden inquired very critically into the source of this power to commit for libels and other state crimes.—By the common law, says his Lordship, neither secretaries of state, nor privy counsellors, are conservators of the peace, nor has any statute ever conferred any such jurisdiction upon them. The office neither implies nor requires the authority of a magistrate; nor is it consistent with the wisdom or analogy of our law to give a power to commit without a power to examine upon oath, which to this day the secretary of state doth not presume to exercise. (Vide 5 Modern, 78.) The king is indeed the principal conservator of the realm; and the secretary appears by some means to have obtained this transfer of the royal authority to himself, but the common law of England knows of no such committing magistrate. 11 St. Tr. 317. 319.

(4) 1. Howell was committed 28th, and Hell-yard, 30 Eliz. by secretary Walsingham, privy counsellor, and it was determined that where the commitment is not by the whole council, the cause must be expressed in the warrant. 1 Leonard, 71. 2 Leonard, 175. Sed vide, 31 Car. 2. c. 2. and Lord Raym. 65.—2. In 34 Eliz. the judges remonstrated against the exercise of this power, and

declare that all prisoners may be discharged unless committed by the queen's command, or by her whole council, or by one or two of them for high treason. 1 And. 297.—3. Melvin was committed 4 Car. 1. by secretary Conway, for suspicion of high treason, but the Court thought the cause of the suspicion should have been expressed. Palm. 538.—4. Crofton was committed by the council, 14 Car. 2. for high treason generally. Vaughan, 112. 1 Sid. 78. 1 Keble, 305.—5. Fitzpatrick was committed by privy council, 7 Will. 3. for high treason in aiding an escape, and bailed for neglect of prosecution. 1 Salk. 103.—6. Yaxley was committed, 5 Will. and Mary, by the Earl of Nottingham, secretary of state, for refusing to declare if he was a jesuit. Carth. 291. Skinner, 369.—7. Kendal and Roe were committed, 7 Will. 3. by secretary Trumbal, for high treason in assisting the escape of Montgomery, and by Holt, C. J. held good, but the prisoners were bailed. 4 State Trials, 539. 5 Modern, 78. Skinner, 596. Holt, 141. Lord Raym. 61. 65. Comb. 343. 12 Modern, 82. 1 Salkeld, 347.—8. Derby was committed, 10 Anne, for publishing a libel (quere for felony, 11 State Trials, 311) called The Observer, and the Court held the warrant good and legal. Fortes. 140. 11 State Trials, 309.—9. Sir W. Windham was committed, 4 Geo. 1. by secretary Stanhope, for high treason, and by Parker, C. J. held good. Strange, 8. 3 Viner, 516.—10. Lord Scarsdale and Duplin, and Mr. Harvey of Comb, were committed, 2 Geo. 1, by Lord Townsend, secretary of state, for treasonable practices, and admitted to bail. 3 Viner, 534.—11. Doctor Earbury was arrested and committed by warrant from the secretary of state, for being the author of a seditious libel, and his papers seized, and he was continued on his recognizance, 7 Geo. 2. 8 Mod. 177. 11 State Trials, 309.—12. Florence Henney was committed, 31 Geo. 2. by the Earl of Holderness, secretary of state, for high treason in adhering to the king's enemies. 1 Barr. 642.—13. Doctor Shebbear was committed, 31 Geo. 2. on two warrants from the secretary of

As to the THIRD POINT, viz. To what prison such offenders are to be committed, I shall observe,

FIRST, That the prison ought to be in the realm of England.

SECONDLY, That regularly it ought to be a common prison.

Sect. 5. As to the first of these particulars, it is enacted by 31 Car. 2. c. 12. "That no subject of this realm, being an inhabitant or resiant of this kingdom of England, dominion of Wales, or town of Berwick upon Tweed, shall or may be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or into parts, garrisons, islands, or places beyond the seas, which then were, or at any time hereafter should be, within or without the dominions of his majesty, his heirs or successors; and that every such imprisonment is by the said statute enacted and adjudged to be illegal; and that every subject so imprisoned shall have an action of false imprisonment, &c. and recover treble costs, and no less damages than five hundred pounds against the person making such warrant, who shall also incur a *præmunire*."

Sect. 6. As to the second of the above-mentioned particulars, it is enacted by 14 Edw. 3. c. 10. as followeth: "In the right of the gaols which were wont to be in ward of the sheriffs, and annexed to their bailiwicks; it is assented and recorded, that they shall be rejoined to the sheriffs, and the sheriffs shall have the custody of the same gaols, as before this time they were wont to have; and they shall put in such under-keepers for whom they will answer." And this is confirmed by 19 Hen. 7. c. 10.

Vide 11 and 12 Will. 3. c. 19. sect. 3. made perpetual by 6 Geo. 1. c. 19. to enable justices of peace to build and repair gaols in their respective counties, where the same clause is enacted.

(a) See 1 And. 343. C. Eliz. 829, 830.

9 Co. 119. Salkeld, 343. Forres, 31. 3 Ld. Raym. 767. 879.

Also it is recited by 5 Hen. 4. c. 10. "That divers constables of castles within the realm, being assigned justices of peace by the king's commission, had, by colour of such commission, used to take people to whom they bore evil will, and imprison them within the said castles, till they had made fine and ransom with the said constables for their deliverance." And thereupon it is enacted, "That none be imprisoned by any justice of the peace but only in the common gaol; saving to lords and others which have gaols their franchise in this case."

Sect. 7. And it (a) seems that the king's grant since this statute to private persons to have the custody of prisoners committed by justices of peace, is void. And it is said that none can claim a prison as a franchise, unless he have also a gaol-delivery.

† And whereas vagrants and other criminals, offenders, and persons charged with small offences, are for such offences, or for want

state; for a libel. 1 Burr. 460.—14. John Wilkes, Esq. was committed, 3 Geo. 3, by warrant from the Earl of Halifax, secretary of state, for a libel, but being a member of parliament, he was protected by his privilege, and on that account discharged. 2 Wilson, 150. 11 State Trials, 302.—15. Sayer was apprehended, 8 Geo. 3, by war-

rant from the Earl of Rochford, secretary of state, for high treason, and bailed by Lord Mansfield. Black. 1165. Vide the case of Entick v. Carrington, upon a special verdict, for apprehending the plaintiff under the warrant of a secretary of state, for a libel, 11 State Trials, 327.

want of sureties, to be committed to the county gaol, it being adjudged by law that the justices of the peace cannot commit them to any other prison for safe custody, which by experience hath been found to be very prejudicial and expensive, it is therefore enacted by 6 Geo. 1. c. 19. "That it shall and may be lawful to and for the justices of the peace within their respective jurisdictions to commit such vagrants and other criminals, offenders, person and persons, either to the common gaol or house of correction, as they in their judgment shall think proper."

Sect. 8. It seems to be (a) agreed, that if a person be arrested in one county, for a crime done in it, and fly into another, and be retaken there, he may be brought before a justice of the county where the offence was done, and be committed by him to the gaol of such county. But it seems to be the stronger (b) opinion, that if one who hath committed an offence in one county, fly into another before he be taken, and be pursued and arrested in such county, he ought to be brought before a justice of the county, where he is taken, and be committed by him to the common gaol of the same county (c), whether it lie in such county or another; (d) unless there be some special reason to the contrary, as an apparent danger that the party may be rescued from such prison by rebels, &c. And it seems to be laid down as a rule, by some books, (e) that any offender may be committed to the gaol next to the place where he was taken, whether it lie in the same county or not.

(a) Summary, 93.
11 Hale, 580.
2 Hale, 94, 115.
Dalton, c. 118.
Crom. 172, 173.
(b) Dalton, c. 118.
Crompton, 72.
Summary, 92.
93.
11 E. 4. 1, 5.
13 E. 4. 8, 9.
Plowden, 37.
Keilwood, 45.
Con.
2 Bulst. 264.
31 E. 4. 7.
(c) Keilw. 45.
31 E. 4. 5.
(d) 11 Ed. 4.
22 Edw. 4. 34.

† By 23 Geo. 2. c. 26. s. 11. and 24 Geo. 2. c. 55. If an offender, against whom a warrant shall be issued by any justice of peace of one county, shall escape into another, he may be apprehended (by virtue of the warrant being indorsed by any justice of the county into which he shall so escape), and bailed in the county in which he is apprehended, if the offence be bailable; if not, or he cannot find bail, he shall be carried back into the county from which the warrant was granted, and be there committed or bailed.

Sect. 9. It is (f) said, that if a constable bring a felon to gaol, and the gaoler refuse to receive him, the town where he is constable ought to keep him till the next gaol delivery. But (g) in other cases it seems, that regularly no one can justify the detaining a prisoner in custody out of the common gaol, unless there be some particular reason for so doing; as if the party be so dangerously (h) sick that it would apparently hazard his life to send him to the gaol, (i) or there be evident danger of a rescue from rebels, &c. Yet constant practice seems to authorize a commitment to a messenger; and it is (k) said, that it shall be intended to have been made in order for the carrying of the party to gaol.

(f) Sum. 114.
10 H. 4. 7.
F. Escape, 8.
Dalton, c. 118.
B. F. Imprison. 25.
(g) 2 Hale, 123.
20 Ed. 4. 6.
B. F. Imprison. 21, 37.
11 Ed. 4. 7.
2 Ed. 4. 8.
(h) 2 Hale, 96.
119, 120.
(i) 2 Hale, 81.
11 Ed. 4. 4, 5.
(k) Salkeld, 347. 5 Modern, 78 to 85. Skinner, 599.

Sect. 10. As prisoners ought to be committed at first to the proper prison, so ought they not to be removed from thence, except

Prisoners not to be removed but by habeas corpus, &c.

except in some special cases. And to this purpose it is enacted by 31 Car. 2. c. 2. s. 9. "That if any subject of this realm shall be committed to any prison, or in custody of any officer or officers whatsoever, for any criminal, or supposed criminal matter; that the said person shall not be removed from the said prison and custody, into the custody of any other officer or officers, unless it be by *habeas corpus*, or some other legal writ; or where the prisoner is delivered to the constable, or other inferior officer, to carry such prisoner to some common gaol; or where any person is sent by order of any judge of assize, or justice of the peace, to any common workhouse, or house of correction; or where the prisoner is removed from one prison or place to another, within the same county, or ordered to a trial, or discharged by due course of law; or in case of sudden fire, or infection, or other necessity; upon pain that he who makes out, signs or countersigns, or obeys or executes such warrant, shall forfeit to the party grieved one hundred pounds for the first offence, two hundred pounds for the second, &c."

Magistrates must take examinations in writing, &c.

As to the FOURTH POINT, viz. What ought to be done previous to the commitment of such offenders.

Sect. 11. It is enacted by 2 and 3 Ph. and Mary, c. 10. "That every justice or justices before whom any person shall be brought for manslaughter or felony, or for suspicion thereof, before he or they shall commit or send such prisoner to ward, shall take the examination of such prisoner, and information of those that bring him, of the fact and circumstances thereof; and the same, or as much thereof as shall be material to prove the felony, shall put in writing within two days after the said examination, and the same shall certify in such manner and form, and at such time, as they should and ought to do, if such prisoner, so committed or sent to ward, had been bailed, or let to mainprise; upon such pain as in 1 and 2 Ph. and Mary, c. 13. is limited and appointed for not taking or not certifying such examinations, &c."

Viz. fine at the discretion of the justices of gaol delivery.

And it is further enacted, "That the said justices shall have authority to bind all such by recognizance or obligation as do declare any thing material to prove the said manslaughter or felony, to appear at the next general gaol delivery to be holden within the county, city, or town corporate, where the trial of the said manslaughter or felony shall be, then and there to give evidence against the party; and that the said justices shall certify the said bonds taken before them, in like manner as they ought to certify the bonds mentioned in the said former act, &c."

C. ELL. 839, 830.
1 Hale, 586.
2 Hale, 180, 171.

Sect. 12. It seems that a justice of peace ought not to detain a prisoner by virtue of this statute, in order to examine him, any longer than is necessary for such purpose, for which it is said that the space of three days is a reasonable time.

As to the FIFTH POINT, viz. What ought to be the form of a commitment, the following rules are to be observed.

Sect.

Sect. 13. FIRST, It must be in writing, under the hand and seal of the person by whom it is made, and expressing his office, or authority, and the time and place at which it is made, and must be directed to the gaoler, or the keeper of the prison.

Summary, 94. 5 Burrow, 2686.

Sect. 14. SECONDLY, It may be made either in the name of the king, and only *tested* by the person who makes it, or it may be made by such person in his own name.

Sect. 15. THIRDLY, It may command the gaoler to keep the party in safe and close custody; (a) for if every gaoler be bound (b) by the law to keep his prisoner in such custody, surely it can be no fault in a *mittimus* to command him so to do.

put him in mind of his duty and punishment in case of an escape. (b) 8 Co. 100. 9 Co. 87. 5 Mod. 21. Dalton, c. 118.

Sect. 16. FOURTHLY, It ought to set forth the crime alleged against the party with convenient (c) certainty, whether the commitment be by the privy (d) council, or any other authority; otherwise the officer (e) is not punishable, by reason of such *mittimus*, for suffering the party to escape; and the court before whom he is removed by *habeas corpus*, ought to discharge or bail him. And this doth not only hold where (f) no cause at all is expressed in the commitment, but also where it is so loosely set forth, that the court cannot adjudge whether it were a reasonable ground of imprisonment; as (g) where one was committed for manifold contumacy to the high commission court, or for (h) refusing to answer before them to certain articles, or (i) for insolent behaviour and words spoken at the council table, &c. And it is holden by Sir (k) Edward Coke, in his Second Institute, that a commitment for high treason, or felony in general, without shewing the species of the offence, is not good: yet in (l) another part of the same book, such general commitments seem to be allowed by him to be good; and there are precedents of commitments for felony in general, in (m) good authors. And (n) it hath been resolved, that commitments for high treason in general, are good.

(a) 1 Roll. 245. (b) 1 Roll. 220. 245. (c) C. Car. 133. 579. 2 Bolst. 139, 140. (d) 2 Inst. 591. 5 Modern, 85. 1 Barn. 155. (e) 2 Inst. 52. (f) 1 Hale, 595. 609. 2 Hale, 123. Crompt. 233. Dalt. c. 125. But although it be not necessary to state, on a warrant of commitment on a charge of felony, that the act was done feloniously, yet unless it sufficiently appear to the court that a felony has been committed, they are bound to bail the defendant. Rex v. Judd, 2 Term Rep. 255. (g) 1 Sid. 78. 1 And. 298. 1 Keble, 305. Palm. 558. Strange, 2. 10 Modern, 234. 1 Hale, 595. 2 Hale, 123. confirmed by Pratt, C. J. in Wilkes' case, 2 Wilson, 158.

Sect. 17. FIFTHLY, It is safe to set forth, that the party is charged upon oath; but this is not necessary; for it hath been resolved, (5) that a commitment for treason, or for suspicion of it, without setting forth any particular accusation, or ground of the suspicion, is good.

Sect.

(5) This resolution was in the case of Sir W. Windham, 3 Geo. 1. who was committed by the secretary of state for high treason generally. Stra. 2. and 3 Viner's Abr. 515. at large. It is confirmed by Pratt, C. J. 3 Geo. 3. in Mr. Wilkes' case, committed by a similar warrant for a libel. 2 Wilson, 158. 11 State Trials, 304, and Mr.

Justice Foster says, in cases wherein the justice of the peace hath jurisdiction, the legality of his warrant will never depend on the truth of the information whereon it is grounded. Curtis's case, 136. See also Dalton, c. 125. Crompt. 233. 2 Inst. 52. Palmer, 558. 1 Selkeld, 347. 5 Modern, 78. 10 Modern, 334. 1 Hale, 582.

(a) 2 Inst. 52.

591.

Summary, 94.

Crompt. 233.

Dalt. c. 124.

(b) 1 Lev. 230.

Com. C. Cur.

558.

(c) 6 Mod. 73,

74.

(d) 1 Hale, 584.

195. 609.

2 Inst. 52. 591.

1 Roll. 220.

1 Lev. 230. Cro. Car. 579. con. 3 Bulst. 48, 49. 1 Roll. 410. Vide also 3 Keble, 531. 2 Ld. Ray.

851. 978. 3 Salkeld, 91. Holt, 590. Carth. 152. 291. Salkeld, 48. 348. Ld. Raym. 99. 1453.

300. 213. 323. Comber. 390. 3 Com. Dig. 496. Strange, 1005. 917. 5 Modern, 308. 1 Bac. Abr.

382. Set. & Rem. 236. 2 Black. Rep. 805. Sayer, 44.--N. B. Commitments grounded upon acts

of parliament must pursue the conclusions which the statutes prescribe:—And where a man is committed

as a criminal, the conclusion must be, "until he be delivered by due course of law;" if he be committed

for contumacy, it should be, "until he comply."

Sect. 18. SIXTHLY, Every such *mittimus* ought to have a lawful conclusion, (a) *viz.* That the party be safely kept till he be delivered by law, or by order of law, or by due course of law:— Or that he be kept till further (b) order (which shall be intended of the order of law), or to the like effect. And if the party be committed only for want of bail, it seems (c) to be a good conclusion of the commitment, that he be kept till he find bail. But a commitment (d) till the person who makes it shall take further order, seems not to be good. And it seems, that the party committed by such, or any other irregular *mittimus*, may be bailed.

As to the **SIXTH POINT, viz.** At whose charge offenders are to be sent to prison.

Sect. 19. It is enacted by 3 Jac. 1. c. 10. "That every person and persons, that shall be committed to the common or usual gaol within any county or liberty within this realm, by any justice or justices of the peace, for any offence or misdemeanour, having means or ability thereunto, shall bear their own reasonable charges, for so conveying or sending them to the said gaol, and the charges also of such as shall be appointed to guard them to such gaol, and shall so guard them thither. And if any such person or persons so to be committed, shall refuse at the time of their commitment and sending to the said gaol, to defray the said charges, or shall not then pay or bear the same, then such justice or justices of the peace shall and may, by writing under his or their hand and seal, or hands and seals, give warrant to the constable or constables of the hundred, or constable or tythingman of the tything or township where such person or persons shall be dwelling and inhabit, or from whence he or they shall be committed, or where he or they shall have any goods within the county or liberty, to sell such, and so much of the goods and chattels of the said persons, as by the discretion of the said justice or justices of the peace shall satisfy and pay the charges of such his or their conveying or sending to the said gaol; the appraisement to be made by four of the honest inhabitants of the parish or tything where such goods or chattels shall remain and be; and the overplus of the money which shall be made thereof, to be delivered to the party to whom the said goods shall be long."

The second sect. of the above act of 3 Jac. 1. c. 10. which was here recited in the former edition of this work, is repealed by 27 Geo. 3. c. 3. sect. 2.

Sect. 20. And it is further enacted by 27 Geo. 2. c. 3. s. 1. "That when any person not having goods or money within the county where he is taken, sufficient to bear the charges of himself, and of those who convey him, is committed to gaol or the house of correction by warrant from any justice of the peace, then on application by any constable or other officer who conveyed him, any justice of the peace for the same county or place shall upon oath examine into and ascertain the reason—
"able

“able expenses to be allowed such constable or other officer, and shall forthwith, without fee or reward, by warrant under his hand and seal, order the treasurer of the county or place to pay the same; which the said treasurer is hereby required to do as soon as he receives such warrant; and any sum so paid shall be allowed in his accounts. Except in Middlesex, in which county the expenses of the constable or other officer occasioned by his conveying any person to gaol by virtue of a warrant from a justice of the peace, shall (after such expenses have been examined into upon oath, and allowed by such justice, and for which no fee or reward shall be taken) be paid by the overseer or overseers of the poor of the parish or place where the person was apprehended.”

Vide ante, 91.
1 Burn's Justice, 374.

As to the SEVENTH POINT, viz. To what court such commitments are to be certified.

Sect. 21. It is enacted by 3 Hen. 7. c. 3. “That every sheriff, bailiff of franchise, and every other person, having authority or power of keeping of gaol, or of prisoners for felony, do certify the names of every such prisoner in their keeping, and of every prisoner to them committed for any such cause, at the next general gaol-delivery, in every county or franchise where any such gaol shall be, there to be calendared before the justices of the deliverance of the same gaol, whereby they may, as well for the king as for the party, proceed to make deliverance of such prisoners according to law; on pain to forfeit to the king for every default there recorded, one hundred shillings.”

As to the EIGHTH POINT, viz. By what means a person under such a commitment may be discharged.

Sect. 22. It seems, that a person legally committed for a crime, certainly appearing to have been done by some one or other, cannot be lawfully discharged by any one but by the king, till he be acquitted on his trial, or have an *ignoramus* found by the grand jury, or none to prosecute him, on a proclamation for that purpose by the justices of gaol-delivery.

Keilwood, 34.
3 Inst. 209, 210.
Sum. 94, 95.
114.
1 Hale, 583.

Sect. 23. But if a person be committed on a bare suspicion, without any appeal or indictment, for a supposed crime, where afterwards it appears that there was none, as for the murder of a person thought to be dead, who afterwards is found to be alive; it hath been holden, that he may be safely dismissed without any further proceeding, for that he who suffers him to escape is properly punishable only as an accessory to his supposed offence; and it is impossible that there should be an accessory where there can be no principal; and it would be hard to punish one for a contempt, in disregarding a commitment founded on a suspicion, appearing in so uncontested a manner to be groundless.

CHAP. XVII.

OF HINDERANCES IN BRINGING OFFENDERS
TO PUBLIC JUSTICE, &c.

HAVING shewn in what manner criminals are to be arrested, bailed, or committed, I am now to consider in what manner they and their assistants are punishable for an hinderance in bringing them to public justice.

And in order hereto I shall examine,

1. How far they are punishable for an offence of this kind before an arrest made.

2. How far after an arrest made.

As to the **FIRST POINT**, *viz.* How far persons and their assistants are punishable for hindering offenders being brought to public justice.

(a) Sum. 116.
(b) S. P. C. 31.
Crompton, 38.
26 Assize, 47.
F. Just. of
Peace, 114.
231.
Con. Sum. 116.
1 Hale, 606.
F. Cor. 333.
2 Inst. 590.
(c) Sum. 218.
219.
2 Inst. 183.
Moor, 8.
S. P. C. 41.

Sect. 1. It is (a) certainly an offence of a very high nature to oppose one who lawfully endeavours to arrest another for treason or felony. And some (b) have said, that the person who so opposes an arrest for treason, whereof he knows the party to have been guilty, is thereby guilty of the treason; and that he who so opposes an arrest for felony, is an accessory to the felony. And if it be a general (c) rule, that whoever, knowing a person to have committed any such crime, receives and comforts him, and endeavours to favour and aid him in the making his escape, thereby becomes a principal in the case of treason, and an accessory in the case of felony, though he use no force in giving such assistance to the offender, it seems strange that he who so far takes part with him as to fight in his defence from justice, should not be at least equally guilty. And therefore it seems reasonable to understand the books above cited, which seem to contradict this opinion, to intend no more than that it is not felony in the party himself, who is attacked in order to be arrested, to save himself from the arrest by such resistance.

S. P. C. 32.
9 H. 4. 1.
26 Assize, 47.

Sect. 2. But if a person, knowing another to have been guilty of such a crime, barely receive him, and permit him to escape, without giving him any manner of advice, assistance, or encouragement in it, as by directing him how to do it in the safest manner, or furnishing him with money, provisions, or other necessaries, it seems he is guilty of a high misdemeanour only, but no capital offence.

Sum. 111. 271.

Sect. 3. Also it is certain, that the party himself who flies from such an arrest, is not thereby guilty of a capital offence, but only liable to forfeit his goods, when such flight is found against him, in such manner as hath been already shewn, chapter 9. sect. 51. and shall be also more fully considered hereafter.

Sect.

Sect. 4. How far a vill, which suffers one who has been guilty of homicide to escape, is liable to be amerced, hath been already shewn, chap. 12. sect. 2, 3.

As to the **SECOND POINT**, viz. Offences of this kind, after an arrest made, may be considered in relation either, To the party under such an arrest: or, To others—And such offences by the party himself are either without or with force.

Sect. 5. And **FIRST**, As to such offences by the party himself, without force, which seem properly to come under the notion of escapes, there is little remarkable in the books; and therefore I shall content myself with taking notice, that as all persons are bound to submit themselves to the judgment of the law, and to be ready to be justified by it, whoever, in any case, refuses to undergo that imprisonment which the law thinks fit to put upon him, and frees himself from it by any artifice, before such time as he is delivered by due course of law, is guilty of a high contempt, punishable with fine and imprisonment. Summary, 108.
2 Inst. 589,
590.
C. Car. 210.

And **SECONDLY**, If it be so great a crime for one not arrested to fly, in order to save himself from imprisonment for a capital offence, surely it must be at least as great a crime for one who is actually under the custody of the law for any such crime, by any indirect means to free himself from it. And some (a) have holden, that such an escape amounts to felony: But this opinion seems to be over severe, and not to be maintained by the (b) books cited to prove it. 1 Assize, 6.
(a) S. P. C. 31.
(b) 2 Ed. 3. 2.
F. Cor. 149.

CHAP. XVIII.

OF BREAKING PRISON.

SUCH offences by the party himself, accompanied with force, come under the notion of prison-breaches; which I shall consider,

1. As they stand by the common law.

2. On the statute *de frangentibus prisonam*, which was made in the first year of King Edward the Second.

And **FIRST**, as to prison-breaches, as they stood by the common law.

Sect. 1. It seems to be the better opinion, (c) that all such offences were felonies, if the party were lawfully in prison for any cause whatsoever, whether criminal or civil, and whether he were actually in the walls of a prison, or only in the stocks, or in the custody of any person who had lawfully arrested him; and it seems not to have been any way material whether the prison did belong to the king, or to the lord of a franchise; not only for that every person who is under a lawful imprisonment may properly enough be called the king's prisoner, but also because it is allowed, (a) Bract. l. 3.
c. 9.
Britton f. 17.
S. P. C. 30.
2 Inst. 589.
Summary, 87.
1 Hale, 607.
Cont.
S. P. C. 31. 33.
1 H. 7. 6.
B. Corone, 130.
C. Car. 210.
2 Inst. 589.

(b) Vide infra,

6. 4.

(c) Vide supra,
c. 9. s. 49.

allowed, (a) that whoever breaks from any such imprisonment, since the statute 1 Edw. 2. *de frangentibus prisonam*, is guilty of felony: From whence it seems clearly to follow, that he must have been in like manner guilty before that statute, the purport whereof is not to make any offences felonies which were not so before; but only to restrain some of those which were. And it (b) seems also to be clear, that the confession of such offence before the coroner is not traversable by the common law; which is not altered as to this point by the statute.

Sect. 2. And now I am to consider these offences, as they stand by the said statute: For the better understanding whereof I shall first set down the words of the statute, and then endeavour to shew in what manner they are to be understood.

2 Inst. 389.

1 Hale, 608.

Sect. 3. And first, the words of the statute are as follow:
“*De prisonariis prisonam frangentibus dominus rex vult et præcipit, quod nullus de cætero, qui prisonam fregerit, subeat judicium vite vel membrorum pro fractione prisonæ tantum, nisi causa, pro qua captus et imprisonatus fuerit, tale judicium requirat, si de illa secundum legem et consuetudinem terræ fuisset convictus, licet temporibus præteritis aliter fieri consuevit.*”

For the better understanding of the construction whereof, I shall consider the following points:

1. What shall be said to be a Prison, within the meaning of this statute.

2. How far the imprisonment ought to be well grounded.

3. What shall be said to be a breaking of prison.

4. For what crime the party ought to be imprisoned, to make the offence of breaking the prison felony within the intent of the statute.

5. Whether the offence of breaking prison can ever amount to high treason.

6. At what time, and in what manner, the offender is to be proceeded against.

7. In what manner he is to be indicted.

8. In what manner those are to be punished for a breach of prison, who are within the benefit of the statute.

As to the FIRST POINT, viz. What shall be said to be a prison (c) within the meaning of the statute.

(c) F. Cor. 138.
290. 312. 48.

164. 230. 419.
99. Crom. 38, 39.

22 Assize, 85. C. Car. 210. 2 Inst. 389, 390. Summ. 107. 2 Hale, 608. 610. Dyer,

Sect. 4. It seems clear, that any place whatsoever wherein a person under a lawful arrest for a supposed crime is restrained of his liberty, whether in the stocks, or the street, or in the common gaol, or the house of a constable or private person, or the prison of the ordinary, is properly a prison within the statute; for imprisonment (d) is nothing else but a restraint of liberty.

(d) S. P. C. 30.

As

As to the SECOND POINT, *viz.* How far the imprisonment ought to be well grounded.

Sect. 5. It is clear, (a) that if a person be taken upon a *capias* awarded on an indictment or appeal against him, for a supposed treason or felony, he is within the statute if he break the prison, whether any such crime were in truth committed by him, or any other person or not; for that there is an accusation against him on record, which makes his commitment lawful, be he never so innocent, and the prosecution never so groundless.

(a) 2 Inst. 590.
Summary, 109.
1 Hale, 610.
B. Escape, 29.

Sect. 6. Also if an innocent person be committed by a lawful *mittimus* on such a suspicion of a felony, actually done by some other, as will justify his imprisonment, though he be neither indicted nor appealed, he is certainly (b) within the statute if he break the prison, for that he was legally in custody, and ought to have submitted to it till he had been discharged by due course of law.

(b) Sum. 109.
1 Hale, 610,
611.
2 Inst. 590.
Dyer, 99.
Crompton, 38.

Sect. 7. But if no (c) felony at all were done, and the party be neither indicted nor appealed, it seems clear, that no *mittimus* for such a supposed crime will make him guilty within the statute by breaking the prison, for that his imprisonment was unjustifiable.

(c) Sum. 109.
2 Inst. 590, 591.
Com. 2.
Leon. 166.

Sect. 8. Also if a felony were done, yet if there were no just cause of suspicion, either to arrest or commit the party, it seems clear, that if his *mittimus* be not in such form (d) as the law requires, his breaking of the prison cannot be felony, because the lawfulness of his imprisonment in such case depends wholly on the *mittimus*; which if it be not according to law, the imprisonment will have nothing to support it. But if the party were taken up for such strong (e) causes of suspicion as will be a good justification both of his arrest and commitment, but happen to be committed by an informal warrant, it seems that it may be probably argued, that it will be felony (f) in him to break the prison; for if, by the ancient common law, any private person might, of his own authority, justify both an arrest and commitment, for treason or felony, on a reasonable cause of suspicion, as it seems probable (g) from the tenor of all the old books that he might: and if the necessity of a *mittimus* (h) from a magistrate depend rather on the constant settled practice of justices of peace than any direct law, it seems difficult to maintain that a slip in want of form of such a *mittimus* should make it lawful for the prisoner to break the prison; whereas, by the old law, it would have been felony in such a case to have broken it without any such *mittimus* at all. And on the other side, if the party be taken up for such slight causes of suspicion of a felony actually done, as will not in strictness justify the arrest, yet if the justice, before whom he is brought, think them of such weight as to require a commitment, and do accordingly send the party to gaol by a regular *mittimus*, it seems very dangerous for him to break the prison; for the practice of justices of peace in making such commitments, being now grown into settled law, it seems reasonable, that their *mittimus* be a good justification of the imprisonment which

(d) Vide c. 16.
s. 13, 14, 15,
16, 17, 18.

(e) Vide sup. c.
12, s. 3, 9, &c.

(f) B. Escape,
29.
42 Assize, b.
1 Hale, 609.

(g) Vide sup. c.
12, & c. 16, s. 3.
(h) 5 Mod. 80.

Vide inf. s. 15.

which it commands, for a crime within their jurisdiction regularly brought before them; from whence it follows, that to break from such imprisonment must be unlawful. And therefore, since it doth not appear that there hath been any direct resolution of these points, perhaps it may be reasonable to understand, what is more generally said by Sir Edward Coke, (a) Sir Matthew Hale, (b) in relation to this matter, according to the abovementioned distinctions.

(a) 2 Inst. 391.
(b) Summ. 109.
1 Hale, 609.
2 Hale, 610.

As to the THIRD POINT, viz. What shall be said to be a breaking of prison within the meaning of this statute, the following rules are to be observed.

Sect. 9. FIRST, There must be an actual (c) breaking; for every indictment for this offence, as a felony, must have the words "*felonice fregit prisonam*," which seem necessarily to import the use of some real force or violence, and not such only as may be implied by the construction of law, in any act done in contempt of it; and therefore, if without any obstruction a prisoner go out of the prison doors, being opened by the consent or negligence of the gaoler, or otherwise escape without using any kind of force or violence, he is guilty of a misdemeanor only, but not of felony, and the gaoler is punishable in such manner as shall be set forth more at large in the next chapter.

(c) 2 Inst. 590.
Summary, 108.
S. P. C. 31.
Rex v. Burr.
3 P. Will. 439.

1 Hale, 611.

Sect. 10. SECONDLY, Such breaking must be either by the prisoner himself, or by others through his procurement, or at least with his privity; for if the prison be broken by others, without his procurement or consent, and he escape through the breach so made, it seems the better (d) opinion, that he cannot be indicted for the breaking, but only for the escape.

(d) 2 Inst. 589.
Summary, 108.
S. P. C. 30, 31.
1 Hale, 611.
F. Corone, 48.
1 H. 7. 6.

Sect. 11. THIRDLY, Such breaking must not be necessitated, by an inevitable accident happening without any fault of the prisoner; as where (e) the prison is fired by lightning, or otherwise, without his privity, and he breaks it open to save his life.

(e) 15 H. 7. 1. 2.
Plowden, 136.
2 Inst. 590.
Summary, 108.
1 Hale, 611.

Sect. 12. FOURTHLY, It seems, that no breach of prison will amount to felony, unless the prisoner escape. For if the breaking of a prison by a stranger, in order to free the prisoners who are in it, be not felony, unless the prisoners go out of it, as it is said (f) that it is not, it seems *à fortiori*, that such a breach by the prisoner himself, who lies under so much stronger a temptation to it, cannot be felony unless he do escape.

(f) Keilw. 48.

As to the FOURTH POINT, viz. For what crime the party must be imprisoned, to make his breaking the prison felony within the meaning of the statute, the following rules are to be observed.

Sect. 13. FIRST, It is not material, whether the offence for which he was imprisoned were capital at the time of this statute, or were made so by subsequent statutes; for since all breaches of prison were felonies by the common law which is restrained by the statute in respect only of imprisonment for offences not capital; when an offence becomes capital, it is as much out of the benefit of the statute, as if it had always been so.

Summary, 108.
1 Hale, 611.

Sect.

Sect. 14. SECONDLY, The offence for which the party was imprisoned must be a capital one at the time of the offence, and not become such by matter subsequent; as where (a) A. is committed to a prison for a dangerous wound given to B. and breaks the prison, and then B. dies: For though to some intents such offence be esteemed capital from the time of the first act, yet inasmuch as it was in truth but a trespass at the time of the breaking of the prison, and it was then uncertain whether it would ever become capital, and it becomes such afterwards *ab initio*, by fiction only, for some special purposes; and fictions of law are never carried farther than the necessity of those particular cases, which were the cause of the inventing them, doth require, they shall never be construed to exempt a person from the advantage of a beneficial law made in favour of life, who is clearly within the letter, and doth not plainly appear to be out of the meaning of it. However it seems certain, that such an offender breaking prison, while it is uncertain whether his offence will become capital, is highly punishable for his contempt by fine and imprisonment.

(a) Summ. 108.
219.
2 Inst. 591.
Plow. 258. 401.
11 H. 4. 12.
S. P. C. 33.
1 Hale, 427. 591.

11 H. 4. 12.
S. P. C. 35.

Sect. 15. THIRDLY, If the party be only arrested for, and in his *mittimus* charged with a crime which does not require judgment of life or member, as petit larceny or homicide *se defendendo*, or by misadventure, and the offence, in truth, be no greater than the *mittimus* doth suppose it to be, it is clear, from the express words of the statute, that a breaking of the prison cannot amount to felony. And if the offence for which the party is committed, be supposed in the *mittimus* to be of such a nature as requires a capital judgment, yet if in the event it be found to be of an inferior nature, and not to require such a judgment, it seems difficult to maintain, that the breaking of the prison on a commitment for it can be felony; for the words of the statute are, "*nisi causa pro qua captus et imprisonatus fuerit, tale judicium requirat*;" and here it appears, that the offence, which is the cause of his imprisonment, doth not require such a judgment; and it is hard to say, that a mistake of the nature of the crime, by the person who makes the arrest or *mittimus*, should so far prejudice the party, as to make his escape amount to felony by reason of such mistake, which otherwise would have been but a trespass.

1 Hale, 609.
Summary, 110.
2 Inst. 590.

Also it seems to be agreed, that if a person be committed for a supposed felony, where no felony hath been done, he is not guilty of felony for breaking the prison; from whence it clearly appears, that in that case the law doth not so far regard the charge contained in the *mittimus*, where there is no good ground to support it, as in respect thereof to exclude the party from the benefit of the statute; and yet in that case the party is as much accused of a capital offence, as in the case in question; so that it is clear, that the law doth not so much respect the heinousness of the charge against the party, as of the very crime which is the subject of the charge: and this will further appear, if it be considered, that the accusation cannot be said to be the cause which requires judgment of life and member, but the offence which supports

supports the accusation ; and if there be no such offence, there is, in truth, no cause which requires such a judgment.

On the other side, if the offence, which was the cause of the commitment, be in truth of such a nature as requires a capital judgment, but in the *mittimus* be supposed to be of an inferior degree, it may probably be argued, that the party's breaking of the prison is felony within the meaning of the statute ; for the cause of his arrest and commitment is the fact for which he was arrested and committed, and that does in truth require judgment of life, though the nature of it be mistaken in the *mittimus*, which does no way alter the judgment of law in relation of the guilt of it. But there appearing no express resolution of these points, and the (a) authors who have expounded this statute seeming rather to incline to a different opinion, I shall leave these matters to the judgment of the reader.

(a) 2 Inst. 590.
591.
Summary, 109,
110.
1 Hale, 609.

S. P. C. 32.

Sect. 16. FOURTHLY, It is not material, Whether the party who breaks his prison were under an accusation only, or actually attainted of the crime charged against him ; and yet the words of the statute are, "*si causa tale judicium requirat.*" And it cannot be properly said, that the offence of one attainted doth require such a judgment (for that there ought not to be a second judgment against one already condemned), but only that it did require it ; and it is a settled rule, that all statutes are to be construed strictly in favour of life, and that no parallel case, which comes within the same mischief, shall be construed to be within the purview of it, unless it can be brought within the meaning of the words. Yet considering that the manifest purport and meaning of the words of the statute, taken all together, is no more than this, that the breaking of prison shall not be a capital offence, unless the crime for which the party was in prison be also a capital offence ; and it is frequent, in the construction of penal laws, to bring persons within the purview of them by being within the meaning of the words, though not in strict grammar properly within the very letter ; and it would be extremely harsh to imagine, that the makers of the statute could intend a greater favour to persons appearing to be guilty, and actually under the condemnation of the law, than to persons under an accusation only ; there can be no doubt but that the persons attainted, breaking prison, are as much guilty within the meaning of the abovementioned exception as any others.

As to the FIFTH POINT, *viz.* Whether the offence of breaking prison can ever amount to high treason.

Sect. 17. It seems clear, that a person committed for high treason becomes guilty of felony only, and not of high treason, by breaking the prison and escaping singly, without letting out any other prisoner, for that no offence is to be construed high treason, which is not either within the purview of 25 Edw. 3. or of some subsequent statute relating to treason. But if other persons committed also for high treason escape together with him, and his intention in breaking the prison were to favour their escape

2 Inst. 590.
S. P. C. 32.
1 H. 6. 5.
2 Hale, 137.
Summary, 103.

escape as well as his own, he seems to be guilty of high treason in respect of their escape, for that there are no accessories in high treason, and such assistance given to persons committed for felony, will make him who gives it an accessory to the felony, and by the same reason a principal in the case of high treasons. But this offence, coming more properly under the notion of rescous than of the breaking of prison, shall be more fully considered in the chapter concerning rescous.

As to the SIXTH POINT, viz. At what time, and in what manner, the offender is to be proceeded against.

Sect. 18. It is said, that he may be arraigned for this offence before he is convicted of the crime for which he was imprisoned, for that it is not material whether he were guilty of such crime or not: neither is he punishable as an accessory in respect thereof, but as a principal offender in respect of the breach of prison itself. On which account this case differs from that of a rescous or voluntary escape, as shall be shewn more at large in the following chapter.

1 Hale, 611.
Summary, 110.
116.
2 Inst. 509.
2 Hale, 284.
251.

Sect. 19. It seems clear, that the sheriff's return of breach of prison, is not a sufficient ground to arraign the prisoner for it, unless he be also indicted.

F. Indict. 30.
1 H. 7. 6.

As to the SEVENTH POINT, viz. In what manner an offender is to be indicted for a breach of prison.

Sect. 20. It is certain that every indictment of this kind, to bring the offender within the intention of this statute, must specially set forth his case in such a manner that it may appear that he was lawfully in prison, and for such a crime as requires judgment of life or member; and that it is not sufficient to say in general, "*quod felonice fregit prisonam.*" And it seems, that the same rules which are required for an indictment of an escape, set forth at large in the next chapter, are generally to be observed in indictments of breaking prison.

Summary, 1.
2 Inst. 59.
F. Indict. 18.

As to the EIGHTH POINT, viz. In what manner those are to be punished who are within the benefit of the statute, by being freed from that severe judgment for the breach of prison, to which by the common law they would have been liable:

Summary, 116.
S. P. C. 35.
11 H. 4. 12.

Sect. 21. There seems to be no doubt, but that whoever breaks from any lawful imprisonment is still punishable as for a high misprison by fine and imprisonment, for that every capital offence doth include in it a misprison and may be proceeded against as such only, if the king please; and it cannot be thought the meaning of the statute, in ordaining that such offences shall not be punished as capital ones, to intend that they shall not be punished at all.

CHAP. XIX.

OF ESCAPES SUFFERED BY OFFICERS.

HAVING shewn, in the precedent chapters, how far the party himself, under a lawful arrest for a crime charged against him, is punishable for unlawfully freeing himself from such arrest, without waiting for his deliverance by due course of law, I shall now, in the second place, consider offences of this kind in relation to others.

*And **FIRST**, Such as are without force.

SECONDLY, Such as are accompanied with force.

Such offences ~~without~~ without force come under the notion of escapes, which are either, 1. By officers. Or, 2. By private persons.

As to **ESCAPES** suffered by officers, I shall endeavour to shew the following particulars.

1. What shall be adjudged an escape.
2. Where such escape is to be esteemed voluntary, and where negligent.
3. Where the prisoner may be retaken after an escape.
4. Whether the escape is excused by such a retaking; or by killing the prisoner, if he cannot be retaken.
5. In what manner the officer suffering an escape is to be indicted.
6. How an escape is to be tried and adjudged.
7. How a voluntary escape is to be punished.
8. How a negligent one.

As to the **FIRST POINT**, viz. What shall be judged an escape, the following rules are to be observed.

Sect. 1. FIRST. There must be an actual arrest; and therefore, If (a) an officer having a warrant to arrest a man, see him shut up in a house, and challenge him as his prisoner, but never actually have him in his custody, and the party get free, the officer cannot be charged with an escape.

(a) B. Cor. 76.
9 H. 4. 1.
27 Assize, 1.
F. Corone, 249.
Br. Escape, 22.

Sect. 2. SECONDLY. As there must be an actual arrest, such arrest must (b) also be justifiable; for if it be either for a supposed crime, where no such crime was committed, and the party neither indicted nor appealed, or for such a slight suspicion of an actual crime, and by such an irregular *mittimus* as will neither justify the arrest nor imprisonment, the officer is not guilty of an escape by suffering the prisoner to go at large: And it seems to be a good general rule, that wherever an imprisonment is so far irregular that it will be no offence in the prisoner

(b) F. Cor. 224.
1 Hale, 583.
599.
42 Assize, 5.
B. Escape, 27.
29.
5 Mod. 414,
415, 416.
Con.
2 Leonard, 166.
See c. 28, sect.
59.

to break from it by force, it can be no offence in the officer to suffer him to escape.

Sect. 3. THIRDLY. As the imprisonment must be justifiable, so must it be also for a criminal matter; and some (a) are said to have holden that no escape is criminal, but where the commitment is for felony. However it is certain, that the escape of one committed for petit larceny (b) only is criminal: And it seems most agreeable to the general reason of the law, that the escape of a person committed for any other crime whatsoever should also be criminal: For surely wherever the public justice requires that a person be committed for a crime, it likewise requires that he be safely kept under such commitment, and consequently may reasonably demand public satisfaction from the officer to whose custody he is committed, if he neglect to keep him as he ought.

Sect. 4. FOURTHLY. As the imprisonment must be justifiable, and for some crime, so must its continuance at the time of the escape be grounded on that satisfaction which the public justice demands for such crime; for if a prisoner be acquitted, (c) and detained only for his fees, it will not be criminal to suffer him to escape, though the judgment were, that he be discharged "paying his fees;" so that till they be paid, the first imprisonment continued lawful, as before; for inasmuch as he is detained not as a criminal, but only as a debtor, his escape cannot be more criminal than that of any other debtor. Yet if a person convicted of a crime be condemned to imprisonment for a certain time, and also till he pay his fees, and he escape after such time is elapsed without paying them, perhaps such escape may be criminal, for that it was part of the punishment, that the imprisonment be continued till the fees should be paid. But it seems, that this is to be intended where the fees are due to others as well as to the gaoler, for otherwise the gaoler will be the only sufferer by the escape, and it will be hard to punish him for suffering an injury to himself only, in the non-payment of a debt in his power to release.

Sect. 5. FIFTHLY. It is an escape, in some cases, to suffer a prisoner to have greater liberty than by the law he ought to have; as to admit a person to bail, (d) who by law ought not to be bailed, but to be kept in close custody; or to permit (e) a prisoner to go out of the limits of the prison: Yet some (f) seem to have holden, that in this last case it shall not be adjudged an escape, unless the prisoner be found to have had an intention to escape; but it will be difficult to maintain, that the offence of the gaoler can depend on the intention of the prisoner.

Sect. 6. SIXTHLY. If (g) the gaoler so closely pursue the prisoner who flies from him, that he retake him without losing sight of him, the law looks on the prisoner so far in his power all the time as not to adjudge such a flight to amount at all to an escape: But if the gaoler once lose sight of the prisoner, and afterwards retake him, he seems in strictness to be guilty of an escape; and *a fortiori* therefore, (h) if he kill him in the pursuit, he

(a) F. Cor. 248.
S. P. C. 33.

(b) F. Cor. 430.
431.
S. P. C. 33.
1 Hale, 592.

(c) B. Escape,
16.
21 H. 7. 7.
S. P. C. 34.
1 Hale, 594.
234.

See F. Cor. 430.
S. P. C. 34.

(d) 25 E. 3. 29.
1 Hale, 596,
597.
Summary, 113.
F. Escape, 4.
F. Cor. 246.
(e) F. Cor. 242.
(f) F. Cor. 431.
S. P. C. 133.

(g) F. Co. 236.
400.
S. P. C. 33.
1 Hale, 602.
B. Escape, 14.
32. 49. 52.
10 H. 7. 45, 26.
6 H. 7. 11, 12.
(h) F. Cor. 246.
246.

S. P. C. 33.

he is in like manner guilty, though he never lost sight of him, and could not otherwise take him, not only because the king loses the benefit he might have had from the attainder of the prisoner by the forfeiture of his goods, &c. but also because the public justice is not so well satisfied by the killing him in such an extrajudicial manner.

(a) B. Escape, 38. 50.
2 H. 4. 15.
F. Cor. 222.
316.
but 27 Ass. 54.
and B. Escape, 24. seem contrary.

Sect. 7. SEVENTHLY. While the privileges of sanctuaries were allowed, if a sheriff conducting a prisoner to gaol had brought him in the way through the limits of such a franchise, and the prisoner had claimed the privilege of it, and by that means got free, it seems (a) that the sheriff was guilty of an escape, for that it was his fault, by bringing his prisoner that way to gaol, to give him an opportunity of claiming the franchise.

(b) F. Cor. 16.
27 H. 6. 7.
S. P. C. 33.
Vide 23 H. 8.
11.

Sect. 8. EIGHTHLY. Also while the law allowed those who had the benefit of the clergy to free themselves from prison in certain cases, by making their purgation before the ordinary, it was an escape (b) in the ordinary, to suffer such persons to deliver themselves by it, in such cases in which they ought not to have been admitted to it.

(c) B. Escape, 10. 32. 52.
6 H. 7. 11, 12
10 H. 7. 25, 26.
29 Assize, 34.
1 Hale, 596. B. Escape, 26 seems contrary.

Sect. 9. NINTHLY. If (c) a prisoner be rescued by enemies, the gaoler is not guilty of an escape, as he would have been, by the better opinion, if he had been rescued by the subjects, because there is a legal remedy against them.

As to the SECOND POINT, *viz.* Where such escape is to be esteemed voluntary, and where negligent.

(d) See C. Car. 492.
S. P. C. 32.
It is an escape to discharge a night-walker from the watch-house, although no positive charge is made.
2 Burr. 867.
(e) Sum. 113.
Supra, sect. 5.
1 Hale, 596,
597.

Sect. 10. There (d) can be no doubt, but that wherever an officer, who hath the custody of a prisoner, charged with, and guilty of, a capital offence, doth knowingly give him his liberty with an intent to save him either from his trial or execution, he is guilty of a voluntary escape, and thereby involved in the guilt of the same crime of which the prisoner was guilty, and stood charged with. And it seems to be the opinion of Sir Matthew Hale, (e) that in some cases an officer may be adjudged guilty of such escape, who hath not such intent, but only means to give his prisoner that liberty which by the law he hath no colour of right to give him; as where a gaoler bails a prisoner who is not bailable. But it seems agreed, that a person who hath power to bail, is guilty only of a negligent escape, by bailing one who is not bailable: neither can I meet with any authority in other books, to support the above-mentioned opinion, that the bailing of one who is not bailable, by one who hath no power to bail, must necessarily be esteemed a voluntary escape; but the contrary opinion seems more agreeable to the purview of 5 Edw. 3. c. 8. set forth more at large in the subsequent part of this chapter. Also there are some cases wherein an officer seems to have been found (f) to have knowingly given his prisoner more liberty than he ought to have had, as to go out of the prison on promise of returning, or to go among his friends, to find some who would warrant goods to be his own, which he is suspected to have stolen, and yet seems to have been only adjudged guilty of a negligent

(f) F. Cor. 242.
316. 431
S. P. C. 33.

negligent escape. But it must be confessed, that in these cases the prisoner was only accused of larceny; and it doth not appear, whether he were bailable or not; and generally the old cases concerning this subject are so very briefly reported, that it is very difficult to make an exact state of the matter from them: However, thus much seems clear, that if in the cases above-mentioned the officer were only guilty of a negligent escape, in suffering the prisoner to go out of the limits of the prison without any security for his return, he could not have been guilty in a higher degree, if he had taken bail for his return: From which it seems reasonable to infer, that it cannot be in all cases a general rule, that an officer is guilty of a voluntary escape by bailing his prisoner whom he hath no power to bail; but that the judgment to be made of all offences of this kind, must depend on the circumstances of the case, as the heinousness of his crime with which the prisoner is charged, the notoriety of his guilt, the improbability of his returning to render himself to justice, the intention of the officer, the motives on which he acted, &c. 1 Hale, 597.

Sect. 11. Neither is it a certain rule, that an officer, who unlawfully, knowingly, and willingly suffers a capital offender to escape, is in all cases to be adjudged guilty of a voluntary escape; for where an ordinary suffered a clerk attainted, being committed to his custody, to free himself from imprisonment, by making his purgation, he might be truly said to have suffered such prisoner to escape unlawfully, knowingly, and willingly; and yet it seems, (a) that he was guilty only of a negligent escape, for that he did not save the prisoner from execution, which was excused by the privilege of the clergy, but only from the imprisonment. (a) F. Cor. 16. 570. F. Escape, 1. S. P. C. 34. 141. 15 H. 7. 9. 1 Hale, 593.

As to the THIRD POINT, viz. In what cases a prisoner may be retaken after an escape.

Sect. 12. It seems to be clearly agreed, by all the books, (b) that an officer making a fresh pursuit after a prisoner, who hath escaped through his negligence, may retake him at any time after, whether he find him in the same, or in a different (c) county. And it is said generally in some books (d) that an officer who hath negligently suffered a prisoner to escape, may retake him wherever he finds him, without mentioning any fresh pursuit; and indeed since the liberty gained by the prisoner is wholly owing to his own wrong, there seems to be no reason he should take any manner of advantage from it. But where a gaoler hath voluntarily suffered a prisoner to escape, it is said by some, (e) that he can no more justify the retaking him, than if he had never had him in custody before, because by his own free consent he hath admitted, that he hath nothing to do with him. And it seems to be holden by Sir William Staundford, (f) that after a gaoler hath been fined for suffering a prisoner negligently to escape, he cannot afterwards retake him; but the book (g) on which alone he seems to ground his opinion, doth not fully come up to it; for the purport of it seems to be no more than this, that a gaoler's retaking of a prisoner, after he hath been fined (b) F. Tres. 94. F. Escape, 2. F. Corone, 236. B. Escape, 49. 32. 52. 1 Hale, 602. 13 Ed. 4. 9. 2 Ed. 4. 6. (c) 35 H. 6. 52. 53. 3 Co. 44. 52. B. Escape, 4. Fresh Suit, 3. 5. Con. Kellw. 3. (d) F. Cor. 236. 400. 313. 335. S. P. C. 117. B. Execution, 58. 151. 27 H. 8. 1. 13 H. 7. 1. F. N. B. 130. (e) 2 Jones, 21. 22. 45. 3 Coke, 52. C. Jac. 659. Qu. 1. Danv. Abr. Summary, 114. (f) 638. 545. (g) S. P. C. 33. 13 E. 4. 9. F. Escape, 2. B. Escape, 35. 1 Hale, 602.

fined for an escape, shall be to no purpose, for that it is contrary to the record, by which it appears that a prisoner hath been at large; by which it seems only to be intended, that a gaoler, who hath been fined for an escape, shall not avoid the judgment of his fine by retaking the prisoner: But I do not see how it can be collected from hence, that he cannot justify the retaking him.

As to the **FOURTH POINT**, viz. How far an escape is excused by retaking the prisoner, or by killing him, if he cannot be retaken.

S. P. C. 33.
Summary, 114.
seems contrary.

See the books
cited sect. 6.
1 R. Abr. 808.
1 Danv. Abr.
633.
3 Danv. Abr.
119.
Vide 8 W. 3. c.
27.

Sect. 13. Perhaps it is the better opinion, that wherever a prisoner, by the negligence of his keeper, gets so far out of his power that the keeper loses sight of him, the keeper is finable, at the discretion of the court, notwithstanding he retook him immediately after; for it seems agreed, that this is to be adjudged a negligent escape, which implies an offence, and consequently must be punishable. It is true indeed, that in an action against a gaoler for suffering one arrested in a civil action to escape, it is a good excuse for the gaoler, that before the action brought he retook the prisoner upon fresh suit, which is well maintained by shewing that he pursued him immediately after notice of the escape, though it were some hours after it, and retook him; but it does not from hence follow, that the like excuse will serve for the negligent escape of a criminal, because this is an offence against the public, but the other is only a private damage to the party. Neither will it be the like hardship to the officer to be exposed to such punishment as the court in discretion shall think fit to impose upon him for the negligent escape of a criminal, as it would be to be liable to an action of escape, for suffering a person in his custody, in a civil action, to escape; for that in the former case the court would moderate his fine according to the circumstances of the whole matter, and would certainly mitigate, if not wholly excuse it, if he should appear to have taken all reasonable care. But, in the other case, if he should be liable to an action, his judgment would not lie in the discretion of the court, but he would be bound to pay the whole debt for which the party was in his custody, if the escape should be adjudged against him. However it is certain, that it will be no advantage to a gaoler to retake his prisoner, after he has been fined for the escape, as hath been shewn in the precedent section. Also it is clear, that he cannot excuse himself by killing a prisoner in the pursuit, though he could not possibly retake him; but must, in such case, be content to submit to such fine as his negligence shall appear to deserve.

Vide sup. sect. 6.

As to the **FIFTH POINT**, viz. In what manner the officer suffering an escape is to be indicted.

(a) 37 Assize, 9.
1 Hale, 599.
B. Escape, 27.
F. Assize, 247.
(b) Salkeld, 272.
3 Modern, 414, 415. Holt, 283. 1 Roll. Ab. 806. C. J. 588. Salkeld, 272.

Sect. 14. It seems clear, that every indictment for an escape, whether negligent or voluntary, must expressly shew, that the party was actually (a) in the defendant's custody for a crime, action or commitment for it; and that (b) it is not sufficient to

say, that he was in the defendant's custody, and charged with such a crime; for that a person in custody may be so charged, and yet not be in custody by reason of such charge. And it seems also, that every such indictment must expressly shew that the prisoner went at large, which is most properly (a) expressed by the word *exivit ad largum*. Also it seems necessary to shew the time when the offence was committed for which the party was in custody, not only (b) that it may appear that it was prior to the escape, but also (c) that it was subsequent to the last general pardon. Also it seems clear, that every indictment for a voluntary escape, must allege that the defendant *felonice et voluntarie* A. B. *ad largum ire permisit*; and must (d) also shew the species of the crime for which the party was imprisoned; for it is not sufficient to say, in general, that he was in custody for felony, &c. for that no one can be punished in this degree, but as involved in the guilt of the crime for which the party was in his custody; and therefore the particular crime must be set forth, that it may appear, that the principal is attainted for the very same crime, if it were felony, or that it was in truth committed, if high treason. But it seems questionable, (e) whether such certainty, as to the nature of the crime, be necessary in an indictment for a negligent escape, for that it is not material in this case, whether the person who escaped were guilty or not.

As to the SIXTH POINT, viz. In what manner an escape is to be tried and adjudged.

Sect. 15. It is to be observed, that where persons being present in a court of record, are committed to prison by such court, the keeper of the gaol is bound to have them always ready, whenever the court shall demand them of him; and if he shall fail to produce them at such demand, the court will adjudge him guilty of an escape, without any farther inquiry, unless he have some reasonable matter to allege in his excuse; as that the prison was set on fire, or broken open by enemies, &c. for he shall be concluded, (f) by the record of the commitment, to deny that the prisoners were in his custody. And some (g) have holden, that if a gaoler say nothing in excuse of such an escape, it shall be adjudged voluntary; but I cannot find any resolution to this purpose; and where it stands indifferent, whether an escape be negligent or voluntary, it seems difficult to maintain that it ought to be adjudged a crime of so high a nature, without a previous trial.

Sect. 16. As to other prisoners who are not so committed, but are in the custody of a gaoler, sheriff, constable, or other person, by any other means whatsoever, it seems agreed, (h) that the person who has them in custody is in no case punishable for their escape, except in some special cases, until it be presented.

For the better understanding whereof I shall endeavour to shew,

1. Before whom such presentments are to be made;
2. In what cases they are traversable.

As to the first particular, *viz.* Before whom such presentments are to be made.

Sect. 17. It is enacted by the statute of Westminster 1. c. 3. "That nothing be demanded nor taken, nor levied by the sheriff, nor by any other, for the escape of a thief, or felon, until it be judged for an escape by the justices in eyre; and that he who does otherwise, shall restore to him or them that have paid it, as much as that he or they have taken or received, and as much also unto the king."

(a) 27 Assize, 9.
21 Assize, 12.
S. P. C. 35.
2 Inst. 166.
1 Hale, 600.

Sect. 18. It hath been adjudged, (a) that this statute restrains not the court of king's bench from receiving such presentments, for that its jurisdiction includes in it that of justices of eyre, and this court is itself the highest court of eyre.

Ante sect. 12.
15.
S. P. C. 35.

Sect. 19. It is further enacted, by 31 Edw. 3. c. 14. "That the escape of thieves and felons, and the chattels of felons, and of fugitives, and also escapes of clerks convict, out of their ordinary's prison, from thenceforth to be judged before any of the king's justices, shall be levied from time to time, as they shall fall, as well of the time past as time to come." By which it seems to be implied that other justices, as well as those in eyre, may take cognizance of escapes; and it is certain, that justices of gaol-delivery may punish justices of peace for a negligent escape, in admitting persons to bail who are not bailable.

Sect. 20. And it is further enacted by 1 Rich. 3. c. 3. "That justices of peace shall have authority to inquire in their sessions, of all manner of escapes of every person arrested and imprisoned for felony."

As to the second particular, *viz.* In what cases such presentments are traversable.

S. P. C. 35.

Sect. 21. It is laid down as a rule, by Sir William Staundford, that wherever an escape is finable, the presentment of it is traversable; but that where the offence is amerciable only, there the presentment is of itself conclusive; such amercements being reckoned among those *minima de quibus non curat lex*; and this distinction seems to be well warranted by the old (b) books; and in what cases escapes are finable, and where amerciable only, shall be considered in the following part of this chapter, section 31, 33, 35.

(b) 21 Ass. 12.
27 Ass. 9. 27.
F. Co. 291. 328.
345. 346. 352.
1 Hale, 603.
1 Hale, 154.

As to the SEVENTH POINT, *viz.* In what manner a voluntary escape is to be punished.

(c) S. P. C. 32. 1.
Summary, 113.
1 Hale, 234.
390. 391. 593.
B. Cor. 112.
27 Assize, 62.
11 H. 4. 12.
(d) Sum. 114.
115.
Dyer, 99.
F. Escape, 3.
27 Assize, 62.

Sect. 22. It seems to be generally (c) agreed, that such escape amounts to the same kind of crime, and is punishable in the same degree, as the offence of which the party was guilty, and for which he was in custody, whether it be treason, felony, or trespass, and whether the person escaping were actually committed to some gaol, or under an arrest only and not committed; and whether he were attainted, or only accused (d) of such crime, and neither indicted nor appealed. And it is said to be no excuse of such escape, that the prisoner had been acquitted on an indictment

ment of death, and only committed till the year and day be passed, to give the widow or heir of the deceased an opportunity of bringing their appeal.

Sect. 23. Also such an escape, suffered by one who wrongfully takes upon him the keeping of a gaol, seems to be (a) punishable in the same manner as if he were never so rightfully intitled to such custody, for that the crime is in both cases of the very same ill consequence to the public; and there seems to be no reason that a wrongful officer should have greater favour than a rightful officer, and that for no other reason but because he is a wrongful one.

(a) B. Escape, 18. 22.
2 Roll. 146.
F. Assize, 252.
39 H. 6. 33, 34.
Quære, 27.
Assize, 27.
1 Hale, 594.
Summary, 114.

Sect. 24. Also if the warrant of commitment do plainly and expressly charge the party with treason or felony, but in some other respect be not strictly formal, yet it seems that it may (b) be probably argued, that the gaoler suffering an escape, is as much punishable as if the warrant were perfectly right; for it would be highly inconvenient to suffer gaolers to take advantage of a slip of this kind in commitments, which being generally made by persons of no great knowledge in the law, cannot be expected to be always agreeable to its forms; and therefore if they be good in substance, the public good seems to require, that the gaoler be as much bound to observe them, as if they were never so exactly made.

(b) Salkeld, 272.
347, 348.
Con.
Summary, 114.
2 Inst. 590, 591, 592.
See c. 16. & c. 18. sect. 5, 6, 7.
1 Hale, 595.

Sect. 25. But it seems to be agreed, that no escape can amount to a capital offence, unless the cause for which the party was committed, (c) were actually such at the time of the escape; and therefore, if a gaoler suffer one to escape who is committed for having given a dangerous wound to another, who afterwards dies of such wound, yet he is not guilty of felony, for that the offence of the prisoner was but a trespass at the time of the escape; and though by a fiction of law it be afterwards, for some purposes, esteemed a felony from the time of the giving of the wound, yet since it is, in truth, no felony till the death of the party, it shall be afterwards construed such in respect of those only who were privy to the giving of the wound.

(c) Summary, 114, 219.
See c. 16. sect. 19.
11 H. 4. 12.
1 Hale, 591.

Sect. 26. Also it seems clear, that he who suffers another to escape who was in his custody for felony, cannot be arraigned for such escape as for felony, until the principal be attainted; for that he who suffers such escape is, by the better opinion, not punishable in this degree, but as an accessory to the felony; and it is a rule, that no accessory ought to be tried till the principal be attainted, as shall be more fully shewn hereafter. Yet it seems certain, (d) that one accused of such an escape may be indicted and tried for a misprision, before the attainder of the principal offender, for that whether such offender were guilty or innocent, it was a high contempt to suffer him to escape. And if the commitment were for high treason, and the person committed actually guilty of it, it seems that the escape is immediately punishable as high treason also, whether the party escaping be ever convicted of such a crime or not; for that there are no accessaries in high treason, but all who are guilty of assisting the party guilty

1 Hale, 237, 238. 591. 598.
Summary, 110.
215, 216.
2 Hale, 254.
F. Cor. 158.
Quære, 27.
Ass. 62. Con.
Crom. 58.
(d) Summary, 116.
F. Cor. 158.
See c. 18. sect. 21.
Summary, 110.
seems con.

Summary, 116. guilty of such crime, in such a manner as would make them accessories to a felony, are accounted principals in the treason, as shall be more fully shewn in the chapter concerning Principal and Accessary.

Salkeld, 272.
Summary, 113.
1 Hale, 597,
598.

Sect. 27. Also it seems to be clear, that no one is punishable in this degree for a voluntary escape, but the person only who is actually guilty of it; and therefore, that the principal gaoler is only finable for a voluntary escape suffered by his deputy, for that no one shall suffer capitally for the crime of another.

As to the EIGHTH POINT, *viz.* In what manner a negligent escape is to be punished; I shall endeavour to shew,

1. How such escape is punishable by the common law;
2. How by statute.

Summary, 114.
2 Roll. 146.
B. Escape, 18.
23.

As to the first particular, *viz.* In what manner a negligent escape shall be punished by the common law.

Qu. 27. Ass. 27.
Vide sup. sect.
23.

Sect. 28. I shall take it for granted at this day, that whoever *de facto* occupies the office of gaoler is liable to answer for such an escape; and that it is no way material whether his title to the office be legal or not.

(a) F. Cor. 337.

Sect. 29. Also I take it to be the better opinion, that (a) a sheriff is as much liable to answer for an escape suffered by his bailiff, as if he had actually suffered it himself, and that (b) the court may charge either the sheriff or bailiff for such an escape; and if a deputy-gaoler be not sufficient to answer a negligent escape, his principal must answer for him: but if the gaoler who suffers an escape, have an estate (c) for life, or years in the office, I do not find it agreed how far he in reversion is liable to be punished.

(b) Salkeld, 272.
Summary, 113.
1 Hale, 597, 604.
2 Levins, 71.
(c) 39 II. 6.
33, 34.
2 R. Abr. 155.
2 Levins, 81.
3 Levins, 288.

(d) B. For. of
Offices, 27.
2 R. A. 153.

Sect. 30. It seems the better opinion, that one negligent escape will not amount to a forfeiture of a gaoler's office, as one voluntary (d) one will; yet if a gaoler suffer many negligent escapes, it is said, that he puts it in the power of the court to oust him of his office by its discretion.

(e) 8 H. 5. 2.
F. Cor. 84. 292.
S. P. C. 33.
B. Escape, 16.
Rast. 583.
(f) F. Cor. 335.
(g) 23 Ed. 3.
39. 22.
27 Assize, 9.
S. P. C. 63.
26 Assize, 51.
Summary, 113.
F. Cor. 196.
291. 370.
Graunt, 39.
Escape, 4.
See the Books
supra, c. 12.
sect. 9.
(h) F. Escape, 7.
40 Assize, 41.

Sect. 31. It seems to be certain, that wherever a person is found guilty upon an indictment, or presentment, of a negligent escape of a criminal actually in his custody, he ought to be condemned in a certain sum to be paid to the king, which seems most properly to be called a fine. But this does not clearly appear from the old books; for in some (e) of them it seems to be taken as a fine, in others (f) as an amercement, and in others it is spoken of generally, as an imposition of a certain sum, and without any (g) mention either of fine or amercement. But where the books speak of the punishment of a vill or hundred, for suffering a felon to escape without being arrested, they seem always to take it as an amercement, and not as a fine: and where a sheriff, having returned a *cepi corpus* into the king's bench, on a *capias* against a man on an indictment of felony, does not bring him in at the day, it seems (h) that he is, by the course of the said court, to be amerced, not fined.

Sect.

Sect. 32. It hath been holden, (a) that a negligent escape may be pardoned by the king before it happens, but that a voluntary one cannot be so pardoned; but this shall be more fully considered in the chapter concerning Pardon.

(a) 3 H. 7. 15.
8 H. 5. 2.
F. Graunt, 37.

Sect. 33. And it seems, (b) that by the common law, the penalty for suffering the negligent escape of a person attainted, was of course a hundred pounds, and for suffering such escape of a person indicted and not attainted, was five pounds (c); but if the person escaping were neither attainted nor indicted, it seems, that it was left to the discretion of the court to assess such a reasonable forfeiture as should seem proper; and (d) if the party had twice escaped, it seems, that the penalties above-mentioned were of course to be doubled; yet it seems, that the forfeiture was to be no greater for suffering (e) a prisoner committed on two several accusations to escape, than if he had been committed but on one.

(b) S. P. C. 35.
Summary, 113.
1 Hale, 604.
F. Cor. 370.
(c) S. P. C. 35.
Summary, 113.
27 Assize, 9.
40 Assize, 42.
25 Ed. 3. 39.
F. Cor. 454.
(d) S. P. C. 33.
F. Cor. 422.
(e) F. Cor. 196.
26 Assize, 51.

As to the second particular, viz. In what manner offences of this kind are punishable by statute.

Sect. 34. It is recited by 5 Edw. 3. c. 8. "That persons indicted of felonies in times past, had removed the indictments before the king, and there yielded themselves, and by the marshals of the king's bench had been incontinently let to bail, and after had done many evil deeds, &c." and thereupon it is enacted, "That such inditees and appellees shall be safely and surely kept in prison, as belongeth to them, according to the charge which the said marshals shall have of the justices; and if any marshal shall do otherwise, at the complaint of every man that will complain, the justices shall do him right during the terms; and in the end of the terms, upon their rising, the said marshals shall choose before the said justices, before they depart their places, in what town they will keep such prisoners at their peril: and in the same town they shall allow to them houses to keep such prisoners at their own costs and charges; and there they shall keep them in prison, and shall not suffer them to go wandering abroad, neither by bail nor without bail. And if any such prisoner be found wandering out of prison by bail or without bail, and that be found at the king's suit, or at the suit of the party, the marshals which shall be found thereof guilty shall have half a year's imprisonment, and be ransomed at the king's will; and the justices shall thereof make inquiry when they see time; and as to the marshals, it shall be done within the verge that which reason will. And in case that the marshals suffer by their assent such prisoners to escape, they shall be at the law, as before the time of the statute they had been. And the king intendeth not by this statute to lose the escape, where he ought to have the same."

On a conviction for letting a prisoner escape, when the defendant is brought before the court for judgment, the prosecutor may produce and read affidavits, made even by a witness on the trial, in aggravation of the damages, which the defendant, in mitigation, may answer and contradict. *Rex v. Sharpness, Easter, 26 Geo. 3.*

Sect. 35. Also it is enacted by 19 Hen. 7. c. 10. "That every sheriff have the custody of the king's common gaols, during the time of his office, except all gaols whereof any person or persons

Vide 3 Anne, c. 9.—The penalties for escapes inflicted by the subsequent part

of this statute, which were recited in the former edition of this work, have been expired above 200 years. Vide Ruffhead's Statutes, and 1 Burn's Justice, 503.

“sons have the keeping of estate of inheritance: and that all letters patents made for term of life, or years, of the keeping of the said gaols, &c. shall be annulled and void.”

CHAP. XX.

OF ESCAPES SUFFERED BY PRIVATE PERSONS.

Summary, 112. **HAVING** in the precedent chapter endeavoured to shew the nature of escapes suffered by officers, I am now in the second place to consider the nature of such escapes suffered by private persons.

But the law being generally the same in relation to such escapes, as in relation to those suffered by officers, I shall refer the reader, for the general learning of this kind, to what is said in the former chapter, concerning escapes suffered by officers.

I shall content myself in this place with considering the two following particulars:

1. Where a private person is to be adjudged guilty of such an escape;

2. In what manner he is to be punished.

As to the **FIRST POINT**, viz. When a private person is to be adjudged guilty of an escape.

Sect. 1. It seems to be a good general rule, that wherever any person hath another lawfully in his custody, whether upon an arrest made by himself or another, he is guilty (a) of an escape, if he suffer him to go at large, before he hath discharged himself of him by delivering him over to some other who by law ought to have the custody of him.

(a) See c. 12.
Summary, 112.
1 Hale, 595.

Sect. 2. And therefore, if a private person arrest another for suspicion of felony, and deliver him into the custody of another private person, who receives him, and suffers him to go at large, it is said, (b) that both of them are guilty of an escape; the first, because he should not have parted with him till he had delivered him into the hands of a public officer; the latter, because, having charged himself with the custody of a prisoner, he ought, at his peril, to have taken care of him.

(b) Sum. 112.
44 Assize, 12.
B. Escape, 31.
45 Ed. 3. 36.
F. Cor. 454.
F. Escape, 3.

Sect. 3. But if a private person, having made such an arrest, have delivered over his prisoner to the proper officer, as the sheriff, (a) or his bailiff, (b) or a constable, (c) from whose custody the prisoner escapes, the party who made the arrest is not chargeable with it.

(a) F. Cor. 345.
(b) F. Cor. 328.
357.
S. P. C. 34.
(c) Summ. 112.
1 Hale, 594,
595.

Sect. 4. But if no officer will receive such prisoner into his custody, it seems (d) to be the safest way to deliver him into the custody of the township where the person who arrested him lives, or perhaps

(d) 10 H. 7.
F. Escape, 8.

perhaps of that where the arrest was made, which shall be bound to keep him till the next gaol-delivery; but if such township refuse also to receive him, I do not see how the person who made that arrest can discharge himself of him before the next gaol-delivery, unless he can in the mean time procure him to be bailed.

Sect. 5. Neither can such private person excuse himself of the escape of such a prisoner, by alleging that he delivered him over to a sheriff or other officer, without shewing to whom, in particular, by name, he so delivered him, that the court may certainly know who is answerable for him.

Summary, 114.
F. Cor. 345.

As to the SECOND POINT, viz. In what manner a private person is punishable for such an escape.

Sect. 6. I shall take it for granted that if it were voluntary, he is punishable in the same manner as an officer, for which I shall refer the reader to the former chapter; and if it were negligent, he is punishable by fine and imprisonment, at the discretion of the court.

Summary, 112.
B. Cor. 112.
27 Ass. 62.
Vide De Treas-
sier's case,
Black. 268.
who was fined

£50 for effecting the escape of French prisoners.

CHAP. XXI.

OF RESCOUS.

THE offence of a stranger in forcibly freeing another from an arrest, comes under the notion of *rescous*, which in most instances is of the same nature with the offence of *breaking prison*, which hath been already considered in the eighteenth chapter.

1 Hale, 606.

It seems, therefore, sufficient for the declaration of the nature of this crime, to shew,

1. In what cases the offence of *rescous* agrees with the offence of *breaking prison*.

2. In what it differs.

3. What provisions the legislature has made upon this subject.

I. This offence agrees with that of *breaking prison* in the following particulars.

Sect. 1. FIRST, Whatever is such a prison that the party himself was, by the common law, guilty of felony by breaking from it, in every such case a stranger was guilty of as high a crime at least, in rescuing him from it.

2 Inst. 589.
S. P. C. 30, 31.
and the cases
cited c. 18. s. 1.
and 4.

Sect. 2. SECONDLY, Wherever (a) the imprisonment is so far groundless, or irregular, or for such a cause, or the breaking of it is occasioned by such a necessity, &c. that the party himself breaking the prison is, either by the common law, or by the statute *de frangentibus prisonam*, saved from the penalty of a capital offender, a stranger who rescues him from such imprisonment, is in like manner also excused; *et sic è converso*.

(a) See c. 18.
S. P. C. 30, 31.
Summary, 116.

Sect.

Keilwood, 78.
B. Escape, 52.

Sect. 3. THIRDLY, As the party himself seems not to be guilty of felony by breaking the prison, unless he go out of it, so neither is a stranger, unless the prisoner actually go out of the prison.

7. Endit. 30.
1 H. 7. 6.
4 Burr. 2129.

Sect. 4. FOURTHLY, As the sheriff's return, that a prisoner hath broken the prison, is not a sufficient ground to arraign him for such offence, unless he be indicted also for it, so neither is his return of a *rescous* a good ground for the arraignment of the rescuer, unless he be indicted.

Vide sup. c. 18.
s. 20. and c. 19.
s. 14.
Dyer, 164.

Sect. 5. FIFTHLY, As an indictment of breaking prison, and also an indictment of escape, must specially set forth the nature and cause of the imprisonment, and the special circumstances of the fact in question, so also must an indictment of *rescous*.

Vide sup. c. 18.
s. 21.

Sect. 6. SIXTHLY, As those who break prison are still punishable, as for a high misprision, by fine and imprisonment, in those cases wherein they are saved from judgment of death, by the statute *de frangentibus prisonam*, so also are those who rescue such prisoners in the like cases in the same manner punishable.

II. The offence of *rescous* differs from that of breaking prison in the following particulars.

Vide sup. c. 18.
s. 17.
1 Hale, 237.

Sect. 7. FIRST, Whereas a person committed for high treason, who breaks the prison and escapes, is guilty of felony only, unless he lets others also escape whom he knows to be committed for high treason, in which case he is guilty of high treason, not in respect of his own breaking of the prison, but of the *rescous* of the others; a stranger(a) who rescues a person committed for, and guilty of, high treason, knowing him to be so committed, is in all cases guilty of high treason; and by some(b) he is in like manner guilty, whether he knew that the prisoners were committed for high treason or not. But this opinion is not proved by the authority of the case(c) on which it seems to be grounded.

(a) S. P. C. 11.
32.
Summary, 109.
Dalton, f. 228.
1 Jones, 455.
1 H. 6. 5.
F. Cor. 2.
B. Treas. 11.
(b) C. Car. 583.
(c) 1 H. 6. 5.

(d) Sup. c. 18.
s. 17.
(e) Vide sup.
c. 19.
Summary, 116.
S. P. C. 43.
seems contrary.

Sect. 8. SECONDLY, Whereas a prisoner who breaks the prison may be arraigned(d) for such offence before he is arraigned of the crime for which he was imprisoned, he who rescues one imprisoned for felony cannot, according to the better opinion, (e) be arraigned for such offence as for a felony, until the principal offender be first attainted; but if the person rescued were imprisoned for high treason, the rescuer may immediately be arraigned, for that in high treason all are principals: also it seems that he may be immediately proceeded against for a misprision only, if the king please.

+ III. The legislature hath made provisions upon this subject in the following instances.

1. In assisting the rescue of a prisoner convicted of treason or felony.

2. In assisting the rescue of a prisoner committed for petty larceny.

3. In conveying instruments into any prison to facilitate escapes of prisoners committed for treason or felony.

4. In delivering instruments of escape to persons committed for petty larceny.

5. To aid and assist in rescuing a felon or traitor from the custody of a constable.

6. In rescuing a person ordered for transportation.

7. In rescuing a person convicted of murder.

8. In rescuing the dead body of a murderer.

9. In rescuing smugglers.

10. In rescuing offenders against the Black Act.

† *Sect. 9. FIRST*, It is enacted by 16 Geo. 2. c. 31. "That if any person shall, by any means whatsoever, be aiding or assisting to any prisoner to attempt to make his or her escape from any gaol, though no escape be actually made, in case such prisoner was then attainted or convicted of treason, or any felony except petty larceny, or lawfully committed to, or detained in, any gaol, for treason or any felony except petty larceny, expressed in the warrant of commitment or detainer, every person so offending shall, on conviction, be transported for seven years."

Vide 1 Ann. st. 2. c. 6. and 5 Ann. c. 9. respecting rescues upon civil process; and 8 and 9 Will. 3. c. 27. by which it is made felony, without benefit of clergy, to oppose the execution of process, or to rescue pri-

soners in any of the pretended privileged places therein mentioned.

† *Sect. 10. SECONDLY*, It is also enacted, "That in case such prisoner then was convicted of, committed to, or detained in any gaol for petty larceny, or any other crime, not being treason or felony, expressed in the warrant of his or her commitment or detainer as aforesaid, or then was in gaol upon any process whatsoever, for any debt, damages, costs, sum or sums of money, amounting in the whole to the sum of one hundred pounds, every person so offending as aforesaid, shall, on conviction, be deemed guilty of a misdemeanor liable to fine and imprisonment."

Assisting the escape of a prisoner for petit larceny, &c.

† *Sect. 11. THIRDLY*, It is also further enacted by par. 2. "That if any person shall convey, or cause to be conveyed, into any gaol or prison any visor or other disguise, or any instrument or arms, proper to facilitate the escape of prisoners; and the same shall deliver, or cause to be delivered, to any prisoner in any such gaol, or to any other person there, for the use of any such prisoner, without the consent or privity of the keeper or under-keeper of any such gaol or prison; every such person, although no escape, or attempt to escape, be actually made, shall be deemed to have delivered such visor or other disguise, instrument or arms, with an intent to aid and assist such prisoner to escape or attempt to escape; and in case such prisoner then was attainted or convicted of treason, or any felony except petty larceny, or lawfully committed to, or detained in, any such gaol for treason, or any felony except petty larceny expressed in the warrant of commitment or detainer, every person so offending shall, on conviction, be deemed guilty of felony, and transported for seven years."(1)

Conveying instruments to facilitate escape is transportation.

† *Sect.*

(1) The indictment must state that the instruments were conveyed with a design to effectuate the escape. O. B. But no indictment can be maintained upon this act of parliament for contributing to the escape of a prisoner committed on

suspicion only. Walker's case, 1774, Cases Crown Law, 92; and the King v. Greeniff, at Maidstone, Lent Assizes, 1785, Cases Crown Law, 292. Vide also the case of William Gibbons, Cases Crown Law, 93. *notis*.

But if detained for petit larceny, a misdemeanor.

† **Sect. 12. FOURTHLY,** And it is further enacted, "That in case the prisoner to whom, and for whose use, such visor or disguise, instrument or arms, shall be so delivered, then was convicted, committed, or detained for petty larceny, or any other crime, not being treason or felony, expressed in the warrant of commitment or detainer, or upon any process whatsoever, for any debt, damages, costs, sum or sums of money, amounting in the whole to the sum of one hundred pounds, every such person so offending shall, on conviction, be deemed guilty of a misdemeanor, and liable to fine and imprisonment."

Vide 6 Geo. 1. c. 23. s. 5. and 24 Geo. 3. c. 56. where to assist felons convict to make their escape from the persons to whom they are delivered to be transported, is felony without clergy. And vide 3 Peere Will. 439.

† **Sect. 13. FIFTHLY,** And it is also enacted by par. 3. "That if any person shall aid or assist any prisoner to attempt to make his or her escape from the custody of any constable, headborough, tythingman, or other officer or person who shall then have the lawful charge of such prisoner in order to carry him or her to gaol, by virtue of a warrant of commitment for treason or any felony, except petty larceny, expressed in such warrant, or if any person shall be aiding or assisting to any felon to attempt to make his escape from on board any boat, ship, or vessel, carrying felons for transportation, or from the contractor for the transportation of such felons, his assigns or agents, or any other person to whom such felon shall have been lawfully delivered in order for transportation, then every person so offending, on conviction, shall be guilty of felony, and transported for seven years."

Returning from transportation, felony.

† **Sect. 14. SIXTHLY,** And it is further enacted, "That if any person who shall be ordered for transportation in pursuance of this act, shall return or be found at large, without some lawful cause, before the expiration of the term, he shall be liable to the same punishment, prosecution, trial and conviction, as other felons returning, &c. from transportation, &c. are liable to."

Limitation.

† **Sect. 15.** Provided always, "That there shall be no prosecution for any of the said offences, unless such prosecution be commenced within one year after such offence committed."

By stat. 1 and 2 Geo. 4. c. 88. s. 1. intituled, "An act for the amendment of the law of rescue," it is enacted, "That, from and after the passing of this act, if any person shall rescue, or aid and assist in rescuing, from the lawful custody of any constable, officer, headborough, or other person whomsoever, any person charged with, or suspected of, or committed for any felony, or on suspicion thereof, then, if the person or persons so offending shall be convicted of felony, and be entitled to the benefit of clergy, and be liable to be imprisoned for any term not exceeding one year, it shall be lawful for the court, by or before whom any such person or persons shall be convicted, to order and direct, in case it shall think fit, that such person or persons, instead of being so fined and imprisoned as aforesaid, shall be transported beyond the seas for seven years, or be imprisoned only, or be imprisoned and kept to hard labour in the common gaol, house of correction, or penitentiary house, for any term not less than one and not exceeding three years."

(&c.)

Sect. 2. Enacts, "that, from and after the passing of this act, if any

"any person shall assault, beat, or wound any constable, officer, headborough, or other person whomsoever, with intent in so doing, or by means thereof, to obstruct, resist, or prevent the lawful apprehension or detainer of any person charged with, or suspected of, felony; or if any person charged with, or suspected of, felony, shall assault, beat, or wound any constable, officer or headborough, or other person whomsoever, with intent in so doing, or by means thereof, to obstruct, resist, or prevent his or her apprehension or detainer; then, and in every or any such case, if the person or persons so offending shall be convicted of a misdemeanor only, it shall be lawful for the court, by or before whom any such person or persons shall be so convicted as aforesaid, to order and direct, in case it shall think fit, that such person or persons shall, in addition to any other pains, penalties, or punishment to which he, she, or they are now subject or liable, be kept to hard labour for any term not exceeding two years, and not less than six months."

† Sect. 16. SEVENTHLY, By 25 Geo. 2. c. 37. s. 9. it is enacted, "That if any person or persons whatsoever shall by force set at liberty or rescue, or attempt to rescue or set at liberty, any person out of prison who shall be committed for, or found guilty of, murder; or rescue, or attempt to rescue, any person convicted of murder, going to execution, or during execution, every person so offending shall be deemed guilty of felony, and suffer death, without benefit of clergy."

Rescuing a convict for murder, &c.

† Sect. 17. EIGHTHLY, By 25 Geo. 2. c. 39. it is enacted, "That if any person or persons whatsoever shall, after such execution had, by force rescue, or attempt to rescue, the body of such offender out of the custody of the sheriff, or his officers, during the conveyance of such body to any of the places directed by the act; or shall by force rescue, or attempt to rescue, such body from the company of surgeons, or their officers or servants, or from the house of any surgeon where the same shall have been deposited in pursuance of this act; every person so offending shall be transported for seven years, and shall be subject to the like punishment, &c. in case of returning, as by law other felons returning from transportation are subject to."

Rescuing the dead body of a murderer.

† Sect. 18. NINTHLY, By 11 Geo. 2. c. 26. "If any persons, to the number of five or more, shall, in a tumultuous and riotous manner, assemble themselves to rescue any offender against 9 Geo. 2. c. 23. or to assault, beat, or wound any person or persons who shall have given, or be about to give, any information or evidence against, or shall have discovered or given evidence against, or be about to discover or give evidence against, seize or bring to justice any person or persons offending against the said act, they, their aiders and abettors, shall be guilty of felony, and the court, on conviction, shall have power to transport them for seven years."

By 2 Will. and M. sess. 1. c. 5. s. 4. persons guilty of any pound breach, or the rescous of any goods or chattels distrained for rent, or of the owner of any goods so distrained, shall pay treble damages, &c. &c. Vide Raym. 19.

342. C. C. C. 120. and 461.

† Sect. 19. TENTHLY, By 9 Geo. 1. c. 22. commonly called The Black Act, "If any person or persons shall forcibly rescue any person being lawfully in custody of any officer or other person,

Rescuing an offender on the Black Act.

" person, for any of the offences mentioned in the act, or if any
 " person or persons shall by gift, or promise of money, or other
 " reward, procure any of his majesty's subjects to join him or
 " them in any such unlawful act, every person so offending shall
 " suffer death, without benefit of clergy."

CHAP. XXII. OF ATTACHMENT.

HAVING shewn in what manner offenders may be apprehended without process from a court of record, I am now to shew in what manner they may be brought into court by such process.

Of Process from a court of record there are two sorts.

1. Such as may be awarded by the discretion of the judge upon a bare suggestion, or their own knowledge, without Appeal, Indictment, or Information.

2. Such as can be awarded only upon such accusations.

See 2 Sess. Cas.
176.
1 Wils. 300.

F. Corody, 4.

For contempts
in Chaucery,
vide 2 Com.
Dig. 89 to 42.
Rastal, 268.
1 Bar. K. B.
110.
Raymond, 376.
C. Car. 146.
1 Roll, 315.
1 Bar. K. B.
333.

Salkeld, 84.
8 Mod. 123.
Black. 892.

1 Tra. 1068.

3 H. 7. 6.
2 Ed. 4. 35.
34.

6 Modern, 73.

The **FIRST** is generally called *an attachment*, and is properly grantable in cases of contempts, against which, for the most part, all courts of record generally, but more especially those of Westminster-Hall, and above all the Court of King's Bench, may proceed in a summary manner, according to their discretion.

Sect. 1. If the contempt happen to be done by a person present in the court, and it appear either from the confession of the party on his examination upon oath, or by the view or immediate observation of the judges themselves, the court may immediately record the crime, and commit the offender, and also inflict such further punishment as shall seem proper.

And if such offences be done by a person not present in court, and be complained of by affidavit, the court will either make a rule on the party to attend at a certain day, in order to answer the matter of the complaint against him; or else will make a rule upon him to shew cause why an attachment should not be granted against him; or else, if the offence be of a very exorbitant nature, as for words of contempt of the court itself, will grant an attachment on the first complaint, without any such rule to shew cause.

And the party who is ordered to attend the court in pursuance of such rule, ought regularly to appear in proper person, and not by attorney; as also must every one against whom an attachment is granted.

And if the offence be of a heinous nature, and the person attending the court upon such a rule to answer it, or appearing upon an attachment, be apparently guilty, the court will generally commit him immediately, in order to answer interrogatories, to be exhibited against him in relation to such contempt. But if there be any favourable circumstances to extenuate or excuse the offence, or if it appear doubtful whether the party be guilty of it

or

or not, the court will generally in their discretion suffer the party, having first given notice of his intention to the prosecutor, to enter into a recognizance to answer such interrogatories; and if no such interrogatories be exhibited within four days after such recognizance, will discharge the recognizance upon motion; yet if the party do not make such motion, and the interrogatories be exhibited after the four days, the court will compel him to answer them.

See *Rex, v. Horsley*, 5 Term Rep. 362.

But in all the cases abovementioned, if the party fully purge himself upon oath in his answer to such interrogatories, of the whole matter charged upon him, the court will discharge him from the contempt, and leave the prosecutor to proceed against him for the perjury, if he thinks fit: but if the party confess the contempts in his answer to such interrogatories, and others, the court will not discharge him from the contempt, but will proceed farther to examine the truth of them, and will inflict such punishment as from the whole shall appear reasonable: neither will the court discharge the party upon a starting or evasive answer to any material part of the charge against him, but will punish him in the same manner as if he had confessed it. (1)

The Queen and Barber, Mich. 11 Annas. Modern, 73. Jones, 178. Douglas, 498, Burr, 1329. Mod. 348. 311. Comb. 63.

But for the better understanding in what cases the court may proceed in the manner abovementioned against such offenders, I shall endeavour to shew,

I. Where it may so proceed against the ministers of the court.

II. Where against others.

As to the FIRST of these POINTS I shall consider,

1. Where it may so proceed against sheriff's, bailiffs of franchises, and sheriff's bailiffs.

2. Where against attornies, and others acting as such.

3. Where against other officers.

4. Where against jurors.

As

(1) The object of an attachment is to bring the party personally before the court. On appearance he is permitted to enter into a recognizance with two sureties, in such sum as the court shall direct, to appear and make answer, upon oath, to such interrogatories as shall be exhibited against him. *Barnard, K. B. 58.* After the interrogatories are filed, and not before, the party may confess the contempt, unless in the case of a rescue, or for contempt in the face of the court, 1 *Black. 649*, and submit to the mercy of the court, 1 *Black. 6.* Otherwise examinations are taken thereon, and referred to the master of the crown-office to make his report. *B. R. H. 23.* But the party is not obliged to answer any interrogatories tending to convict him of any other offence, *Strange, 444*, or which may subject him to a penalty. *B. R. H. 239.* Upon these examinations the master is to make his report, and the party is then, and not before, either acquitted of the charge, or adjudged in contempt, *B. R. H. 23*, and in the latter case, is either immediately sentenced or committed to

the marshal, unless the court wave giving judgment, and order the recognizance to be discharged, 3 *Burr. 1256*, or the Attorney-General consent that he may continue upon the recognizance to appear, under a rule of court, at some future time, 2 *Burrow, 797.* 4 *Burr. 2105.* The master's report cannot be moved for the last day of term, unless upon extraordinary cases, without permission of the court, 1 *Black. 311*, such as in attachments for non-payment of costs, or not returning a writ, 1 *Burrow, 651.* Nor will the court grant a day-rule to one committed for a contempt. 1 *Barnard, K. B. 167.*

NOTE. Motions and affidavits for attachments in civil suits are proceedings on the civil side of the court of king's bench until the attachment issue, and are to be intitled with the names of the parties; but as soon as the attachments issue, the proceedings are on the crown side, and from that time the king is to be named as the prosecutor. 3 *Term Rep. 253.*

As to the first of these particulars I shall endeavour to shew,

1. Where the court may so proceed against sheriffs, bailiffs of franchises, and sheriffs bailiffs, for not executing a writ.

2. Where for doing it oppressively.

3. Where for not doing it effectually.

4. Where for making a false return.

As to the first particular, viz. In what cases the court may proceed in the manner abovementioned against sheriffs, bailiffs of franchises, and sheriffs bailiffs, for not executing a writ.

Sect. 2. It seems clear from the general reason of the law, which gives all courts of record a kind of discretionary power over all abuses by their own officers, in the administration or execution of justice, which bring a disgrace on the court themselves, as not taking sufficient care to prevent them, that where ever it shall appear, that any such officers have been guilty of any corrupt practice in not serving any writ—as where they refuse to do it, unless paid an unreasonable gratuity from the plaintiff—or receive a bribe from the defendant—or give him notice to remove his person or effects, in order to prevent the service of any writ, the court, which awarded it, may punish such offences in such manner as shall seem proper by attachment, &c. as well as the court of king's bench, which has a general superintendency over all crimes whatsoever (as the Star-chamber (a) had also formerly), but commonly leaves offences of this kind, in relation to causes in other courts, to be punished by such courts to which they more immediately belong (b). But if there neither appear to have been any palpable corruption in the case, nor particular obstinacy, as by disobeying a special rule of the court, in relation to the service of such writ, nor other extraordinary circumstances of wilful negligence, the judgment whereof is to be left to the discretion of the court, it seems not to be usual to grant an attachment in such cases, but to leave the party to his ordinary remedy against the officer; which he may have either by serving him with rules to return the writ, &c. or by suing him for the damage sustained by his negligence, in an action of escape, or on the case, or by taking out an *alias* (c) and *pluries*, which if the sheriff do not execute, an attachment, directed to the coroners, goes against him of course, unless he give a good excuse for his not having done it. † And if the coroners do not execute the writ, the court will, in the first instance, grant an attachment against them directed to elizors (d).

As to the second particular, viz. Where the court may proceed in the manner abovementioned, against a sheriff, or bailiff, &c. for an oppressive practice in the execution of a writ.

Sect. 3. It is every day's practice to grant attachments for misdemeanors of this kind, as for using needless force, violence, and terror, in making an arrest; or by breaking open doors where by law it is not justifiable, and there is no plausible excuse for doing it; or treating the persons arrested basely and inhumanly; or keeping

Dyer, 210.

(a) Noy, 101.

(b) 2 Bar. K.
B. 277.
1 Vent. 11.
Strange, 567.
Hob. 264.
Lately v. Weston. See F.
Process, 13.
104.

(c) F. N. B. 38.
47. 263.
Finch, 237.
264. 62, 263.
Hob.

(d) 2 Bl. Rep.
912. 1218.

keeping them in custody till they ^{consent} to pay money for their deliverance; or making an arrest without due authority, as by force of a blank (a) warrant, filled up with the name of a special bailiff by the party himself, or bailiff, without the privity or subsequent agreement of the sheriff. (a) Noy, 101. Moor, 770. 2 R. Abr. 278.

Yet I have sometimes known attachments of this kind denied, in respect of the common use of the practice, which by experience hath been found to be almost necessary in some cases to prevent the defendant's having notice of the intended arrest; and therefore, if it shall appear to the court, that there was any such reasonable cause for such a proceeding, it will be a great inducement to excuse, if not wholly to dispense with it.

As to the third particular, viz. Where the court may proceed in the manner abovementioned against a sheriff, or bailiff, &c. for not executing a writ effectually

Sect. 1. It seems clear, that where any such officer is guilty of any corrupt practice in depriving the party who sues out a writ of that benefit and advantage which he ought to have from the execution of it, he is liable to be punished in the manner abovementioned; as if he levy the debt by virtue of an execution, and keep the money in his own hands, and embezzle it but unless there appear some gross and palpable corruption in a sheriff neglecting to return a writ, which hath been executed by him, or to bring in the body, or the money, &c. according to his return, the court will hardly grant an attachment against him immediately, but will rather proceed against him by rules to return the writ, &c. and if he do not obey them, will increase the amercements upon him till he do, or perhaps grant an attachment for the contempt; and (b) if the sheriff return, that he sent the process to the bailiff of a liberty, who hath given him no answer, a *non omittas* shall be awarded to the sheriff and if he return, that he sent the process to such bailiff, who hath returned a *cepi corpus*, or such like matter, and the bailiff bring not in the body or money, &c. at the day, by the better (c) opinion the bailiff shall be amerced, and a writ (d) shall issue to the sheriff, to distrain the bailiff to bring in the body, &c.

Capias, pl. 20. B. Process, 23. ff. 117. 118. B. Return, 96. 97. 5 Id. 3. 14. 11 Id. 3. 1. 3 Id. 5. 8 Id. 3. 2

As to the fourth particular, viz. Where the court may proceed in the manner abovementioned against a sheriff, &c. for making a false return to a writ.

Sect. 5. There seems (e) to be no doubt, but that wherever any such officer endeavours to impose upon a court, by making a return to a writ of a matter known by him to be false, he is, in strictness, liable to be punished in this manner, for his contempt. Yet it seems, that the court will not easily be prevailed on to proceed in this manner for a bare false return, but will rather leave the party injured by it to his remedy by an action on the case, unless there be some extraordinary circumstances of hardship or oppression; as where (f) an officer who had arrested one on a *capias*, returned, that he had taken him, but that the party

(e) F. Process, 5. B. Surmises, 19. Return de Breve, 100. Rastal, Habeas Corpus, 7.

(f) 11 H. 6. 42, 43. Sayer, 121.

was so sick, that he could not bring in his body at the day for fear of endangering his life, where in truth the party had been all the while in good health, and was only detained under such pretence, in order to extort money from him, &c.

*Rex v. Sheriff
of Middlesex, 3
Term Rep. 153.*

† And where a sheriff has been guilty of a contempt in the course of a civil suit, and the defendant afterwards dies, an attachment may still issue against the sheriffs for the prior contempt.

As to the SECOND POINT, viz. In what cases the court may proceed in the manner abovementioned, against attornies, and others acting as such; I shall endeavour to shew,

1. Where it may so proceed against them, for appearing for a person without sufficient authority.

2. Where for injustice to their clients.

3. Where for other contempts to the court, or dishonest practice.

Vide Str. 402.

As to the first of these particulars, viz. Where the court may proceed, in the manner abovementioned, against attornies and others acting as such, for appearing for any persons without sufficient authority.

(a) 88 Ed. 3. 8.
41 Ed. 3. 1.
Rastal, 582.
16 Ed. 4. 3.

Sect. 6. There is no doubt (a) but that it may proceed against them, for taking upon them to prosecute or defend a suit for another, without any manner of directions from him. Also if they have in truth a warrant from the party, but do not cause it to be recorded before judgment, it seems, (b) that they are in strictness liable to an attachment, for that the court takes no

(b) *Rastal, 96.*

(c) *F. Judg. 96.*
41 Ed. 3. 1.
30 Ed. 3. 8.
4 Ed. 4. 13.
16 Ed. 4. 3.
Rastal, 582.
Burrow, 654.

judicial notice of any such warrant not of record; yet (c) if in such case it appear, upon examination, that the warrant of attorney happened not to be recorded through the negligence of the officer, or some such like accident, attended with no corrupt practice in the attorney, it seems, that the court would never easily be prevailed on to proceed in this manner against the attorney; and much less at this day, since he is liable by statute (d) to a certain pecuniary forfeiture for every offence of this kind.

(d) *Vide infra,*
sect. 9.

Coke's En. 167.

Sect. 7. For it is enacted by 32 Hen. 8. c. 30, made perpetual by 2 Edw. 6. c. 32. and by 18 Eliz. c. 14, and 4 & 5 Ann. c. 16, "That the plaintiff's attorney shall file his warrant the same term he declares, and the defendant's attorney the same term he appears; on pain of forfeiting ten pounds, and also suffering such imprisonment, as by the discretion of the justices of the court where any such default shall fortune to be, shall be thought convenient."

Vide Dyer, 180.
Rastal, 589.

Sect. 8. And it seems, that since these statutes, it hath not been usual to grant attachments in these cases, without some apparent circumstances of fraud, or other corruption.

1 *Burr, 20.*

Sect. 9. But howsoever a regular attorney may be excused from an attachment, for not having recorded his warrant, those have no reason to expect the like favour from the court, who take upon

upon them to appear for others as attorneys without having been admitted and sworn as such, for these are liable to an attachment for every appearance, whether their warrant were recorded or not.

† And it is enacted, by 2 Geo. 2. c. 23. 22 Geo. 2. c. 46. perpetuated by 30 Geo. 2. c. 19. "That whoever shall in his own name, or in the name of another, act as an attorney or solicitor for reward, without being admitted and enrolled, shall forfeit £50 to whoever shall prosecute, and be disabled from acting in either of those capacities.—And whoever, being admitted and enrolled, shall lend his name to any other not being admitted and enrolled, shall be incapable to act, and his admittance, &c. rendered null and void."

As to the second particular, viz. Where the court may proceed in manner abovementioned against attornies, and others acting as such, for injustice to their clients.

Sect. 10. It is every day's practice to move for it against them, for base and unfair dealing towards their clients in the way of business, as for protracting suits by little shifts and devices, and putting the parties to unnecessary expenses in order to raise their bills; or demanding fees for business which never was done, or for refusing to deliver up to their clients writings with which they have been intrusted in the way of business; or money which has been recovered and received by them to their client's use, and for other such-like gross and palpable abuses: but the court will seldom grant an attachment for the detainer of such writings or money, without first making a rule on the attorney, to deliver them to the party. Also it will justify an attorney's detaining such writings or money for his security till he be paid all his just fees. Nor will it ever interpose in this manner as to any writings or money received by an attorney on any other account, except only in his way of business as an attorney, but will leave the party to his ordinary remedy by action. (1)

As to the third particular, viz. Where the court may proceed in the manner above-mentioned against attornies, and others acting as such for other contempts to the court, or dishonest practice.

Rastal, 93.
3 Atkins, 568.
1 Bar. K. B. 101.
Savil, 31.
See 4 H. 4. c.
18.
3 Jac. 1. c. 7.
Sayer, 51.

Salkeld, 87.
Str. 547, 621.
8 Mod. 339,
340. 192. 227.
243. 306.
2 Bar. K. B.
34. 263.

4 Hen. 4. c. 18.
Freem. 74.
4 Mod. 367.
6 Mod. 16, 187.

Sect.

(1) It is a contempt of court in an attorney to use reproachful words on delivering a declaration in ejectment. *Strange*, 576. Or to assign the death of a plaintiff in ejectment for error. *Strange*, 890. Or to bring a fictitious action. *L. Hard. Ca.* 237. 8 Mod. 109. Or to some process on a person attending his business in the court. *Andr.* 275. *Strange*, 1094. Or to arrest one attending arbitrators under a rule of court. *Black.* 1110. Or to refuse answering questions by the court. *Strange*, 1197. *Wils.* 30. Or to undertake to appear and then not appearing. *L. H. Cases*, 131. *Vide Com. Dig. Tit. Attorney*, b. 13. 15. Or to refuse to prove the execution of a deed to which he is a subscribing witness. *Cowper*, 845. Or to

let an argument go on, in order to obtain the opinion of the court after the parties have privately agreed. *Strange*, 420. Or to alter the name in a sheriff's warrant. 1 *Black.* 2. Or for signing a counsel's name to a bill in equity without his consent. *Fawcett v. Garford*, *Trinity*, 29 Geo. 3. And if he has neglected to attend the court after order so to do, he shall be immediately committed and answer interrogatories in vinculis. 2 *Bar. K. B.* 219. And for any ill practice attended with fraud and corruption, the court will order the party to be struck off the roll. *Freem.* 74. *Black.* 991. But this does not create a perpetual disability, for he may be again restored. *Blackstone*, 222. *

Sect. 11. It seems, that it may not only proceed in such manner against them for disobedience of its rules, after notice given them of such rules, either expressly or impliedly; but also, for any such ill practice as is against the known and obvious rules of justice and common honesty; as for forging (a) a writ, or any other matter of record, (b) or but attempting to do it; or for taking out a *capias*, (c) which has no original to warrant it; or for receiving (d) money of the client for suing out an original, and also for the fine due thereon to the king, where, in truth, no original has been sued out, nor any fine paid to the king; or for endeavouring to impose upon the court; as (e) by causing an action to be brought against one in it by collusion, without any just ground, in order to intitle the party to the privilege of the court, and afterwards, upon the examination of the matter in court, giving a false account of it; or (f) for giving directions to a sheriff concerning what persons he should return on a panel; and for other misdemeanors of the like nature.

(a) C. Car. 52.
74.
Dyer, 241. 244.
(b) F. Attach. 7.
(c) 20 H. 6. 37.
F. Attach. 3.
(d) C. Car. 52.
74.
(e) 16 Ed. 4. 5.
1 Burn, 20.
Vide 12 Geo. 2.
c. 13.
12 Geo. 1. c. 29.
B. Privilege, 43.
(f) Moor, 882.
3 Burr. 1564.
Vide 1 Black. 2.

As to the **THIRD POINT**, *viz.* Where the court may proceed in the manner above-mentioned against other officers of the court.

Sect. 12. There being scarce any thing of this kind to be met with in the books, I shall only observe, that it seems clear, from the general reason of the law, which gives all courts of record a kind of discretionary power in the government of their own officers, that any such court may proceed in such manner against any such officer, not only for refusing to execute its commands, or for executing them irregularly, remissly, (g) or oppressively, but also for all kinds of oppression or injustice done by them in the execution of their offices, or by colour of them.

2 Bar. K. B.
254.
Vide sup. sect. 1.
F. Off. del
Court, 12.
Rast. 329. 268.
Dyer, 218.
(g) F. Tres. 73.
33 H. 6. 55.
b. 56.

As to the **FOURTH POINT**, *viz.* In what cases the court may proceed in the manner above-mentioned against jurors.

Sect. 13. It is observable, that jurors may be considered either in a ministerial capacity, *viz.* as persons bound to attend the court, in order to perform the duty for which they are returned, until they shall be discharged; or in a judicial capacity, *viz.* as judges of the fact which is to be tried or inquired by them.

And therefore, for the better understanding of this matter, I shall consider,

1. How far jurors are punishable in the manner above-mentioned in their ministerial capacity.

2. How far in their judicial.

As to the first particular, *viz.* How far jurors are punishable by attachment in their ministerial capacity.

It seems clear, that jurors are punishable in the manner above-mentioned in their ministerial capacity, in the following instances.

Sect. 14. FIRST. For making default. As where more than one of the persons returned on a jury do appear, but not a sufficient number to take an inquest, and some (h) of the others come

48 Ed. 3. 30.
(h) Rast. 167.
368.

come within view of the court, or into the same town (*a*) in which the court is holden, but refuse to come into the court to be sworn; in which cases, upon proof of such matter, the court (*b*) may, at the prayer of the party, order the jurors who appeared, to inquire what is the yearly value of such defaulter's lands, and after such inquiry made, either to summon them to appear, on pain of forfeiting such sum as their lands have been found to be worth by the year, or some lesser (*c*) sum, or impose (*d*) a fine of the like sum upon them, without any farther proceeding. But it seems, (*e*) that such juror shall be liable to lose his issues only for such default, and not the yearly value of his lands, unless the party pray it. But a juror (*f*) who hath actually appeared, and after makes default, is said to be subject to such forfeiture of the yearly value of his lands, whether the party pray it or not, because his contempt appears to the court by its own record; yet (*g*) even in this case, the court, in discretion, will sometimes only impose a small fine. Also it is said, that no juror shall be subject to such penalty, where (*h*) the inquest could not be taken if he had appeared; as where but five of the jurors summoned on an assize, have had a view of the land. Also it seems (*i*) that a juror who makes a default without ever coming into the town wherein the court is holden, is liable only to lose his issues, or to be amerced, but not to be fined: And it is said, that he shall neither (*k*) be fined nor amerced, if the defendant be essoined on the day on which the jury was to appear, for that his appearance in such case would be to no purpose. And it seems (*l*) questionable whether a juror be amerciable for not appearing at the return of a *sicut alias venire facias*, where the first *venire* was not served. Neither doth a juror seem to be amerciable at all, at the day of the return of the first *venire* (*m*) *facias*, except before justices errant, or of oyer and terminer, &c.

Sect. 15. SECONDLY, For refusing to be sworn when they do appear. For which, as it seems, (*n*) every court of record may, of common right, impose such a reasonable fine on any one returned on a grand or petit jury, as shall seem convenient.

Sect. 16. THIRDLY, For refusing (*o*) to give any verdict at all.

Sect. 17. FOURTHLY, For endeavouring to impose upon the court; as where (*p*) a petit jury offer a verdict to the court, as agreed to by their whole number, where, in truth, some of them have not agreed to it: Or where (*q*) they agree upon two verdicts, and first offer one of them to the court, and to stand to it, if the court shall express no dissatisfaction to it, but if the court shall dislike it, then to give the other.

Sect. 18. FIFTHLY, For misbehaving themselves after their departure from the bar; as where they (*r*) do not all keep together till they have given their verdict; or where any (*s*) of them carry any thing eatable with them in their pockets; or eat, (*t*) or drink,

F. Exam. 17.

(*a*) Rast. 267.
30 Ass. 3. 42.
48 Ed. 3. 30.
B. Jurors, 25, 26.
20 Assize, 11.
(*b*) Rast. 267,
268.
4 Ed. 4. 37.
9 H. 4. 5.
20 Assize, 11.
8 Co. 41.
(*c*) Rast. 267.
(*d*) Rast. 267,
268.
(*e*) F. Peine, 1, 2.
30 Assize, 42.
4 H. 6. 7.
4 Ed. 4. 36, 37.
36 H. 6. 7.
B. Jurors, 15.
18. 26.
Enquest, 42.
(*f*) F. Chet. 47.
36 H. 6. 27.
(*g*) F. Office do
Court, 12.
(*h*) F. Peine, 3.
9 H. 4. 5.
(*i*) 10 E. 4. 19.
(*k*) 10 E. 4. 19.
30 Assize, 17.
Qu. 48 E. 3. 12.
12 Assize, 14.
F. Assize, 65.
(*l*) 1 H. 7. B.
(*m*) F. Ass. 136.
466.
11 Assize, 7.
B. Amerce, 68.
See the chapter
of Process
against Jurors.
(*n*) 2 Inst. 142.
44 Ed. 3. 19.
8 Co. 38.
7 H. 6. 12.
(*o*) Vaugh.
152.
Nov. 49.
3 Bult. 173. 9 H. 6. 44.
(*p*) 29 Ass. 27.
B. Jur. 28.
40 Assize, 10.
1 R. Abr. 219.
(*q*) Cro. Eliz.
779.
Or if a jury cast
lots for their ver-
dict.
3 Keb. 805.
2 Levinz, 140. 205. 2 Jones, 63. Str. 642.
(*r*) 14 H. 7.
29, 30.
Vaugh. 151.
(*s*) Dyer, 78.
(*t*) Dyer, 218.
Vaugh. 152.
C. Jac. 21.
B. Jur. 15.

(a) Rast. 268.
Dr. and St. 158.
1 Inst. 227.
2 Hale, 296.

drink, or otherwise refresh themselves without leave from the court, before they have given their verdict, though they were agreed (a) on it, and were also all the time in the custody of the bailiff appointed to take care of them.

(b) Rast. 329.
Hobart, 114.
F. Exam. 17.
1 Inst. 227.
2 Hale, 296.

Sect. 19. SIXTHLY, For sending (b) for, or receiving instructions from either of the parties concerning the matter in question, and therefore (c) much more for receiving a bribe.

(c) 40 Ass. 43. See Book 1. c. 27. p. 467. 2 Hale, 160, 161. 310 to 313. 5 Ed. 3. c. 10. 34 Ed. 3. c. 8. 38 Ed. 3. c. 12. Lord Raym. 407.

As to the second particular, viz. How far jurors are punishable in the manner above-mentioned in their judicial capacity.

(d) F. Cor. 108.
Vaugh. 152.

Sect. 20. It seems to be the current opinion of the old books, that jurors are not subject to any prosecution for a false verdict, except by way of attain; and there seem to be very few ancient precedents for the punishment either of a grand or petit jury, merely for giving a verdict against evidence, or the direction of the court, either in a criminal or civil matter. It is said (d) indeed in Fitzherbert's Abridgment of a case in the time of king Richard the Second, that the judge told the jury, upon their acquitting a common thief of an indictment, that they should be bound to their behaviour for their lives; but this was only the sudden opinion of a judge, and it doth not appear, that the jurors were afterwards actually so bound in the pursuance of the said opinion; and Fitzherbert makes a *quere* in his Abridgment of the case, by what law they could be so bound: And as to those three

(e) F. Impr. 4.
Judgment, 89.
Verdict, 40.
(f) 8 Assize, 35.
Vaugh. 151.
2 Jones, 16, 17.

(e) other cases in the time of king Edward the Third, wherein it is said that a juror was committed for refusing to agree with the other eleven, it may be answered, that it is said (f) in the first of those cases, "that such juror stayed his companions a day and a night, without agreeing with them, and this without a reason;" from whence it is reasonable to intend, that there might be some circumstances of misbehaviour, as an obstinate perverse resolution, right or wrong, to find a verdict one way, and not to consult with the other jurors, nor hear their reasons, &c. And in the last of the (g) said cases it is said, that the "juror committed by the justices of assize, for refusing two days and a night to agree with his companions, and saying, that he would rather die in prison than agree with them, was afterwards discharged by the justices of the common bench, upon the adjournment of the assize thither." And it was part (h) of the charge against Empson, who was indicted in the beginning of the reign of king Henry the Eighth, for a great complication of offences, that he had committed a jury to ward, and bound them to appear before the king and his council, and afterwards on their appearance fined them (though with the concurrence of the rest of the council) in the sum of eight pounds a piece, for refusing to find a person guilty of an indictment of larceny, upon sufficient evidence; yet it is said in Dalison's (i) Reports of cases in the third and fourth years of Philip and Mary, that it was agreed, that justices of assize, oyer and terminer, gaol-delivery, or the peace, have no power indeed to assess fines on jurors who make a false oath before them, but

(g) 41 Ass. 11.
41 Ed. 3. 31.
Vaugh. 151.

(h) Raym. 88.
89.

(i) Dalison, 18.

that

that they may give them a day before themselves, or the king's council; by which it seems to be implied, that such jurors were then thought to be some way or other punishable by such judges, or at least by the king's council; for otherwise it would be to little purpose to bind them to appear before them. Also it seems to be holden by Sir Edward Coke, (a) that though a jury be no way punishable for convicting a man upon an indictment against evidence, yet they might be charged in the Star-chamber for their partiality in finding a manifest offender not guilty: And about (b) the latter end of the reign of queen Elizabeth, a jury was committed and fined, and bound to their good behaviour, for finding one Wharton guilty of manslaughter only, against clear evidence and the direction of the court, upon an indictment of murder: And it is said in Palmer's (c) Reports, that jurors, who go against the directions of the court, are to be fined: and there are several instances in the beginning of the reign of king Charles the Second, wherein it was resolved, that both grand (d) and petit (e) juries were finable by the justices of gaol-delivery, for going against plain evidence, and the directions of the court.

(a) 12 Co. 23, 24.

(b) Yelv. 23. Noy, 48, 49.

(c) Palmer, 363.

(d) 1 Sid. 229, 230.

2 Keb. 180.

(e) 1 Sid. 272, 273.

Raym. 88, 89.

130.

1 Keb. 769, 938.

1 Keb. 404.

But these proceedings were always thought grievous, and were complained (f) of in the House of Commons; and this question was at last fully considered and debated in Bushel's case, who having been committed by the justices of oyer and terminer at the Old Bailey, brought his *habeas corpus*, in the court of common pleas; to which it was returned, that he was committed for the fine of forty marks, imposed on him for having, with other jurors, acquitted certain defendants of an indictment for an unlawful assembly, against full and manifest evidence, and against the direction of the court in matter of law; and upon this return he was discharged, and the return was adjudged insufficient, for not setting forth particularly (g) so much of the evidence that it might appear that it was full and manifest; and likewise (h) for not setting forth, that the defendant did know and believe it to have been full and manifest; and also (i), for not shewing what the direction of the court was, and in what manner the defendant found against it. And it was also resolved, (k) that petit jurors are in no case finable for giving a verdict against the evidence delivered in court, whether they be liable to an attainr for such verdict or not, not only for that the jury are by law the proper judges of matter of fact, as the judges are of matter of law, and therefore ought to be free in their judgment of it, without being over-ruled by the judges, who, strictly speaking, have no more to do with the judgment of the fact, than the jurors have, with the judgment of the matter of law; neither is it possible that a judge can certainly know that a juror acts corruptly in giving his verdict contrary to the strength of the evidence delivered in court; for he may be influenced by his own personal knowledge of the truth of the fact, of the credit of the witnesses, the reputation of the parties, and many other circumstances unknown to the judge, and well known to the jury; for which cause the law provided, that all issues should be tried by the neighbourhood of the place in which they are supposed to arise, because neighbours are presumed to have better knowledge than others of what concerns their

(f) 1 Sid. 130.

2 Keb. 100, 101.

Tr. per Pais,

225.

Vaugh. 135.

(g) Vaugh. 142.

2 Jon. 16, 17.

(h) Vaugh. 142.

2 Jon. 16, 17.

(i) Vaugh. 143.

(k) Vaugh. 144.

145.

3 Keble, 352.

2 Jones, 16.

Vide Hob. 114.

Co.

3 Keble, 352.

1 Inst. 226.

2 Hawk. c. 47.

s. 11.

Tr. per Pais,
209. 279.
1 Ventris, 67.
1 Salkeld, 405.
Hil. 10 Ann.
Q. v. Wakefield.

their neighbours. And for these causes, and other such like, the court of king's bench granted an information against a town-clerk, for publishing an order of the court against jurors, who had found a person guilty of manslaughter only, upon an indictment of murder, by which order the said jurors were declared to be justly suspected of bribery, and declared incapable of holding an office, &c.

2 Jones, 15, 16.
Vaughan, 144.
Palm, 363.
Co. Lit. 228.
Id. Ray, 470.
2 Hale, 309, 325.

Sect. 21. Yet if it shall plainly appear in any case, that jurors are perfectly satisfied of the truth of a fact, whereupon they declare to the court, that they find it in such a particular manner, and the court directly tell them, that upon the fact so found, as they have agreed it to be, the judgment of the law is such or such, and therefore that they ought to give a verdict accordingly, yet they obstinately insist upon a verdict contrary to such a direction; it seems agreeable to the general reason of the law, that the jurors are finable by the court in such a case, unless an attain lies against them; for otherwise they would be punishable for so palpable a partiality, in taking upon them to judge of matters of law, which they have nothing to do with, and are presumed to be ignorant of, contrary to the express direction of one who by the law is appointed to direct them in such matters, and is to be presumed of ability to do it.

Bract, 288, 289.
2 Jones, 15, 16.
Vaughan, 144.

Sect. 22. Also if a judge, for the better direction and information of a jury, shall ask them their opinions concerning such a particular fact, and they shall refuse to answer him, and obstinately insist to deliver in their verdict as they think fit, contrary to his direction, it seems questionable, whether they may not be fined in such a case also, unless an attain lie against them, for that it is the duty of jurors to take the advice and information of the court, in order to be governed by it as far as shall be consistent with their consciences.

Moor, 730.
3 Leon, 140.
Vaughan, 153.

Sect. 23. Also, if a jury shall refuse to find an office for the king, upon full evidence, it hath been holden, that they may be fined, for that in such case they are not liable to an attain, and their finding does not determine any man's right, and the king, in many cases, hath no other remedy. Yet it seems questionable, how far at this day these reasons may be thought conclusive; and it seems, that they hold as strongly for the punishment of grand jurors refusing to find an indictment of high treason; and yet it will be hard to maintain, that such jurors are any way punishable for such a refusal.

9 H. 6. 44.

9 H. 6. 44.

Sect. 24. But if a petit jury in a leet conceal a matter presentable by them, it is a good custom that they may be amerced for such concealment, being found by the grand jury; and by 3 Hen. 7. c. 1. set forth more at large Book 1. c. 7. p. 73. "If an inquest conceal any matter inquirable before justices of peace, another inquest may be impanelled to inquire of such concealments, and the concealers may be amerced by the discretion of such justices."

Having shewn in what cases the ministers of the court are punishable in the manner above-mentioned, I am now to shew in

in what cases others may be so punished; and for this purpose I shall endeavour to shew,

1. Where inferior judges are punishable in such manner.
2. Where counsellors.
3. Where gaolers.
4. Where any person whatsoever.

As to the FIRST POINT, *viz.* Where inferior judges are punishable by attachment, I shall endeavour to shew,

1. Where inferior judges are in such manner punishable for proceeding without jurisdiction.
2. For proceeding unjustly, oppressively, or irregularly.
3. For refusing to do justice.
4. For contempts of superior courts.

As to the first of these particulars, *viz.* In what cases inferior judges are punishable in the manner above-mentioned for proceeding without jurisdiction.

Sect. 25. It seems, (*a*) that the court of king's bench, having a general superintendency over all inferior courts, may, in strictness, award an attachment against any such court usurping a jurisdiction no way belonging to it, and putting the subject to unnecessary vexation by colour of a judicial proceeding wholly unwarranted by law, and therefore (*b*) prohibited by it. Yet in these cases it seems to be rather the more usual (*c*) way, first to award a writ of prohibition to such court, and afterwards an attachment upon its proceeding after such prohibition, and not to grant a rule to shew cause why an attachment should not go in the first instance, unless there be some extraordinary circumstances in the case; as where (*d*) the steward of a leet is guilty of a double usurpation, as of holding plea of a matter which arose out of his precinct, and which, if it had arisen within his precinct, would not have been within the jurisdiction of his court; or where (*e*) the judge of an inferior court refuses to receive a plea that the cause of action arose out of his jurisdiction; or where (*f*) any judge takes cognizance of a cause to which he himself is a party; or where the judge of a court-baron is privy to a practice of splitting (*g*) a cause of action for more than forty shillings into lesser sums, in order to bring it within the jurisdiction of the court. But in this last case, there seem to be more instances (*h*) of prohibitions than attachments; and in the cases above-mentioned, and all others of the like nature, it seems to lie wholly in the discretion of the court to grant either.

1 Keble, 484. 1 Siderfin, 564.

As to the second particular, *viz.* In what cases inferior judges are punishable in the manner above-mentioned for acting unjustly, oppressively, or irregularly.

Sect. 26. It is not easy to meet with cases of this kind in the books, there being seldom any thing in them so remarkable as to be

(*a*) 41 Ass. 30.
Salkeld, 201.
1 Keble, 484.
Palmer, 564.
Far. 1. 30. 84.
B.S.
(*b*) Vide 19 H.
6. 54.
9 H. 6. 61.
F. N. B. 270.
(*c*) Register,
145, 146.
F. N. B. 239.
1 Siderfin, 464.
6 Modern, 90.
2 Inst. 312.
2 H. Abr. 317.
(*d*) 41 Assize,
30.
F. Lect. 9.
B. Lect. 18. 31.
(*e*) Vaughan &
Hodges, Pas-
chw, 11 Annæ.
(*f*) Salkeld,
201. 396.
Farres. 1, 2.
(*g*) Palmer, 564.
1 Keble, 484.
(*h*) 19 H. 6. 54.
2 H. Abr. 317.
6 Modern, 90.
2 Keble, 617.
1 Ven. 65. 73.

be thought worth reporting. But it seems to be a common practice, to grant attachments against the judges of such courts for any practice contrary to the plain rules of natural justice, though it have been never so long used in such courts, as for denying a defendant a copy of the declaration against him, and going on to trial; or giving judgment against him, without giving him any manner of notice, or time to make his defence; or for taking of unreasonable (a) distresses, either on mesne profits, or execution; or for compelling (b) a defendant to give exorbitant bail; or for proceeding contrary to the prohibition (c) of a statute, as (d) by amercing a clergyman according to his spiritual benefice; or by assessing (e) an amercement without any affectment by the tenants of the manor; or by (f) taking money of a plaintiff or defendant for vicious pleading.

- (a) Salk. 201.
3 Keble, 92.
(b) 2 Jones, 178.
(c) F. N. B. 76.
160. 165, 166.
270.
9 H. 6. 61.
19 H. 6. 54.
(d) F. N. B. 76.
(e) F. N. B. 76.
(f) F. N. B.
270.
2 Inst. 122.
F. Attach. 8.

As to the third particular, viz. In what cases inferior judges are punishable in the manner above-mentioned for refusing to do justice.

Sect. 27. It seems clear, from the general reason of the law, and the common practice of the court of king's bench in cases of this nature, that the said court may in its discretion award an attachment against any such judge, obstinately and perversely, and without any colour of a reasonable excuse, refusing to proceed at all, or to give judgment, or award execution, in a matter brought regularly before him; for all such delays of justice are not only grievous to the suitor, but bring a disgrace upon the law itself.

Yet if there be no extraordinary circumstances in any such delay, to bring the judge under a reasonable suspicion of corruption, it seems the more usual method to take out a writ to such judge, commanding him to do the thing, of the delay whereof you complain, and if such writ be not obeyed, to take out an *alias* and *pluries*, or to take (g) but the *alias* and *pluries* together with the first writ, and thereupon, if the judge refuse to comply, to take out an attachment against him at the suit of the king and of the party, which may either be returnable into the court of king's bench, or, at the party's election, into the court of common pleas, except in some special (h) cases. And this seems (i) to be the proper remedy to compel the lord of a manor to hold a court for the determining of a writ of right patent, or a writ (k) of right close; or to compel the judge of any inferior court, whether of record (l) or not, to proceed (m) in a plea, or to give judgment (n) or to award execution. (o)

- (g) F. N. B. 68.
Infra, sect. 34.
(A) F. N. B.
62. 230. 63.
67. 13, 14.
(i) F. N. B. 3.
13.
(k) F. N. B. 12.
(l) Rastal, 83.
F. N. B. 20.
153. 243.
(m) F. N. B.
12, 13.
Rastal, 83.
(n) F. N. B.
153. 243.
(o) F. N. B. 20.

As to the fourth particular, viz. In what cases inferior judges are punishable in the manner above-mentioned for contempts of superior courts.

Sect. 28. There is no doubt but that justices (a) of peace, or commissioners (b) of sewers, may be so punished for proceeding in any matter before them, after a *certiorari* delivered to them; or the judge of a spiritual (c) or civil (d) law court, for proceeding in a cause after notice of a rule to shew cause why a prohibition should not go; or a judge of any inferior common law court, for proceeding in a cause after a *habeas corpus*, or writ of error

- (a) Moor, 677.
Yelv. 32.
1 Keble, 93.
(b) 1 Mod. 44.
(c) 2 Jones, 47.
(d) 1 Roll, 315.

error allowed; or a sheriff, (a) for proceeding in replevin, or other cause, in the county-court, after a *superedeas*, *pone*, or *recordare*. Also a rule (b) has been granted to shew cause why an attachment should not go against the steward of a wapentake for proceeding after a *tolt*, though this be only a contempt to the county-court.

(a) F. N. B. 13, 14.
F. Replev. 31.
43 Ed. 3. 16.
F. Process, 168.
Act. le Case, 29.
(b) Burgh and Blunt. Hil.
3 Geo. 1. 10 Modern, 349.

Sect. 29. Also justices of peace may be punished in the manner above-mentioned for acting in a contemptuous manner against the determination of the court of king's bench; as where an order of settlement, specially setting forth the circumstances of the case, is removed into the said court, and quashed there, by the judgment of the court, upon the merits; and yet the justices of peace afterwards make another order to remove the same person to the same place, for the very same cause, without regarding the judgment of the court, though it were well known to them, and insisted on by the parties.

As to the **SECOND POINT**, viz. In what cases counsellors are punishable in the manner above-mentioned.

Sect. 30. It seems clear, that notwithstanding they are neither officers of any court, nor invested with any judicial office, but barely practise as counsellors, yet inasmuch as they have a special privilege to practise the law, and their misbehaviour tends to bring a disgrace upon the law itself, they are punishable for any foul practice as other ministers of justice are.

6 Modern, 137.
1 Hawk. c. 27.
p. 480.
3 Burr. 1256.

As to the **THIRD POINT**, viz. In what cases gaolers are punishable in the manner above-mentioned.

Sect. 31. It seems clear, that they are not only punishable in this manner, as all other officers are, by the courts to which they more immediately belong, for any gross misbehaviour in their offices, or contempts of the rules of such courts, but they are also punishable by any other courts for disobeying writs of *habeas corpus* awarded by such courts, and not bringing up the prisoner at the day prefixed by such writs. Also it seems clear (c) that it is no excuse for not obeying a writ of *habeas corpus ad subjiciendum*, that the prisoner did not tender the fees due to the gaoler: Also (d) it seems to be the better opinion, that the want of such a tender is no excuse for not obeying a writ of *habeas corpus ad faciendum et recipiendum*: However (e) it is certain, that if the gaoler bring up the prisoner by virtue of such *habeas corpus*, the court will not turn him over till the gaoler be paid all his fees; (f) nor, as some (g) say, till he be paid all that is due to him for the prisoner's diet; for that a gaoler is compellable (h) to find his prisoner sustenance; but this is denied by others. (i)

(c) 1 Keble, 272.
(d) Vatch, 89.
1 Keble, 280.
2 Jones, 178.
Con.
1 Keble, 566.
(e) 2 Jones, 178.
(f) 2 R. Abr. 32.
(g) 1 Roll. 338, 339.
Con.
2 R. Abr. 32.
(h) Co. Lit. 295.
9 Coke, 87.
(i) Plowden, 68.
2 R. Abr. 32.
Strange, 532.

Sect. 32. Also it seems, that the court of king's bench, which has a general (k) superintendency over all persons who are in any respect ministers of justice, may award an attachment against any gaoler using a prisoner barbarously and inhumanly. Yet it is said, (l) that a gaoler is no way punishable for keeping a debtor in irons. And it seems agreed at this day, that a gaoler shall not be punished in the manner above-mentioned, for the bare escape

(k) 6 Mod. 137.
(l) 2 Inst. 381.
2 R. Abr. 806, 807.
8 Modern, 226.
3 Coke, 44.
Bk. 1. c. 27.
of n. 1. p. 414.

of a person in his custody by civil process, but the party grieved by such escape ought to take his remedy.

As to the **FOURTH POINT**, viz. In what cases (1) whatsoever is punishable in the manner above-mentioned.

(a) F. Process, 114. 161.

Ret. Vicount. 74.

1 H. 5. 14.

Dyer, 212.

27 H. 8. 22.

Crom. Jur. 14.

(b) 21 Ed. 3. 3.

(c) 2 R. Abr.

222, 234.

8 Ed. 4. 17.

Ville 25 Ed. 3.

c. 6.

F. N. 7.

F. Q. 2.

mut. 7.

B. Contempt, 5.

8 Coke, 60.

(d) 1 H. 4. 15.

F. Wither. 4.

(e) 21 Ed. 3. 3.

F. N. B. 3.

(f) Dyer.

(g) F. E. 108.

(h) Dyer.

1 R. Abr. 221.

Sect. 33. It seems, that even peers of the realm, spiritual or temporal, are liable to such punishment for contempts; for rescuing (a) a person arrested by due process of law, or for proceeding in a cause against (b) the king's prohibition, or for disobeying other (c) writs, wherein the king's prerogative, or the liberty (d) of the subject are nearly concerned. But it doth (e) seem clear, that it is a certain general rule, that a peer is punishable in this manner for disobedience of all writs whatsoever. And it seems (f) certain, that no peer is liable to an attachment for not appearing on a jury. Therefore it seems, that what is said (g) in some books in general, that an attachment lies against peers for contempts, ought to be understood of such only as are of an enormous (h) nature, as those above-mentioned, and others (i) of the same kind, about which it is difficult to lay down any certain particular rules. (2) However it is certain, that all other persons are liable to an attachment for contempts, all the particular instances whereof it would be endless to enumerate.

(i) Dyer. 108. C. Plz. 170. 2 R. Abr. 234. B. Contempt, 3. 19. 6 Coke, 54. Finch, 353. (j) Dyer. Holart 61. 21 Edw. 3. 59. Rastal, 313. 29 Assize, 33. (k) C. Plz. 173. 503. 1 R. Abr. 221. 1 Inst. 112. 1 Wilson, 332. 8 Modern, 192. Sayer, 50.

The most remarkable instances of contempts seem reducible to the following heads:

1. Contempts of the king's writs.
2. Contempts in the face of a court.
3. Contemptuous words or writings concerning the court.
4. Contempts of the rules or awards of the court.
5. Abuses of the process of the court.
6. Forgeries of writs, and other deceits of the like kind, tending to impose on the court.

As to the first particular, viz. Where persons are punishable in the manner above-mentioned for contempts of the king's writ.

Sect. 34. It seems that it may reasonably be argued, that all such writs, being in the king's name, and importing some lawful command or prohibition from him, which every subject is in duty

(1) An attachment also may be granted against a person for threatening a prosecutor, who has indicted another for perjury in an affidavit on which an information had issued against him, with danger of his life, &c. 1 Wilson, 75. — It lies also against a witness, material to the cause, who absents himself without any excuse. Douglas, 540. Strauge, 840. Lord Raymond, 1528. provided the witness be served upon him in reasonable time. Strange, 510. personally, and not given to a servant, B. R. H. 313. and a proper sum to defray his expenses tendered. Strauge, 1150. 1054. or a promise of them made which he accepts, Cro. Car. 540. —

But not where a witness did attend, although too late, he not being able to give other evidence than what was given by another witness, B. R. H. 170. and the court of exchequer refused it where a witness went away after attending two hours, although by that means the plaintiff was nonsuited, Bunb. 142. — Vide also 3 Burr. 1389.

(2) An attachment lies against a peer for refusing obedience to a *habes corpus*, 1 Burr. 634. 1 Wilson, 352. Vide Lord's Journals, 8 June, 1757. But no attachment lies against a corporation in contempt; the mode of compulsion is by sequestration, &c. Cowp. 377.

duty bound to obey, every disobedience (a) of any of them being a contempt against the king's authority, is, in strictness, punishable in the manner above-mentioned, if the court in discretion shall think fit. Yet it doth not seem to have been usual for the court to issue in this manner for a bare nonfeasance, in not performing the command of the first writ in any case whatsoever. But it seems clear, that an attachment lies of course for the non-performance of the demand of a *pluries*, which may in some cases, but not in all, be taken out, together with the *pluries*, at the same time with the first writ: Also it seems, that the court may in any special case, in which it shall seem proper, make a rule to compel the party to whom the first writ is directed, to execute it; and if such rule shall be disobeyed, there can be no doubt but that the court may proceed against such disobedience in the same manner as they usually do against the disobedience of any other rule: Also it seems (c) to be the common practice to grant attachments upon affidavits of contempts to the king's writs, by acting contrary to the purport of them. (3) Also there can be no doubt, but that if a sheriff shall in any case return to the court, that a person arrested (d) or goods seized, (e) or possession of lands delivered (f) by him, by virtue of the king's writ, were rescued or violently taken from him, &c. the court may award an attachment against the rescuers. Also it is certain, that the court hath, in some cases, awarded an attachment upon affidavits of rescous, where the officer hath not returned one. Yet this was anciently (g) looked on as irregular, and of late the court has refused to grant an attachment in any case for a rescous, unless the officer will return it; for that it hath been found by experience, that officers will often take upon them to swear a rescous, where they will not venture to return one.

As to the second particular, *viz.* Where persons are punishable in the manner above-mentioned, for contempts in the face of the court.

Sect. 35. It seems clear, that all persons are punishable in this manner, not only for making an actual breach of the peace, but also for any heinous misdemeanour in the face of the court; as (h) for giving false, trifling, and contradictory answers upon an examination in court concerning one's ability to be bail for another, in an action depending in the court, or concerning any other such like matter in question before the court, and to be determined by the examination of the parties; or (i) for any contemptuous behaviour towards any judge in the face of the court, as by charging him with injustice, and praying for an information against him, &c.

As to the third particular, *viz.* Where persons are punishable in the manner above-mentioned for contemptuous words or writings, concerning the court.

Sect. 36. It seems needless to put any instances of this kind, which are generally so obvious to common understanding; and therefore

(a) 1 Mod. 44.
3 Modern, 314.
F. Q. non ad-
missi, 7.

(b) F. Sugg. 25.
43 Assize, 39.
Rastal, 437.
Finch, 237.
11 H. 4. 86.
F. Count, 34.
Suggest. 25.
F. N. B. 68.
Sup. s. 27.

1 Black. 269.
(c) F. N. B. 6.
65, 1170.
175, 175.
F. Sugg. 9.
8 Coke, 60.
Sup. s. 33.

(d) F. Attach. 6.
F. Proce. 286.
F. Ret. Vacant.
74.

37 H. 6. 27.
1 Black. 212.
2130.
39.

(e) F. Attach. 5.
30 Ed. 3. 9.
(f) Salk. 321.
6 Modern, 27.

(g) F. Suggest.
25.
1 Black. 640.

(h) C. Car. 145.
7 H. 4. 25.

(i) Ray. 376.
1 Black. 641.

(3) Therefore an attachment may be granted for making an insufficient return to the first writ of

Habeas Corpus without issuing an *alias* and a *pluries* writ. *Rex v. Winter*, 5 Term Rep. 89.

Sed vide,
Strange, 1068.
Sayer, 48. 114.

therefore I shall only observe, that sometimes attachments have been granted for contemptuous words concerning the rules of the court, without making any rule to shew cause why such attachments should not be granted, because it would be vain to serve him with a second rule who has despised the first.

43 Assize, 39.

As to the fourth particular, *viz.* Where persons are punishable in the manner above-mentioned, for contempts of the rules or awards of the court:

(a) F. Impris.
18. and vide F.
Accomp, 23.
84. 109. 112.
29 Ed. 3. 35.
(b) 1 Modern,
21.
3 Burrow, 1250.
1 Atkin, 155.
Salkeld, 71. 83.
Sayer, 48.
Farrelly, 8.
Cowper, 23.
2 Burrow, 701.
Vide & 10
Will. 3. c. 15.
1 Bar. K. B.
462.
2 Williams, 40.
Barnes, 40. 41.
3 Barnes, 55.
140.
Salkeld, 71. 84.
10 Modern,
133.
13 Modern,
234. 257. 317.

Sect. 37. There is nothing more frequent than to proceed in this manner for contempts of this kind; as where (a) a defendant in an action of account, being adjudged to account before auditors, refuses to do it, unless they will allow such an acquittance, which was disallowed by the court before: or (b) where one who has submitted to an arbitration by the rule of the court, being afterwards personally served with a copy of the award, and required to perform it, refuses to do it: or where one refusing to pay the costs taxed by the master; for such a taxation is, in judgment of law, a taxation by the court. Or if a defendant in a penal action obtain a rule to stay proceedings on paying a sum agreed upon between him and the plaintiff, it is an undertaking by him to pay that sum, and for the non-payment of it the court will grant an attachment. But it seems, that generally an attachment is not grantable for disobedience of any rule, unless the party have been personally served (4) with it; nor for disobedience of a rule, at *nisi prius*, unless it be made a rule of court; nor for disobedience of a rule made by a judge at his chamber, unless it be entered.

525. 533. 585. Strange, 695. Rex v. Clifton, 5 Term Rep. 257.

1 Bar. K. B.
56. 78. 101.

As to the fifth particular, *viz.* Where persons are punishable in the manner above-mentioned, for abuses of the process of the court.

Sect. 38. There are so many instances of this kind that it would be in vain to go about to enumerate them all, and therefore I shall only take notice of some of the principal of them; as,

Hobart, 264.
Fortesc. 267.
(c) 8 H. 417.
F. Cor. 73.

Sect. 39. FIRST, The taking out of such process without any colour of right to it; as where one sues out execution without any judgment to warrant it, &c. or where a woman brings an appeal (c) of the death of her husband, whom she knows to be alive.

Styles, 239.
343.

Sect. 40. SECONDLY, The making use of such process as a stale to help the jurisdiction of an inferior court: as where one arrests another by a *latitat*, in order by that means to bring him within the limits of an inferior court, and when he has got him there, drops the *latitat* and proceeds in the inferior court.

Sect.

(4) And therefore an affidavit to support a rule for an attachment must state that the defendant was personally served with a copy of the rule, and that the original was shewn to him at the same time. Rex v. Smithies, 5 Term Rep. 351. But if he secrete himself, the court, on affidavit, will grant a

rule nisi for service at the last place of abode.—N. B. One in custody upon an attachment for non-payment of costs under the 5 and 6 William and Mary, c. 11. s. 3. may be discharged under the Lords' act, 38 Geo. 3. c. 28. s. 13.

Sect. 41. THIRDLY, Making use of such a process in a vexatious manner; as where a person who has brought an action in one court, does afterwards sue the same defendant for the very same cause in another court, while the first action is still depending; in which case the defendant seems to have an election, either to move for an attachment, (a) or to bring an action (b) on the case for such a vexatious proceeding against him.

(a) F. Cor.
Cum Causa, 3.
14 Hen. 7. 6, 7.
6 Coke, 60.
Sav. 14.
(b) Hen. 7. 6.
43.

Sect. 42. FOURTHLY, Making use of such process any other way to serve the purposes of oppression or injustice: as where (c) one arrests another at my suit, without my privity, in order to make some undue advantage of him, &c. (5)

(c) Hobart, 264.
Dyer, 249.
Vide 8 Ellis. 2.

As to the sixth particular, viz. Where persons are punishable in the manner above-mentioned for forging of writs, and other deceits of the like kind, tending to impose on the court.

Sect. 43. Nothing can be more frequent than to proceed in such manner for offences of this kind; as for altering (d) the *teste* of writs; or filling (e) them up after they are sealed; or (f) for bringing groundless actions in order to intitle the parties to the privilege of the court; or for getting (g) judgment in ejectment, by affidavit of the service of a declaration on one who was procured to personate the tenant, or for any such like practices.

(d) Dyer, 241.
244.
(e) 6 Modern,
310.
(f) Dyer, 245.
H. Privilege, 43.
(g) 6 Modern,
16.
Savil, 31.

Sect. 44. And it has been adjudged, that trying a feigned issue without the consent of the court, is a contempt for which the parties may be punished by attachment, and the proceedings stayed.

Hookins v. Ld.
Berkley, 4 T.
Rep. 402.

(5) Or where two people put in bail in feigned names. Strange, 384. Or where, on a rule for a special jury, one party strikes out all the hundredors, and then, at the trial, challenges the array on that defect. Strange, 593. Lord Raymond, 1364.

See vide 2 Ld. Ray. 1001. See also Andrew, 275.
8 Modern, 245. Or for arresting the plaintiff while attending arbitration under a rule of court on purpose to prejudice his cause. 2 Black. 1110.
Vide sup. section 37.

CHAP. XXIII.

OF APPEAL. (1)

BEFORE we examine the nature of such process as is grounded on an Appeal, Indictment, or Information, it may not be improper to consider the nature of each of these in particular.

Of

(1) The statute 59 Geo. 3. c. 46. which is intitled "An act to abolish appeals of murder, treason, felony, or other offences, and wager of battel, or joining issue and trial by battel, in writs of right," recites that "whereas appeals of murder, treason, felony, and other offences, and the manner of proceeding therein, have been found to be oppressive; and the trial by battel in any suit is a mode of trial unfit to be used; and it is expedient that the same should be wholly abolished;" and then enacts, "That from and after the passing of this act, all appeals of treason, murder, felony, or other offences, shall cease, determine, and become void; and that it shall not be lawful for any person or

"persons, at any time after the passing of this act, to commence, take, or sue appeal of treason, murder, felony, or other offence, against any other person or persons whomsoever, but that all such appeals shall from henceforth be utterly abolished; any law, statute, or usage to the contrary in any wise notwithstanding.

"From and after the passing of this act, in any writ of right now depending, or which may hereafter be brought, instituted, or commenced, the tenant shall not be received to wage battel, nor shall issue be joined nor trial be had by battel in any writ of right; any law, custom, or usage to the contrary notwithstanding. s. 2."

Of Appeals, there are two sorts:

1. An appeal by an innocent person.
2. An appeal by an offender confessing himself guilty; who is commonly called an Approver.

Sect. 1. An appeal by an innocent person, is the party's private action, prosecuting also for the Crown in respect of the offence against the Public; which he may do two ways:

First, By writ.

Secondly, By bill.

Sect. 2. As to the writ of appeal, I shall only take notice, in this place, that it is an *original* issuing out of chancery, and returnable in the king's bench only: And for the form of it, I shall refer the reader to the latter part of this chapter, wherein I shall endeavour to shew for what defects it may be abated.

Sect. 3. Also I shall refer the reader to the same place for the form of a bill of appeal, and shall not here take any further notice of it than by observing, that it must contain greater certainty than a writ of appeal, and is in the lieu both of the writ and declaration.

And I shall shew before what courts, and against whom, an appeal may be prosecuted.

Sect. 4. And first, there is no doubt (a) but that any appeal may be sued by bill in the king's bench against any person in *custodiâ mareschalli*, either by an actual commitment, or by having bail filed for him in that court; but (b) not against one who is mainprised *de die in diem*, for that such an one cannot be said to be in *custodiâ mareschalli*. And it hath been resolved (c), that if the appellee be arraigned and tried the same term, there is no necessity to file the bill against him. Also (d) it seems clear, that if a defendant appear in the said court on a void writ of appeal, he may be committed to the marshalsea, and then declared against in *custodiâ mareschalli*; but where a defendant appears on a writ not void, but voidable only, as for the want of an addition, &c. it was once (e) holden, that he could not be committed, nor declared against in *custodiâ mareschalli*, but ought to be discharged. But the contrary hereto seems to be now settled in the case of *Reeves v. Trundle* (f), who appearing in the court on a writ of appeal of death, demanded *oyer* of the writ, and pleaded in abatement the want of an addition; and thereupon the court abated the writ, and suffered him to be arraigned by bill in *custodiâ mareschalli*: And surely this cannot but seem more reasonable than to suffer a prisoner under so heavy an accusation, to which he is still liable, to go at large without a trial; neither do I find any reason given why a prisoner appearing on a voidable writ, should have a greater advantage than on a void one.

Sect. 5. SECONDLY, It is holden, that an appeal may be commenced before justices in eyre, which, as I suppose, must be intended of an appeal by bill, for that all writs of appeal must be returnable in the king's bench.

Sect.

(a) C. Eliz. 605.
695.
Skinner, 634.
S. P. C. 64.
Summary, 179.
17 Assize, 5.
17 Ed. 3. 13.
(b) 4 Inst. 180.
1 Bulst. 74.
(c) 1 Jones, 425.
C. Car. 532.
1 R. Abr. 536.
(d) C. Eliz. 694,
695.

(e) C. Eliz. 605.
693.
(f) Pas. 3 Geo.
1.
Comy. Rep.
257.
1 Str. 402.
Like case between Smith & Bowen, Mich. 7 Ann.
11 Mod. 216.
230. 254.
2 Ld. Ray.
1788.
3 Ld. Ray. 536.

Kellwood, 158.

Sect. 6. THIRDLY, Also it seems clearly to follow, from the purport of the statute of Westminster the second, c. 29. that bills of appeal may be commenced and determined before justices, specially assigned, in special cases, and for certain causes, to hear and determine them. 1 Inst. 418.
440.

Sect. 7. FOURTHLY, It is certain (a) that commissioners of gaol delivery may receive a bill of appeal against any prisoner of the gaol which they are authorized to deliver. Also it is generally holden, that they may receive such a bill against a person who has been let to bail by them, but not against one who has been let to mainprise. And it hath been resolved, that if part of the accomplices to the same felony be in the prison which such justices are to deliver, and the others be not in it, the justices shall receive an appeal against them all, which, after the trial of those that are in the prison, shall be removed into the king's bench, where the others shall be proceeded against. But these three last points, having been already more largely considered, Chap. 6. sect. 5. I shall refer the reader to what is there said concerning them. (a) B. App. 11.
19. 31. 123.
Dyer, 201.
S. P. C. 64.
Summary, 179.
2 Hale, 35.

Sect. 8. FIFTHLY, It seems to follow, from the purport of the statutes, which have been generally construed to authorize justices of assize to deliver gaols without any special commission of gaol-delivery, that they may receive bills of appeal in the same manner as commissioners of gaol-delivery may. Vide sup. a. 28,
29, 30.
Dyer, 99.
Co. Lit. 265.

Sect. 9. SIXTHLY, It seems to be holden in Fitzherbert's Abridgment, (b) that justices of peace have power to receive appeals by virtue of 34 Edw. 3. c. 1. which enacts, "That they shall hear and determine all manner of felonies and trespasses in the same county, &c." But there is much greater authority (c) for the contrary opinion; and the case in the (d) Year Book, in the abridgment whereof the said opinion of Fitzherbert is insinuated, is plainly mistaken, for that it makes no manner of mention of justices of peace, but only of justices of gaol-delivery; to which may be added, that the above-mentioned statute of 34 Edw. 3. c. 1. which empowers justices of peace to hear and determine felonies, &c. is express, that they shall have power so to do at the king's suit, which must be either taken to exclude the suit of the party, or to signify little or nothing. (b) Curton, 95.
(c) Vide S. P. C. 65.
2 Inst. 420.
Summary, 179.
2 H. 4. 19.
B. App. 18.
(d) 44 Ed. 3.
44.
See B. App. 11.

Sect. 10. SEVENTHLY, It is certain, that an appeal may be commenced (e) by bill before the sheriff and coroner, and removed (f) from them into the king's bench, by *certiorari*, as hath been more fully shewn Chapter the Ninth. (2) (e) See c. 9.
a. 39, 40, 41.
2 Hale, 67, 68.
(f) See c. 9.
42.

Sect. 11. EIGHTHLY, It seems to be agreed, (g) that an appeal by the course of the civil law, in nature of a bill of appeal by the common law, may be sued before the constable and marshal for some felonies done out of the realm: In relation whereunto (g) Sum. 180.
S. P. C. 65.
1 Inst. 74.
Vide inf. a. 28.

(1) Where an appeal is commenced in the court below, and removed into the king's bench, the appellee is to be arraigned *de novo*, on the same bill of appeal, and it is not necessary to exhibit a new bill against him in *custodia marshalli*, and if the appellant will not appear to prosecute his appeal,

the appellee may sue out a *scire facias* reciting the whole matter, warning him to appear at a certain day; and if he make default, the court on demand will nonsuit him; but the appellant may appear *gratus*, and prosecute without any *scire facias*. *Cartwright*, 394. 595. *Skinner*, 670. *Bac. Ab.* 226.

unto it is enacted by 1 Hen. 4. c. 14. as followeth : “ For many
 “ great inconveniences and mischiefs that often have happened
 “ by many appeals made within the realm before this time, it is
 “ ordained from henceforth, that all appeals to be made of things
 “ done within the realm, shall be tried and determined by the
 “ good laws of the realm; and that all appeals to be made of
 “ things done out of the realm, shall be tried and determined
 “ before the constable and marshal of England for the time
 “ being.”

(a) S. P. C. 65.

1 Inst. 74.

13 H. 4. 5.

(b) 4 Inst. 155.

1 Inst. 74. 391.

Sup. c. 4. s. 10.

B. Jur. 103.

(c) See b. 1.

c. 20. s. 11. and

c. 4. of this

book, s. 10. and

1 Inst. 391.

(d) See c. 4.

s. 8.

Hutton, 3.

1 Inst. 74.

(e) S. P. C. 65.

1 Inst. 74.

B. 1. c. 13.

s. 11.

Sect. 12. In the construction of this statute, it seems to have been agreed, (a) that if any of the king's subjects kill any other of his subjects in any foreign realm, the wife or heir of the deceased may have an appeal of his death, before the constable and marshal, who shall proceed according to the civil (b) law, and give sentence by the testimony of witnesses or combat: From whence it follows, (c) that no such sentence can corrupt the blood of the appellee, for that such corruption can only be caused by a judgment by course of the common law. Also (d) it seems to be clear, that no such appeal can be prosecuted before the marshal alone without a constable.

Sect. 13. It hath been holden (e), that if a man die in England, of a wound given him in a foreign realm, he may be appealed, by the intent of this statute, before the constable and marshal, for that it is certain that he cannot be tried by the common law, and it cannot be thought the meaning of the statute, in restraining the civil law in cases within the consusance of the common, to restrain it also in cases which the common law had nothing to do with, and which were properly consusable by the civil law, and by that only; for the only end of such a construction would be to cause a failure of justice.—† But by the 2 Geo. 2. the offender may be indicted or appealed in the county where either the death or the stroke shall happen.

Sect. 14. It is farther enacted by the said statute of 1 Hen. 4. c. 14. “ That no appeals be from thenceforth made, or in any
 “ wise pursued in parliament, in any time to come.”

I. APPEALS, considered as to the matter of them, are of two kinds, viz. Not capital; and, Capital.

Fleta, l. 1. c. 41.

Brac. l. 3. c. 25.

4 Inst. 182.

1 Inst. 126.

Sect. 15. Of appeals not capital, there were anciently several kinds, as appeals *de pace*, *de plagis*, and *de imprisonmento*, as well as appeals of *mayhem*. But the former of these having been out of use, and turned to actions of trespass, for these many hundred years, I shall only consider the nature of an appeal of *mayhem*.

For the better understanding of an appeal of *mayhem* I shall endeavour to shew,

1. Of what *mayhems* it lies.
2. What ought to be the form of the writ, bill, and declaration.
3. What defence may be made by the appellee.

4. How

4. How the *mayhem* shall be tried, and where the trial shall be peremptory.

As to the FIRST POINT, viz. Of what *mayhems* an appeal lies.

Sect. 16. I shall take it for granted, that notwithstanding every (a) hurt whatsoever done to a man's body, whereby he is less able in fighting, may perhaps, properly enough, in a large sense, be called a *mayhem*, and (b) will certainly subject the person who occasioned it to the payment of damages in an action of trespass by the party grieved, whether it were malicious, or happened through accident or misadventure, yet (c) an appeal of *mayhem* cannot be maintained for any such hurt, unless it were accompanied with some evil intention in the person who caused it; for surely the law, in requiring that the word "Felon" be made use of in every such appeal (as will be more fully shewn under the next point), cannot imply less than that the fact must be attended with some odious circumstances; yet it seems clear, that if a man striking another, with such an evil intent as would subject him to an appeal of *mayhem* if the person struck at should be maimed, shall happen to miss him, and strike a third person, and maim him, he is liable (d) to an appeal of *mayhem* at his suit, whether he had any kind of ill will against him or not.

(a) See B. 1. c. 15. p. 107.

(b) 2 Jones, 205. Hobart, 134.

(c) 13 H. 7. 14.

(d) B. App.

157.
13 H. 7. 14.
See B. 1. c. 15. s. 44.

As to the SECOND POINT, viz. What ought to be the form of the writ, bill, and declaration, I shall only take notice in this place.

Sect. 17. FIRST, That the word "*mayhemavit*" (e) is so necessary in every such writ, bill, and declaration, that it can be supplied by no other word of the like sense, nor by any circumlocution whatsoever.

(e) 1 Inst. 126.

Sect. 18. SECONDLY, That in every such writ, bill, or declaration, the *mayhem* must (f) be laid to have been done *felonice*, and yet the defendant is not, at this day, subject to the loss of member from such an appeal, as anciently (g) he was; in which respect the law seems to have required the use of the word *felonice*.

(f) 1 Inst. 127. B. App. 72. 86. 143.

(g) See B. 1. c. 15. sect. 3. 1 Inst. 127. Pulton, 17.

Sect. 19. THIRDLY, (h) That it is in the election of the plaintiff to declare against him who actually gave the wound, as the principal offender, and against those who abetted him, as accessories; or else to declare against them all as principals.

(h) 41 Assize, 16. 40 Assize, 9. F. Tres. 199. F. Cor. 11. 328. S. P. C. 44.

Contra. B. Appeal, 60. 154. F. Cor. 60. 110.

Sect. 20. FOURTHLY, That if a man bring a writ of appeal of *mayhem*, and count of battery, he abates the writ, because the writ supposes no battery, and therefore is not pursued by such a declaration as it ought to be. But for other particulars relating to the form of appeals, I refer the reader to the books (i) of Entries.

(i) Coke's Ent. 50. 51. Rast. 45, 46.

As to the THIRD POINT, viz. What defence may be made by the appellee.

Sect. 21. Being able to find little or nothing particular concerning pleas in abatement by such an appellee, I shall refer the reader, for that matter, to what is said concerning pleas in abatement of appeals in general, in the latter part of this chapter, and only take notice in this place of the following particulars.

1. Where a recovery in another action may be pleaded in bar of an appeal of *mayhem*.

2. Where and in what manner *son assault demesne*, and other matters of the like nature, may be so pleaded.

3. Whether an arbitrament, or an accord with satisfaction, may be so pleaded.

4. What kind of a release may be so pleaded.

5. Where a nonsuit in a former action.

6. That (a) an appellee cannot wage his law.

(a) 1 Inst. 295.

Vide 48 Edw. 3. 6. F. Ley. 36.

As to the first of these particulars, viz. Where a recovery in another action may be pleaded in bar of an appeal of *mayhem*.

(b) 22 Assize, 82.

F. Cor. 110.

182.

4 Coke, 43.

43 Assize, 39.

(c) B. Ap. 60.

(d) 4 Co. 43.

1 Leon. 318,

319

42 Assize, 3.

(e) 1 Leon. 318.

391

Sect. 22. It seems clear, that notwithstanding a recovery, (b) in an appeal of *mayhem*, cannot be pleaded in bar of an action of trespass for the battery with which the *mayhem* was accompanied, because (c), in such an appeal, the *mayhem* only is considered distinct from the battery, yet (d) a recovery in an action of trespass, for an assault, battery, and wounding, may be pleaded in bar of an appeal of *mayhem*, appearing by proper averments to be brought for the same trespass; for it shall be intended that the jury, in giving damages for the wounding, included the maim, and no man shall be liable to double vexation for one and the same thing; yet (e) in such a case if the appellee shall make it appear, by a special replication, that the maim hath been occasioned since the verdict in the action of trespass, by some subsequent mortification, dryness, or shrinking of the part, by reason of the wound, perhaps he may avoid such plea by such special matter; but the Court will not intend it unless it be specially shewn.

As to the second particular, viz. Where, and in what manner *son assault demesne*, and other matters of the like nature, may be pleaded in bar of an appeal of *mayhem*.

(f) 9 R. Abr. 547.

Rastal, 45

(g) 9 R. Abr.

112.

25 Ed. 3. 42.

(h) 27 Edw. 3.

94.

41 Assize, 21.

F. Cor. 142.

1 Keble, 921.

1 Scl. 240

Sect. 23. It seems clear, that it is a good plea in bar of such appeal, that (f) the plaintiff first assaulted the defendant, and would have beaten and killed him, unless he had defended himself against him, &c. or that (g) the plaintiff first assaulted the defendant, who fled from place to place, till he was reduced to a necessity of fighting, &c. And in some books (h) it seems to be holden in general, that *son assault demesne* may be pleaded in bar of any such appeal, without any special circumstances in favour of the defendant: Yet how far a trifling assault may justify a grievous *mayhem*, as the cutting off a leg or hand, &c. unless it happened accidentally in the scuffle, without any barbarous in-

tention,

tention, may well deserve to be considered. However (a) it seems clear, that if the maim in the declaration be laid in A. and the defendant justify the same maim, by reason of an assault made upon him by the plaintiff in B. he needs not traverse the maiming of the plaintiff in A. or in any other place; for it is apparent, that the same maim could not be given but in one and the same place; and therefore being justified in any one place, it is well answered. Also it seems (b) clear, that a man cannot justify the maiming another in defence of his possessions, but only in the defence of his person. Also it is certain (c) that a defendant cannot give in evidence on the general issue, that the plaintiff first assaulted him, but must specially plead it.

(a) 41 Assize, 21.
B. Vintr. 74.
B. Trav. 173.

(b) 2 R. Abr. 548.

2 Inst. 316.

(c) 2 Inst. 282, 283.
2 Inst. 316.

As to the third particular, viz. Where an arbitrament, or accord with satisfaction, may be pleaded in bar of an appeal of *mayhem*.

Sect. 24. It clearly seems to be admitted in the pleadings (d) in some books, and is said (e) to have been adjudged in a roll not printed, that notwithstanding every such appeal must suppose the fact to have been done feloniously, yet inasmuch as at this day it subjects not the appellee to the loss of member, but only to damages, &c. as an action of trespass doth, it may be well barred either by arbitrament, or an accord with satisfaction executed.

(d) 35 H. 6. 39. 30.

6 H. 7. 1.

F. Corone, 63.

6 Coke, 44.

(e) 9 Co. 78.

As to the fourth particular, viz. What kind of release may be pleaded in bar of an appeal of *mayhem*.

Sect. 25. There can be no doubt but that a release of all manner of appeals, (f) or a release of all manner of actions, or a release of all manner of demands, (g) might always be pleaded in bar of such an appeal; and that a release of all manner of actions (h) personal may also be pleaded in bar of it at this day, because the appellant shall recover in it nothing but damages; but while it subjected the appellee to the loss of member, it seems questionable whether it could be barred by a release of actions personal, because it seems to have been then esteemed an action of a higher nature, and not properly to come under the notion of a personal action.

(f) Lit. sect. 501.

(g) Lit. sect. 501.

(h) 1 Inst. 280.

2 Inst. 288.

As to the fifth particular, viz. Where a nonsuit in a former action may be pleaded in bar of an appeal of *mayhem*.

Sect. 26. It seems clear, (i) that a nonsuit in any such appeal, after the plaintiff hath appeared to it, may be pleaded in bar of any other. Also (k) it seems to have been adjudged, that it may also be pleaded in bar of an action of trespass brought for the same maim, and also for the battery with which it was accompanied; yet howsoever the law may stand in relation to this matter, if such action be brought for the battery only, without mentioning the *mayhem*, I see not, how it can be barred by such a nonsuit, because it is generally holden, that in an appeal of *mayhem* no consideration (l) can be had of the battery, but only of the *mayhem*; and if so, it seems strange, that a nonsuit in such an appeal should bar an action of a different nature, brought

(i) 43 Assize, 39.

40 Assize, 1.

1 Inst. 139.

F. Cor. 214.

(k) 43 Assize, 39.

B. App. 138.

(l) B. App. 60.

F. Cor. 110.

182.

Vide sup. sect.

for 22.

- for a matter which the appeal had nothing to do with. However (a) it seems clear that a nonsuit in an action of trespass is no bar of an appeal of *mayhem*. Also I take it for granted, that a nonsuit in an appeal of *mayhem*, before the plaintiff hath appeared to it, is not (b) a bar of any other appeal or action, because the writ, for what appears to the contrary, might be purchased by a stranger, in the name of the plaintiff.
- (a) B. App. 138.
F. Ley, 36.
- (b) 1 Inst. 139.

As to the FOURTH POINT, *viz.* How the *mayhem* shall be tried, and where the trial shall be peremptory.

- Sect. 27. There is no (c) doubt but that if the defendant put it in issue, whether the plaintiff were maimed or not, and pray that the part which was hurt be viewed by the court, in order to have it adjudged on such view, whether there be any *mayhem* or not, the court may take a view of the part, and on such view determine the matter; or if there remain a doubt upon the view, may (d) award a writ to the sheriff to return some able physicians and surgeons, for the better information of the court. But it seems, that the court cannot proceed to such a trial by their view, unless the defendant pray it: and in such case it seems (e) that they are not bound to try it in such manner, but may order a trial by a jury, at which it is said, (f) that they may, if they think fit, order that the jury shall have a view of the wound: And because the court has such a discretionary power in relation to such view, it hath been resolved, (g) that the plaintiff in the appeal must appear in proper person, and not by attorney, because that would put the view out of the power of the court. And it seems to be agreed, (h) that an adjudication made upon such view is peremptory and conclusive to each party.
- (c) 28 Assize, 5.
8 H. 4. 21.
2 R. Abr. 578.
- (d) 28 Ass. 5.
Rastal, 46.
28 Ed. 3. 94.
(e) 6 H. 7. 1.
21 H. 7. 33.
21 H. 7. 40.
41 Assize, 27.
(f) 22 Ass. 82.
Vide 21 H. 7.
33.
(g) 2 Inst. 213.
- (h) 6 H. 7. 1.
28 Assize, 5.
21 H. 7. 33.
37 Assize, 9.
26 Assize, 32.

Sect. 28. It seem to be holden, that the defendant, in an appeal of *mayhem*, may in some cases wage battle; but I find no instance in which battle hath been actually waged in such an appeal.

II. OF APPEALS capital there are two kinds:

1. Appeal of treason.
2. Appeal of felony.

And FIRST of appeals of *Treason*.

- Sect. 29. APPEALS of treason, as it is said (i), might be sued anciently not only before the parliament, but also before other courts of common law, as well as before the constable and marshal, and were determinable by battle, verdict, or otherwise, according to the course of the several courts before which they were commenced. But it is certain, that such appeals before the parliament are taken away by 1 Hen. 4. c. 14. set forth more at large in the fourteenth section of this chapter. But I do not see any reason why appeals of treason, done in the realm, before other courts of common law, which had before jurisdiction thereof, should be construed to be taken away by that statute, which by ordaining, "that appeal of things done within the realm, shall be tried
- (i) 3 Inst. 139.
Bract. 118, 119.
Fleta, l. 1. c. 21.
S. P. C. 78.
Com.
B. Appeal, 46.
1 Hale, 349.
3 Hale, 150.*

tried and determined by the good laws of the realm," cannot be intended to restrain any appeal determinable wholly by those laws, as all the appeals before courts of common law seem always to have been.

However, since there has been no instance of any such appeal, before any court of common law, either since the making of the said statute, nor for many years before, the law relating to such appeals seems wholly obsolete at this day. (2)

But as for appeals before the constable and marshal, of treasons done out of the realm, it seems clear, that the law in relation to them is still in force, as it always hath been; for the said statute of 1 Hen. 4. c. 14. by ordaining, "that appeals of things done out the realm shall be tried and determined before the constable and marshal," seems clearly rather to affirm than weaken their jurisdiction in relation to such treasons.

1 Inst. 124.
Summary, 180.
seems contrary.

Also it hath been adjudged, that the statutes which ordain, that treasons done out of the realm shall be tried in the king's bench, &c. do not take away the jurisdiction of the constable and marshal, in relation to appeals of such treasons; as hath been more fully shewn c. 4. s. 10. And agreeable hereto, an appeal of treason, supposed to have been committed beyond sea, was actually commenced in the seventh year of the reign of king Charles the First, by Donald Lord Ren, against David Ramsey, Esq. before the constable and marshal, who, for want of sufficient proof to clear the truth of the accusation, actually awarded, that a duel should be fought between the said appellant and appellee, for the final determination of the matter.

Rushworth's
Collect. Part 2.
vol. 1. from fol.
112 to 128.

SECONDLY, Of appeals of *Felony* there are four principal kinds.

1. An appeal of death.
2. An appeal of larceny.
3. An appeal of rape.
4. An appeal of arson.

But before I examine the nature of each of these in particular, I shall premise some things in general concerning what persons are capable of bringing them.

Sect. 30. FIRST, that (a) the infancy, old age, or other imbecility of the plaintiff, is no good objection against his bringing an appeal, though it take from the defendant the benefit of waging battle, and in that respect puts him in a worse condition than he would be in, if the appeal were brought by a person capable of fighting; for inasmuch as the defendant has proper means for his acquittal, by putting himself upon a trial by his country, and the imbecility of the plaintiff is wholly owing to the act of God,

(a) Moor, 481.
Summary, 183.
Kerwood, 120.
S. P. C. 60.
See the books
under cited.
Con. 45 Ed. 3.
27.
41 Andze, 14.

and

(2) Appeals of Treason in the common law courts seem to be taken away by 5 Ed. 3. c. 9. and 25 Edw. 3. c. 4. by which none shall be

put to answer except by indictment or presentment. 1 Hale, 349.

(a) 27 H. 8. 11. and no ways lessens the injury complained of by him, it is not reasonable, he should suffer any disadvantage from it. And agreeably hereto it seems to have been settled, (a) of late times, contrary to the numerous authorities (b) in the old books, that the party shall not demur in an appeal for the nonage of the plaintiff. Yet it is certain, (c) that an infant must prosecute such suit by a guardian; and it is said, (d) that he shall be nonsuited for the non-appearance of such guardian, upon demand, at any day whereon he is demandable, notwithstanding an allegation that he was not able to come by reason of sickness, or other such like excuse. And there (e) is a case wherein the court refused to enlarge the day of such guardian's appearance upon a surmise of his sickness. But notwithstanding the guardian be so necessary in the prosecution of such a suit, yet if the infant come into court, and say he will relinquish it, and yet the guardian will prosecute it, the court may, (f) in discretion, discharge such guardian, and assign another; for it is not reasonable that an infant be bound to continue a suit against his will which demands nothing but revenge, and will be chargeable to him.

(f) 1 R. Abr. 289.
Style, 456. Salkeld, 176, 177.

(g) Co. Lit. 25.
2 Inst. 68.
F. Corone, 357.
S. P. C. 60.
Summary, 184.

Sect. 31. SECONDLY, (g) that a woman may sue any other appeal except that of the death of an ancestor; for the statute of MAGNA CHARTA, 34, which ordains, "that no man shall be imprisoned on the appeal of a woman, for the death of any one but her own husband," restrains not any other appeal whatsoever.

(h) Summ. 183.
S. P. C. 60. 98.
(i) 11 Ass. 27.
(k) 17 Ass. 26.
B. App. 118.
146.
F. Utlag. 47.

Sect. 32. THIRDLY, That an idiot, (h) or person born deaf and dumb, or one attainted (i) of treason or felony, or but outlawed (k) in a personal action (so long as such attainder or outlawry continues in force) cannot bring any appeal whatsoever.

And now I am more particularly to consider the nature of an appeal of death in particular.

For the better understanding whereof, I shall examine the following points.

1. Within what time it must be brought.
2. In what county.
3. By whom.

As to the FIRST POINT, viz. Within what time an appeal of death must be brought.

(l) S. P. C. 62.
Infra sect. 48.

(m) B. App. 37.
28 Ed. 4. 39.
(n) S. P. C. 63.

Sect. 33. It is enacted by the statute of Gloucester, chap. 9. "that an appeal," (l) which from the purport of the whole statute hath been construed to be meant only of an appeal of death, "shall stand in effect, and shall not be abated for default of fresh suit, if the party shall sue within the year and the day (m) after the deed done." And it hath been holden, (n) that the computation of such year and day is to be made from the time of the wound which occasioned the death, and not from the time of the death, and this opinion seems somewhat to be favoured by the letter of the statute, which is, "that the party shall sue within the year and

and day after the deed done," but no deed is done at the time of the death, but at the time of the wound: yet the contrary opinion is settled (a) to be law, and it is certainly more agreeable to the intent of the statute, the plain import whereof seems to be, that the appellant shall not be adjudged to have made default of fresh suit, unless he have been negligent a year and a day; but negligent he could not be as to the bringing an appeal before the party was actually dead, because till then no appeal lay. And agreeably hereto it seems also to be settled, (b) that if a person become accessory after the death, by receiving the offender, an appeal lies against him at any time within the year and day after such receipt, because until then the appellant could not possibly be guilty of any negligence as to the bringing of an appeal against the receiver. Also if an appeal had been abated by the demise of the king, before 1 Edw. 6. c. 7. (by which this mischief is provided against) it seems (c) clear, that the appellant might have sued a reattachment against the appellee, within the year and day after such demise, for that he was in no default, and otherwise would have been without remedy.

(a) 4 Co. 42.
2 Inst. 320. 20.
3 Inst. 53.
1 Hale, 427.

(b) 26 Ass. 25.
3 Inst. 53.
S. P. C. 63.
2 Inst. 320.

(c) 2 H. 7. 10.
B. App. 81.
10 Ed. 4. 13.
F. Re-attach. 8.
7 Co. 30.

Sect. 34. It seems, that the year and day, in any of the cases abovementioned, are to be computed from the beginning of the day on which the death, or receipt, &c. happened, and not from the precise minute, or hour; because regularly the law makes no fraction of a day; and therefore (d) if the party die at any time the first day of January, the year shall end the first day of January following.

(d) Vide 5 Co. 1.
Co. Lit. 130.
255. Con.
3 Inst. 53.

As to the **SECOND POINT**, viz. In what county an appeal of death must be brought.

Sect. 35. I shall take it for granted, that it is a local action, (e) and consequently cannot be brought in a foreign county. But if a person happen to die in one county of a wound received in another, it is said, (f) that the appellant had, by the common law, his election to bring his appeal in either county, and that, in every such case, the trial ought (g) to be at the bar, and by a jury returned (h) from the body of each of those counties. But since the making of 2 and 3 Edw. 6. c. 24. by which it is enacted, "That in such cases, the party to whom appeal of murder shall be given by the law, may commence, take, and sue appeal of murder in the same county where the person feloniously stricken, or poisoned, shall die, &c." I take it for granted, that such an appeal in the county wherein the party died, may be tried by a jury of such county without the joinder of any other.

(e) 18 Ed. 3. 32.
S. P. C. 63.
F. Forfeitt. 14.
Dyer, 18, &c.
(f) 2 Hale, 163.
3 H. 7. 12.
4 H. 7. 18.
F. Cor. 50. 60.
But the preamble of 2 & 3 Ed. 6. 24. seems contrary.
(g) Dyer, 46.
(h) 3 H. 7. 12.
Finch, 410.
Dyer, 46.
Vide 2 Geo. 2. c. 24.

I shall not in this place examine in what county accessaries to murder are to be appealed or tried, but shall refer the consideration thereof to the chapter concerning the arraignment of the principal and accessary.

As to the **THIRD POINT**, viz. By whom an appeal of death is to be brought; I shall endeavour to shew,

1. Where it may be brought by a wife;
2. Where it may be brought by an heir.

As to an APPEAL of death by a wife, the following particulars seem most observable.

Vide *infra*, s.
59 and 60.

(a) 2 Inst. 68.
28 Ed. 3. 91.
50 Ed. 3. 15.
27 Assize, 3.
11 H. 4. 14.
S. P. C. 59.
Summary, 181.
1 Inst. 33.
(b) Bract. l. 3.
c. 29.
Flet. l. 1. c. 35.
S. P. C. 58.
(c) 2 Inst. 68.
217.

(d) S. P. C. 59.

(e) 27 Ass. 11.
35 H. 6. 57.
B. Appeal, 131.
F. Corone, 21.
Co. Lit. 33. b.
7 Co. Culvin's
case, 13. 6.
S. P. C. 59.
(f) B. App.
148.
(g) B. App. 17.
1 Inst. 33.
S. P. C. 59.
Com.
2 Inst. 317.

(h) Sum. 181.
S. P. C. 59.
2 Inst. 69.
20 H. 6. 43.
B. App. 148.
(i) 11 H. 4. 48.
B. App. 109.
112. Con. 21.
E. 4. 73. See
also the books
above cited.
(k) B. App. 27.
3 Inst. 202.
2 H. 7. 10.
2 H. 4. 22.
F. Sc. Fac. 41.
38 H. 6. 13.
9 H. 7. 5.
S. P. C. 166.
(l) 2 Leon. 83.
Vide 21 Ed. 4.
72, 75.

Sect. 36. FIRST, She must be able to prove, not only that she was wholly innocent herself of the death complained of, but also that she was the lawful wife of the deceased, at the time of his death; for it seems to be clearly settled, (a) that "*ne unques accouple in loial matrimonie*" is a good plea in such an appeal, and triable by the bishop's certificate, who, if the marriage were unlawful, by reason of a precontract or consanguinity, or otherwise, ought to certify against the appellant. Also it is laid down as a rule in the old books, (b) that a wife may have an appeal of the death of her husband *inter brachia sua interfecti et non aliter*. By which words "*inter brachia sua*," according to Sir Edward Coke, (c) it is to be understood, that the deceased had the wife lawfully in possession at his death; and if this be the meaning of them, thus much at least seems to follow, that if the husband were divorced from the wife at his death, though by a voidable sentence, she cannot maintain an appeal. Yet it is generally holden, that a wife who hath eloped from her husband may have an appeal of his death, as shall be more fully shewn in the next section. And Staundford (d) seems to understand the import of the expression abovementioned to be this, that the wife ought to have had the deceased in her view, and to have been present at his death, which is most certainly not necessary at this day. But finding little more said concerning this matter in any other modern book, I shall leave the farther consideration thereof to others.

Sect. 37. SECONDLY, In some cases a woman may have an appeal of the death of her husband, where she cannot claim dower of his lands; as where the husband was attainted (e) of high treason at the time of his death; for after the attainder he was still her husband as much as before, and (f) it is the loss of her husband which is the cause of the appeal. Also where a woman elopes from her husband, it is said, that she may have an appeal (g) of his death, though not a writ of dower; for by the common law she might have had both; and the statute of Westminster the second, c. 34. which takes from her the latter, leaves the other as before.

Sect. 38. THIRDLY, If such appellant take another husband either before, or pending the appeal, she puts (h) an end to it for ever; for being given her only from a regard to her widowhood, it cannot but cease when that determines, and being once barred, it is barred for ever. And on this ground it seems also to be certain, (i) that if she marry after judgment in appeal, she cannot pray execution. However it seems clear, that in such a case the appellee shall not (k) be discharged without the king's pardon: But I do not find it settled (l) what ought to be done with the appellee in such a case. But thus much seems to be certain, that the king cannot proceed against him by way of indictment, because he is attainted already; and therefore it may probably be argued, that the court may award execution against him, either *ex officio*, or at least at the demand of the king; for otherwise he would

save

save his life by reason of the attainder by which he is adjudged to lose it.

As to the APPEAL of death by an heir, the following particulars seem most remarkable.

Sect. 39. FIRST, If the deceased had a wife at the time of his death, and such wife were wholly innocent of it, she only, (a) and not the heir, hath a right to the appeal; and whether she bring one, or wholly neglect it, and though she die or marry within the year and day, the heir cannot bring an appeal; and the reason hereof, according to Keilway, (b) is this, that the appeal being once out of the blood, shall not return to it again: Yet (c) if the wife herself had a share in the guilt, the heir may have an appeal against her. But if the petit treason be pardoned by the parliament, it seems, that (d) the heir can bring no appeal; for he cannot bring it for the murder only, because the petit treason includes in it murder and more, and being the greater offence drowns the less, and therefore the pardon of it seems to pardon the murder also.

Sect. 40. SECONDLY, Every such appellant must be heir general (e) to the deceased, by the common course of the law, unless the (f) heir general had himself a share in the guilt, in which case the next heir shall have an appeal against him. But a father cannot (g) have an appeal of the death of his son, because he cannot be his heir. Neither can (h) any one bring an appeal of the death of a person attainted of treason or felony, except his wife, because he can have no heir. Neither shall a special heir, (i) by the custom of borough English, or otherwise, have an appeal of the death of his ancestor, because he is not his next general heir; and yet he is inheritable to such of his lands to which the custom extends, &c. And for the like reason, if the deceased, at the time of his death, had two sons, the elder whereof is attainted of treason or felony, neither (k) of them can have an appeal; not the elder, because of the attainder; not the younger, because he cannot be heir to his father while he has an elder brother; who though he be looked upon as dead in law to some purposes, is yet in truth alive, and capable of forfeiting all the privileges belonging to the heir, though not of taking benefit from any of them. But notwithstanding a younger son cannot bring an appeal of the death of the father, while there is an elder son of the same father living, yet if the eldest son be by one venter, and the middle and younger son by another, and the middle son be killed, the youngest only shall have an appeal of his death, because he only is his heir, as being of the whole blood with him; and therefore, (l) it is no good plea to an appeal for the death of a brother, that the appellant has J. S. an elder brother living, without shewing, that J. S. was of the whole blood to the deceased.

Sect. 41. THIRDLY, If an appeal be once commenced by an heir, who dies hanging the suit, it seems to be agreed, by (m) almost all the books, that no other heir can afterwards proceed in such appeal, or commence a new one, for that this is a personal action, given to the heir in respect to his immediate relation

(a) Keilw. 120. Summary, 182. S. P. C. 59. 20. 6. 43.

(b) Keilw. 120. (c) C. Car. 531, 532.

1 Jones, 425. 18 Edw. 4. 1.

F. Cor. 459. Sum. 181, 182.

S. P. C. 59. (d) Dyer, 50.

1 Leon. 326

(e) 27 Ed. 3. 83. F. Cor. 322.

Summary, 182. S. P. C. 59.

27 Assize, 25. (f) Sum. 182.

F. Cor. 459. S. P. C. 60.

(g) F. Cor. 41. (h) B. App. 116.

131. 2 Assize, 5.

(i) S. P. C. 69. Summary, 182.

(k) S. P. C. 60. 1 Inst. 8. 13.

20 H. 6. 43. F. Cor. 235.

But F. Cor. 322. seems contrary.

(l) 7 E. 4. 15. F. Cor. 20.

B. App. 94. S. P. C. 60.

(m) 11 H. 4. 11. b. 12.

9 H. 7. 5.

16 H. 7. 15. S. P. C. 59.

Summary, 182. B. App. 30. 88.

101. 141. 144.

to the person killed, at the time of his death, and, like other personal actions, shall die with the person. But some (a) have holden, that if the first heir die within the year and day, without commencing an appeal, the next heir may bring one. But this is made a doubt by others, (b) and the generality (c) of the books seem to favour the contrary opinion, as being more agreeable to the reason of the case abovementioned, and the general tenor of the law in relation to appeals, which, in no case that I know of, will suffer the right of bringing one to be transferred from one to another: and therefore, as in case (d) where the deceased hath a wife at the time of his death, who dies within the year and day, the heir hath no right to an appeal; for if he have an heir at his death, in whom the right of appeal is vested, and such heir die within the year and day, it seems, that no other heir shall have an appeal. Yet it is holden, (e) by Sir Matthew Hale, and some others, that if the first heir get judgment in an appeal of death, and die, his heir may sue execution. But this is doubted of by Sir William Staundford (f), and seems contrary to many (g) of the old books, and not easily reconcilable with the reason of the cases abovementioned. But whether in this case the court may (h) not award execution either *ex officio*, or at the demand of the king, may deserve to be considered, for the reasons given Sect. 38. Also if a person who is killed have no wife at the time of his death, and no issue but daughters, and all those daughters die within the year and day, it may reasonably be argued, that the heir male may have an appeal, because the right of bringing one never vested in any other before. But finding this case in none of the books, I shall leave it to be more fully considered by others.

(a) 16 H. 7. 15.
B. App. 156.
11 H. 4. 11.
(b) S. P. C. 59.
Dyer, 69.
(c) 20 H. 6. 43.
11 H. 4. 12.
Summary, 182.
B. App. 30. 88.
104. 141. 144.
(d) Sup. a. 39.
(e) Sum. 182.
13 H. 4. 6.
11 H. 4. 11.
(f) S. P. C. 59.
(g) 38 H. 6. 13.
9 H. 7. 5. 6.
16 H. 7. 15.
11 H. 4. 11. 12.
B. App. 141.
144. 156.
(h) 2 Leon. 83.
seems contrary.

Sect. 42. FOURTHLY, Every such appellant must not only be heir general to the deceased, but also heir male; and this depends upon Magna Charta, c. 35. by which it is enacted, "That no one shall be taken or imprisoned on the appeal of a woman for the death of any one but her own husband." And the judges are so far bound to take notice of this statute, that if a woman bring an appeal of the death of her father, or of any other but her husband, they ought, (i) *ex officio*, to abate the writ, though the defendant take no exception to it. But it is said, (k) that by the common law an heir female might have brought an appeal of the death of her ancestor, as well as an heir male. And it seems (l) to be the better opinion at this day, that the heir male of the deceased, who derives his blood through a female, may have an appeal, as the uncle being heir on the part of the mother, or the grandson by a daughter, &c.; and yet the mother in the first case, and the daughter in the second, could have had no appeal; for inasmuch as by the common law, such mother and daughter had not only a right to bring such appeal, but also to have such right derived through them to others, it seems hard to construe the statute by depriving them of the former to take from them the other also; especially considering that an heir male who derives his blood through females, seems no way less worthy to bring an appeal, than if he had derived it through males; and all statutes whatsoever

whatsoever which are made in abridgment of any right of the subject ought to be strictly construed.

Sect. 43. FIFTHLY, In every such appeal, by one, as heir to the deceased, it must specially (a) appear by the writ, or at least by the count, in what manner he is so.

(a) 21 E. 3. 23.
45 Ed. 3. 25.
27 Assise. 25.
S. P. C. 81.
Summary, 187.
1 Bulst. 71. 75.

And now I am come to an Appeal of Larceny; for the better understanding whereof I shall consider,

1. By whom an Appeal of Larceny may be brought.
2. Against whom it may be brought.
3. In what county it may be brought.
4. Within what time it may be brought.
5. In what case there shall be restitution of the goods stolen.

As to the **FIRST POINT**, viz. By whom an Appeal of Larceny may be brought, the following particulars seem most remarkable.

Sect. 44. FIRST, There is no necessity that the appellant have the absolute property of the goods stolen; for it seems agreed, that a carrier, or even a servant, (b) to whom goods are delivered to be carried to a certain place, or church-wardens having (c) possession of the goods of a church, or, in general, any person whatsoever, (d) who is so far intrusted with the goods of another as in judgment of law to have the possession, and not the bare charge of them, may have an appeal of larceny against any one who shall steal them, for that they have a special kind of property in them against all strangers: and it seems that they may either bring a general (e) appeal, as for their own goods, or a special (f) one for the goods of J. S. in their custody. Also it is said, that a person who hath been robbed of his goods, still continues to have so far the possession as well as the property of them, that he may bring an appeal of larceny against any one who shall steal them from the robber, as shall be more fully shewn in the next section. But it seems clear, (g) that no one can maintain such an appeal who has the bare charge of goods without a possession, as a butler or cook, who in my own house have the charge of my goods, for that in such a case the whole possession, as well as the absolute property, in the judgment of law, always continues in me. Also it is certain that a *villein* cannot (h) have an appeal of larceny against his lord for any of his goods taken by the lord, because (i) the lord by seizing them makes them his own; but it is agreed (k) that a *villein* may have an appeal of death or an appeal of rape against his lord. Also it seems clear at this (l) day, that any tenant who is not a *villein*, may have an appeal of larceny against his lord.

(b) F. Cor. 100.
Litch. 127.
S. P. C. 60.
(c) 11 H. 4. 12.
12 H. 7. 27, 28.
29.
37 H. 6. 30, 31.
(d) 2 Ed. 4. 15.
2 Ric. 2.
3 H. 7. 12.
5 H. 7. 18.
21 H. 7. 14.
Bract. 1. 3. c. 26.
S. P. C. 60.
(e) Keilw. 70.
(f) Bract. 1. 3.
c. 26.
F. Cor. 100.
11 H. 4. 12.
B. G. d'Englisc.
6.
B. Cor. 142.
B. App. 91.
(g) 3 Inst. 108.
(h) Sum. 184.
S. P. C. 60.
F. Cor. 17.
B. Cor. 216.
B. App. 34.
(i) Lit. s. 177.
(k) Lit. s. 189,
190.
Sum. 184.
(l) S. P. C. 62.

Sect. 45. SECONDLY, There is no necessity that the wrong for which such an appeal is brought, be immediately done to the person of the appellant; for if a servant be robbed of the master's goods in his custody, the master (m) may bring the appeal as well as the servant; and in such case he who first commenced it shall prevent (n) the other. Also if one be robbed of goods wherein another is jointly interested with him, and die, the survivor (o) may bring an appeal. Also if I be robbed by A. who afterwards

(m) Sum. 184.
(n) Litch. 127.
(o) Sum. 184.
S. P. C. 61.
F. Corone, 392.

(a) Sum. 184.
S. P. C. 61.
F. Cor. 39. 79.
13 Edw. 4. 3.
Kellw. 160.
B. Appeal, 100.
4 H. 7. 5.

(b) Sum. 184
S. P. C. 60.

See the case of
Hamblly v.
Trott, Cowp.
371.

is robbed of the same goods by B. it is said(a) that I may have an appeal of larceny against B., because A. claiming no property, but taking the goods merely as a felon, had, in judgment of law, neither any property nor possession in them, but the same wholly continued in me. But if the goods had been taken from me by a trespasser, under the pretence of some title, and such trespasser had been robbed of them, it seems that I could have no appeal for them. Neither can an executor(b) bring an appeal for a larceny from the testator, because such larceny, at the time when it was committed, was no injury to the executor, but to the testator only; and therefore the appeal for it being a mere personal action, and wholly vested in the testator, there is no doubt but that it dies with him, as all other actions for mere torts do.

As to the SECOND POINT, viz. Against whom an Appeal of Larceny may be brought.

Sect. 46. Having incidentally shewn what is most considerable relating to this point under the former, I shall only take notice in this place, that this, or other appeal, lies against an infant,(c) as well as against a person of full age; and against a *feme covert*.(d) in the same manner as if she were sole, without taking notice of the husband.

(c) S. P. C. 62. a.
(d) B. Cor. 50.
15 Edw. 4. 1.
S. P. C. 62.
Vide F. Cor. 17.

As to the THIRD POINT, viz. In what county such appeal is to be brought.

(e) Sup. 2. 35.
11 H. 4. 93.
F. Cor. 437.
B. App. 35.
Dyer, 39, 39,
40.
(f) 7 H. 4. 43.
Dyer, 39, 40.
4 H. 7. 5, 6.
S. P. C. 63.
26 Assize, 32.
7 Coke, 2.
F. Cor. 62. 79.
F. Assize, 446.
B. App. 35.
B. 1. c. 19. a.
12.
(g) Sum. 184.
7 Co. 2. Con.
Kellw. 160.
(h) S. P. C. 63.
Inf. 2. 71.
(i) S. P. C. 63.

Sect. 47. There is no doubt but that, like all other(e) appeals, it is a local action, and must be brought in the county where the felony complained of was done. Yet if one rob me in the county of A. and afterwards carry my goods into the county of B. I have my election(f) either to bring an appeal of robbery in the county of A., or an appeal of larceny in the county of B., because the possession as well as property of the goods continued in me, in judgment of law, after the robbery; and therefore, in what place soever the robber keeps them from me, he feloniously injures me in the possession as well as property of them, and consequently may as properly enough be said to steal them from me. Yet he shall be appealed for the robbery in the first county only,(g) for there only he was guilty of taking from the person, without which there can be no robbery. Also(h) if one take me from the county of A. into the county of B. and there rob me, he shall be appealed for the robbery in the county of B. only, for he was guilty only of a trespass in the county of A. But(i) if one bring my goods into the county of B. by reason of a menace in the county of A. it may be questioned which is the proper county for the bringing of the appeal.

As to the FOURTH POINT, viz. Within what time an Appeal of Larceny is to be brought.

(k) Sum. 184.
S. P. C. 62. 184.
B. App. 37. 62.
7 H. 4. 44.
Con.
28 Assize, 97.
(l) Sup. 2. 33.

Sect. 48. It seems to be agreed(k) at this day, that it may be brought at any time, as well after as within the year and day, if the plaintiff brings a fresh suit, for that the statute of Gloucester, c. 9. which requires, "that an appeal be brought within the year and day," hath been construed(l) to intend no other appeal but that of death; and the common law seems to have limited no cer-
tain

tain time for the bringing of an appeal, but to have suffered it to be brought at any time by one who had made fresh suit; the nature whereof shall be more fully considered in the fiftieth section. But it seems that one who has been guilty of a gross neglect in pursuing the offender, may be barred of such an appeal, as well within the year and day as after, for that the common law seems, (a) in all appeals, to have required that the appellant should have made fresh suit; and the said statute of Gloucester, which takes away the necessity of it in appeals of death brought within the year and day, extends not to other appeals.

As to the FIFTH POINT, viz. In what cases there shall be a restitution of the goods stolen.

Sect. 49. I shall premise, that until (b) such goods are seized to the use of the king, or of some other person claiming them under the crown as being waifs, or the goods of a felon, &c. the rightful owner, without any fresh suit or appeal, may seize them wherever he finds them; but they shall not be restored to him after such seizure by others, without bringing his appeal, &c.

And for the better understanding in what cases a restitution of the goods so seized shall be awarded on such an appeal, I shall examine the following particulars.

1. Whether it necessarily require a fresh suit.
2. What shall be esteemed a fresh suit.
3. By whom, and in what manner, such fresh suit shall be inquired and adjudged.
4. How far the appeal must be prosecuted.
5. Whether the appellant's title to such restitution shall be preferred to any subsequent title claimed in the goods.
6. Whether there shall be such a restitution on any other prosecution besides that of appeal.
7. Whether there shall be a restitution of any goods not mentioned in the appeal.

As to the FIRST PARTICULAR, viz. Whether such restitution necessarily require a fresh suit.

Sect. 50. It so fully appears to do so by almost all the books (c) relating to this matter, that it seems needless to cite authorities to prove it.

As to the SECOND PARTICULAR, viz. What shall be esteemed a fresh suit.

Sect. 51. It seems to have been anciently holden, (d) that to make a fresh suit, the party ought to have raised a *hue and cry* with all convenient speed, and also to have taken the offender. But at this day it seems to be settled, (e) that if the party has been guilty of no gross neglect, but have used *due care* and diligence in inquiring after, pursuing, and apprehending the felon, he ought to be allowed to have made sufficient fresh suit, whether any *hue and cry* were levied or not, and whether such offender

(a) 2 Inst. 319.

(b) 21 Ed. 4.
16. 7.
F. Kestry, 2.
Avowry, 151.
S. P. C. 186.
5 Co. 109.
1 Hale, 541.

(c) See the authorities to the three next sections.

(d) F. Cor. 319.
540.
S. P. C. 62. 165.
1 Rich. 3. 13. a.
(e) B. F. Solt,
1. 6.
7 H. 4. 44.
S. P. C. 62. 165.
Qu. Het. 64, 65.

officer were taken by means of such pursuit, or without any assistance from it.

As to the THIRD PARTICULAR, viz. By whom, and in what manner, such fresh suit shall be inquired and adjudged;

(a) 4 Edw. 4.
11.
S. P. C. 166.

(b) 8 H. 4. 1.
2 H. 4. 31.
2 Rich. 3. 13.
10 H. 4. 5.
Cont.
S. P. C. 166.
(c) S. P. C.
166. and see the
books cited to
the other points
of this section,
and Rastal, 52,
53.

(d) Vide F.
Cor. 379. 392.
(e) 14 H. 9. 1.
3 H. 6. 29.
8 H. 6. 5.
Yel. 152
1 Brownlow,
214.
1 Sid. 449.
Contra, Latch.

213. 3 Leonard, 150. 213. (f) C. Jac. 415. 2 Saund. 106, 107. (g) Sum. 185. S. P. C. 62.
(h) 21 E. 4. 16. F. Corone, 42. B. F. Suit; 4. Vide S. P. C. 166. 2 Leon. 108.

As to the FOURTH PARTICULAR, viz. How far the appeal must be prosecuted in order to intitle the appellant to a restitution.

* Sect. 53. It seems that anciently, the appellant could in no case be intitled to a restitution, unless (i) the appellee were attainted at his suit; and therefore if several appeals were commenced against the same person by several plaintiffs, and the appellee were attainted at the suit of one of them, no (k) other could have a restitution, because the appellee (l) being once attainted, could not be afterwards attainted again: But (m) it seems to be settled at this day, that there is no such necessity that the appellee be attainted at the suit of the appellant; and therefore, in the case above-mentioned, after such attainder at the suit of one appellant, it shall be inquired by an inquest of office, whether the appellee were guilty of the facts complained of in the other appeals, and made fresh suit, &c. and upon such matter found by such inquest, a restitution shall be awarded, &c. Also (n) if an appellee be in prison, it seems that the like inquiry shall be made by inquest of office, and thereupon a restitution awarded, &c. (o) If the appellee be outlawed, or have the benefit of his

(i) 44 Edw. 3.
44.
F. Cor. 95.
162. 318, 319.
Avowry, 151.
S. P. C. 165,
166.
(k) F. Cor. 95.
(l) Vide infra in
the chapter con-
cerning judg-
ment.
Contra,
4 E. 4. 11.
(m) S. P. C. 166.
2 H. 4. 31.
F. Cor. 81.
379, 380.
(n) F. Cor. 95.
Perrett, 15.
S. P. C. 166.
(o) 1 Hale, 540.
21 Ed. 4. 16.
10 H. 4. 5. 40 Assize, 39. 2 R. 3. 13. 8 H. 4. 1. 26 Assize, 32. F. Cor. 42. 71. 194. 217, 379.
466. S. P. C. 166. 2 Leon. 108.

his clergy before conviction, or stand mute, or challenge peremptorily above twenty jurors, or break from prison, perhaps a restitution shall be awarded upon such an inquest's finding the fresh suit, without any farther inquiry whether the appellee were guilty or not; because, by refusing to take his trial, he tacitly seems to admit himself guilty. Also if one bring an appeal against two, whereof one is attainted, and the other acquitted; yet (a) it seems he shall have a restitution. But (b) if both the appellees had been acquitted, it seems, that the appellant should never have his goods again, though it were expressly found that they were his goods, but he shall forfeit them to the king for his false appeal. But *quare* if this ought not to be understood of such goods only (c) as were before seized to the king's use, as having been waived, &c.

(a) S. P. C. 106.
(b) F. Cor. 367.
(c) Vide sup.
1. 48.
5 Coke, 110.
S. P. C. 106.
contra.
3 Inst. 277.

As to the FIFTH PARTICULAR, viz. Whether the appellant's title to such restitution shall be preferred to any subsequent title gained in the goods.

Sect. 54. It seems clear that the appellant's title to such restitution shall not (d) be barred by any seizure of such goods, as being waifs, or estrays, or the goods of felons, &c. nor (e) even by a sale of them *bonâ fide* made in market overt, &c.

cited, sect. 49. Qu. Het. 64, 65. F. Avowry, 151. Cor. 71. 318, 319. B. App. 24. 47. Qu. Moor, 360. Poph. 84. 1 And. 344. 1 Hale, 543, 544.

(d) S. P. C. 106.
5 Coke, 109.
21 Ed. 4. 16.
Kely. 35. 47.
See the books
(e) Kryling, 34.

And by the like reason it is certain, that the prosecutor of an indictment, since the statute of 21 Hen. 8. c. 11. set forth more at large in the next section, shall not be barred of his restitution by any such seizure, or sale in market overt, &c. (1)

As to the SIXTH PARTICULAR, viz. Whether there shall be a restitution of the goods stolen, upon any other prosecution besides that of appeal.

Sect. 55. It seems to be clearly agreed (f) that by the common law it could not be had upon any other prosecution whatsoever: but to remedy this inconvenience, it is enacted by 21 Hen. 8. c. 11. "That if any felon or felons do rob, or take away any money, goods, or chattels, from any of the king's subjects, from their persons or otherwise, within this realm, and thereof the said felon or felons be indicted, and after arraigned of the said felony, and found guilty thereof, or otherwise attainted by reason of evidence given by the party so robbed, or owner of the said money, goods, or chattels, or by any other by their procurement; that then the party so robbed, or owner, shall be restored to his said money, goods and chattels; and that as well the justices of gaol-delivery, as other justices, afore whom any such felon or felons shall be found guilty, or otherwise attainted, by reason of evidence given by the party so robbed, or owner, or by any other by their procurement, have power by the said act to award, from time to time, writs of restitution

(f) 4 H. 7. 5.
F. Cor. 62. 460.
S. P. C. 66.
165. 167.
Summary, 212.
Lath. 144.
1 Hale, 542.

(1) For market overt, see 4 Comm. 449. 2 Inst. 713. Mirror, c. 1. s. 3. Cro. Jac. 68. Godbolt, 131. 5 Rep. 25. 12 Modern, 521. and by 1 Jac. 1. c. 21. the sale of any goods wrongfully taken to any pawnbroker in London, or within two

miles thereof, shall be void as to the property.—But respecting pawnbrokers, vide 30 Geo. 3. c. 22. and 24 Geo. 3. c. 42. and the case of Parker v. Patrick, 5 Term Rep. 175.

"restitution (2) for the said money, goods, and chattels, in like manner as though any such felon or felons were attainted at the suit of the party in appeal."

(a) 8. P. C. 167.
1 Hale, 545.

Sect. 56. Sir William Staundford, (a) in his construction of this statute, seems to incline to an opinion, that the party may have a restitution by virtue of it, without making any fresh suit; and this seems to be agreeable to practice, and the purport of the first part of the statute, which seems to require no more in order to entitle the party to a restitution, than that the indicted be found guilty (3) or otherwise attainted by his evidence, &c. Yet if it shall plainly appear to the Court, that the party hath been guilty of gross neglect in prosecuting the offender, it may reasonably be argued, that he is not entitled to a restitution; for the latter part of the statute, by ordaining that writs of restitution shall be awarded as though the felon had been attainted in an appeal, seems to imply, that it is a sufficient favour, within the intention of the makers of the statute, to the prosecutor of an indictment, to give him a like remedy for a restitution of his goods, as the common law gave to the plaintiff in an appeal.

(b) Sup. s. 50,
51, 52.

But it is certain, (b) that the plaintiff in an appeal, who appears to have been guilty of such a neglect, cannot demand a restitution by the common law. And the construction I would contend for will appear the more reasonable, if it be considered, that it hardly can be imagined to be the intention of the makers of the statute, to give the party a greater benefit from a conviction grounded on his own evidence, as a conviction on an indictment may be, than from a conviction on the evidence of others, as a conviction in appeal must be.

However, if it shall appear to the Court, upon the evidence at the trial or otherwise, that the party has been reasonably diligent in prosecuting the offence, I readily grant that the justices may, if they think fit, in their discretion award a restitution, without making any inquiry concerning the fresh suit. But this seems to be no more than they may also do in appeal, if they think fit, as I have already more fully endeavoured to shew in section fifty-two.

As to the SEVENTH PARTICULAR, viz. Whether there shall be a restitution to any goods not mentioned in the appeal.

F. Corone, 100.
Summary, 184.
3 Inst. 227.
5 Coke, 110.
8. P. S. 186.
1 Hale, 538.

Sect. 57. There is no doubt, but that if a man be robbed of several goods by the same person, either at the same or different times, and such goods be seized as waifs, &c. and afterwards the party, in his appeal for the robbery, mention some of those goods only, and omit the rest, and the appellee be convicted, &c. the appellant shall be restored to such of the goods only as were mentioned in the appeal, and the rest shall be confiscated, not only in respect of that favour which the law presumes that the appellant beareth to the felon, in making the charge against him easier

(2) There has been a great deal of restitution sued out these 200 years.—If the goods are produced at the trial, the Court will order them to be restored to the owner, and if not restored, the owner may after prosecution recover them, from the person who converts them, by an action of trover, Loft. 88. Vide *Harris v. Shaw*, B. R. H. 349.

(3) In the particular case of horse-stealing, it is enacted by 31 Eliz. c. 12. that where horses are stolen and sold in open market, and the owner claims them again within six months, and pays the buyer as much as they cost him, he shall have them again, without prosecution.

easier than it ought to have been, which might possibly have given him an opportunity to have escaped, but also because, as it seemeth, the restitution ought regularly to be grounded on the record of the appeal; and by that no other goods can appear to have been stolen than what are mentioned in it:

But whether an appellant, who had, before his appeal brought, lawfully regained the possession of his goods stolen, shall forfeit to the king such of them as he leaves out of his appeal, doth not clearly appear from the principal (a) case concerning this matter, nor from any of the books above cited, which seem chiefly to rely on the authority of it.

But there is a special (b) case wherein the appellant shall recover things which were neither stolen from him, nor mentioned in his appeal; as where the appellee sells (c) the things stolen, or exchanges (d) them for some other thing, before the appeal brought, and the money taken on the sale, a thing given in exchange, are seized to the king's use, &c. in which case they shall be delivered to the appellant, on the conviction of the appellee, though they were never in his possession before; for he appears to be in no manner of fault, and there is no reason that he should be prejudiced by the act of the felon. And I take it for granted, that in all these cases the law is the same at this day in relation to a restitution, by forcé of the above cited statute of 21 Hen. 8. to the prosecutor of an indictment. (4)

And now I am come to an APPEAL of RAPE.

For the better understanding of the nature whereof, I shall consider,

1. By whom, and in what manner it may be brought.
2. In what county.
3. Within what time.

As to the FIRST POINT, viz. By whom and in what manner an appeal of rape may be brought.

Sect.

(4) A bank note of fifty pounds was stolen from Golightly by one Ferguson. On his being apprehended, several articles of silver plate, a bank note for twenty pounds, and ten guineas in gold, were found upon him, produced on the trial, and placed in the custody of Mr. Reynolds, the clerk of the arraigns. Golightly gave evidence against Ferguson at the Old Bailey, and he was convicted of stealing the fifty pounds bank note. The owner demanded restitution from Reynolds of the goods found upon Ferguson, but as they were not the identical goods which Golightly had lost, Reynolds refused to restore them. But on trover being brought before Lord Mansfield, they were ordered to be restored, they being the produce of the fifty pounds bank note. Loft. 90. So where a man had stolen cattle and sold them, the money they produced was restored to the owner of the cattle. Noy, 128. And the same of gold stolen and changed into silver. Cro. Elis. 661. But the owner of goods stolen prosecuting the felon to con-

viction cannot recover the value of them in trover from a person who purchases them in market overt, and sells them again before conviction, notwithstanding the owner give him notice of the robbery while they are in his possession; for in order to maintain trover the plaintiff must prove that the goods were his property, and that while they were so they came to the defendant's possession: but he has a right to the restitution of the goods in specie, and perhaps might recover damages against the person who traffics with the goods after conviction and refusal to deliver them. Horwood v. Smith, 2 Term Rep. 750. And if a person obtain goods by false pretences and pawn them, and on conviction of the offender the original owner get possession of them again, the pawn-broker may recover them back by an action of trover from the original owner; for the 21 Hen. 8. c. 11. only gives restitution on a conviction of felony, and not on a conviction of fraud. Parker v. Patrick, 5 Term Rep. 175.

(a) Bract. 147.
Wileta, l. 1. c. 25.
p. 14.

2 Inst. 180.
See B. 1. c. 16.
s. 7.

Contra,
2 Inst. 433.
Co. Lit. 123.

(b) Littleton,
s. 190.

Contra,
F. Corone, 17.
S. P. C. 98.

(c) Vide Brac-
ton, 147.

S. P. C. 61. 148. (d) Vide 2 Inst. 433, 434. 1 Hale, 632. *Infra*, s. 59, 60, 61. (e) 8 H. 4. 21.
11 H. 4. 14. S. P. C. 98.

Sect. 58. It seems (a) that, by the common law, it might be brought by any women who had been ravished, against the ravisher, whether such person ravished were the nief (b) of the ravisher, or a free woman, and whether she were a virgin, wife, or widow. Neither (c) do I find that she could be barred of her appeal at the common law, for consenting after the rape to the ravisher, as she may (d) be at this day, by force of the statutes of Westminster the Second, c. 34. and 6 Rich. 2. c. 6. But it seems that a woman lawfully married, can neither (e) by the common law, nor by force of any statute, bring such an appeal without her husband, as one married *de facto* only, and not *de jure*, perhaps may.

Sect. 59. But howsoever the common law might stand in relation to appeals of rape, it seems that they were wholly taken away by the statute of Westminster the First, c. 13. by which the offence of rape was reduced to trespass only, and consequently punishable by an action, or indictment, of trespass: but afterwards, appeals of rape were given again by the statute of Westminster the Second, c. 34. by which it is enacted, "That if a man from thenceforth do ravish a woman married, maid, or other, where she did not consent, neither before nor after, he shall have judgment of life and member. And likewise where a man ravisheth a woman married, lady, damsel, or other, with force, although she consent after, he shall have judgment as before is said, if he be attainted at the king's suit, and there the king shall have the suit."

(c) 47 Assize, 6.
Littleton, sect.
190.

2 Inst. 433.
S. P. C. 681.
Contra,

F. Ulag. 49.
B. Corone, 169.

(d) Vide sup.
c. 10. s. 52.

(e) 9 Edw. 4.
26.

F. Endit. 18. Dyer, 202. Vide *infra*, s. 70.

Sect. 60. It seems to be so clear (c) that this statute impliedly gives an appeal to the woman who does not consent to the ravisher, that it seems needless to endeavour to prove it; but it is observable, (d) that the statute does not restore the old common law in relation to such appeals, as it would have done, if it had only repealed the abovementioned statute of Westminster the First, c. 13. but makes a new law in relation to them; from whence it follows that all appeals of rape, at this day, must (e) conclude *contra formam statuti*.

Sect. 61. It is farther enacted by 6 Rich. 2. st. 1. c. 6. in the following words: "Against the offenders and ravishers of ladies, and the daughters of noblemen, and other women in every part of the realm, in these days offending more violently, and much more than they were wont:" it is ordained and established, That wheresoever and whensoever such ladies, daughters, and other women aforesaid be ravished, and after such rape do consent to such ravishers, that as well the ravishers as they that be ravished, and every of them, be from thenceforth disabled, and by the same deed be unable to have or challenge all inheritance, dower, or joint feoffment after the death of their husbands and ancestors. And that incontinently in this case, the next of the blood of those ravishers, or of them that be ravished, to whom such inheritance, dower, or joint feoffment ought to revert, remain, or fall after the death of the ravisher, or of her that is so ravished, shall have title; that is to say, "after

5 Ed. 4. 6.

3 Coke, 61.

Bro. Parl. 29.

1 H. 6. 26.

"after the rape to enter upon the ravisher, or her that is ravished, and their assigns, and land-tenants, in the same inheritance, dower, or joint feoffment, and the same to hold in state of inheritance: and that the husbands of such women, if they have husbands, or if they have no husbands in life, that then the fathers, or other next of their blood, have from thenceforth the suit to pursue, and may sue against the same offenders and ravishers in this behalf, and to have them thereof convict of life and of member, although the same women after such rape do consent to the said ravishers. And the defendant in this case shall not be received to wage battle, but the truth of the matter shall be tried by inquisition of the country: saving always to our lord the king, and to other lords of the realm, all their escheats of the said ravishers, if peradventure they be thereof convict." (5)

In the construction of these statutes the following points have been holden.

Sect. 62. FIRST. That (a) in an appeal brought upon it by a husband for the rape of his wife, it is a good plea, that the appellant and woman ravished were never lawfully married; which shall be tried by the bishop's certificate, who, if the marriage were unlawful, by reason of a precontract, &c. ought to certify against the appellant.

(a) 11 H. 4. 13.
F. Cor. 86. 228.
B. Parha. 89.

Sect. 63. SECONDLY. That there is no (b) necessity to allege, that the woman did consent to the ravisher, in a count which rehearses the statute, and concludes that the rape was against the form of it; which implies, that the woman consented, &c.

(b) 11 H. 4. 14.
F. Cor. 86.
228.
S. P. C. 81.
Dy. 312. 202.

Sect. 64. THIRDLY. That (c) if a woman who hath neither husband nor father be ravished by her next of kin, and consent to him, the next of kin to the ravisher shall have the appeal.

(c) 2 Inst. 434.
Vide sup. sect.
39, 40.
1 Hale. 632.

Sect. 65. FOURTHLY. That (d) whosoever happens at the time to be next heir to the person so ravished, and consenting, &c. shall have the appeal, and also enter (e) into the lands of the person ravished, and retain them against any other who shall afterwards happen by matter *ex post facto* to become heir; and therefore where a woman, having issue only a daughter, consents to a ravisher, and the daughter enters, and then a son is born to such woman, the daughter shall retain the lands, because she took them by virtue of a title given by the statute which first vested in her as a purchaser, and never was in any ancestor.

(d) S. P. C. 61.
(e) F. Assize, 27.
5 Ed. 4. 6.
9 H. 7. 25.
L. Quin.
Ed. 4. 60, 61.
1 Coke, 95.
98, 137.
2 Coke, 61, 62.
1 Howden, 66.
1 Hale, 631.

Sect. 66. FIFTHLY. That (f) the next in remainder or reversion, to whom the lands of the woman who consents to a ravisher would come if she were dead, shall enter and retain the lands by virtue of the statute, provided he be of kin to her, albeit

(f) L. Quin.
Edw. 4. 58,
59, 60.
B. Ent. Cong.
94.
5 Ed. 4. 5.
F. Assize, 27.

another

(5) The offence of Rape, mentioned in these statutes, is obviously not the offence now understood by that term,—the mere carnal knowledge of a female by force; but it means the offence of forcibly carrying off and detaining the persons of women with a view to compel them to marry or cohabit with the wrongdoer, and thereby obtain possession of their property. As the enactments of new laws are frequently the best expositors of the contemporaneous manners of the age, we may infer, that it was no uncommon thing in ancient

times for women possessing property to be forcibly carried off, or, as the legal phrase expressed it, "ravished" from their friends, and either intimidated or persuaded into a marriage with the ravisher. The object of the above statutes was evidently to take away the temptation to such conduct by making it a forfeiture of the woman's estate for her to give a subsequent consent to such rape. And how easily women forgive offenders of this description, is illustrated by a well-known Roman story.

another person be nearer; yet it seems, that the persons so entitled to the lands cannot have an appeal of rape, where there is another nearer of kin; for though the clause relating to the entry into the lands seems to entitle such of the next of kin to whom the inheritance would fall after the death of the party, whether they be absolutely nearest or not, yet the clause relating to the appeal seems to extend to none but the husband, or father, or very next of kin.

(a) L. Quin.
Edw. 4. 58.
Plowden, 42,
64.

Sect. 67. SIXTHLY. That it is not (a) sufficient in setting forth the title of the person claiming the lands by virtue of the statute, to say in general, that he is next of blood to whom the inheritance would fall, &c. without shewing specially in what manner he is so, &c

(b) L. Quin.
Edw. 4. 59, 60,
61.
B. Ent. Cong.
64.
5 Edw. 4. 5.

Sect. 68. SEVENTHLY. That it is not (b) conclusive evidence to prove the woman's consent to the ravisher, to shew, that she lived with him some years as his wife, and had a child by him, if all the time she was under his power, and never at her liberty.

(c) Plow. 364.
See 1 D. Abr.
698. 699, 700.
1 Inst. 79.

Sect. 69. EIGHTHLY. That (c) if the party ravished and consenting to the ravisher, be under the age of twelve years, she shall not lose her lands by the intent of the statute, for that the consent of a woman under that age is looked upon as given by one incapable of discretion, and therefore is not regarded by the law.

(d) S. P. C. 61.
See 1 H. 6. 1.
B. Rape, 4.

Sect. 70. NINTHLY. That (d) in appeals brought on this statute, the count ought to rehearse it; but I do not find any resolution cited to maintain this opinion. It is true indeed, that in the Year-book of 11 Hen. 4. pl. 13, 14. the statute is recited in an appeal granted on it: but it is not there said to be necessary to be so recited; neither do I find any reason given why an appeal may not as well be grounded on this statute without reciting it, as on the statute of Westminster the second, c. 34. as (e) it is agreed that it may be. If it be said, (f) that the common law gave the same appeal as is given by the statute of Westminster the second, and therefore there is no need to recite it, but that there never was such an appeal at the common law as is given by the statute of Richard the Second, and therefore the appeal grounded on it ought to recite it, it may be answered, that the said statute of Westminster (g) does not revive the old common law in relation to such appeals, but makes a new law in relation to them: so that appeals brought upon it, do altogether as much depend upon it, as those brought on the statute of Richard the Second do on that. Neither (h) does there appear to be any such rule, that indictments, or actions grounded on statutes which give a remedy in cases which were no way provided for by law, there is a necessity to recite such statutes; and indeed at best it seems but surplus to recite what the court is bound *ex officio* to take notice of.

(e) S. P. C. 81.
See 1 H. 6. 1.
B. Rape, 4.
(f) Vide 5 H.
7. 17.

(g) Sup. s. 59,
60.

(h) 5 H. 7. 17.
C. Car. 564.
6 Modern, 140.

As to the **SECOND POINT**, viz. In what county an appeal of rape may be brought.

(i) Sup. sect.
35. 47.

Sect. 71. There is no doubt but that this, like all other (i) appeals, is a local action, and consequently ought to be brought in the county wherein the felony was done. And therefore if a man take

take a woman by force in one county, and carry her into another, and there ravish her, the appeal (a) shall be brought only in the county wherein the rape was committed; for the taking in the other was no more than a trespass, and needs not be taken notice of at all in the appeal of the rape; and if it be, is only looked upon as surplus.

(a) 3 H. 7. 12.
F. Vime, 28.
B. Appeal, 83.
S. P. C. 63.
Summary, 186.

As to the **THIRD POINT**, viz. In what time an appeal of rape may be brought.

Sect. 72. It seems, that at this day it may be brought in any reasonable (b) time, the judgment (c) whereof lies in the discretion of the court, for that at the common law there was no certain time limited for the bringing of it; and the statute of Westminster the first, c. 13. by which the offence of rape was turned into a trespass, and forty days limited for the suit of the person ravished, is repealed; and the statute of Gloucester, c. 9. which requires that appeals be brought within the year and day, extends only to appeals of death; and the statute of Westminster the second, c. 34. which makes rape a felony again, limits no time for the bringing of it, but leaves it to the construction of law, which shall be agreeable to the ancient rules of law in such points wherein the statute is silent.

(b) S. P. C. 63.
Summary, 186.
1 Hale, 632.
(c) Vide supra,
s. 51, 52.
Littleton, 69.
2 Inst. 56.
Sup. s. 33. 48.

And now I am come to an **APPEAL** of **ARSON**. (d)

(d) 1 Inst. 208.

Sect. 73. But the learning relating to it seeming to be altogether obsolete at this day, I shall refer the reader to old (e) books for it.

(e) Fleta, l. 1.
c. 37.
Brac. l. 3. c. 27.

Having thus endeavoured to shew in what courts appeals may be brought, and the several kinds of them, and examined the particulars which seemed most properly to come under the consideration of each kind, I shall now proceed to examine some other matters concerning them, wherein I shall consider them all together.

1. In what cases the appellant and the appellee are to appear in proper person, and where by attorney or guardian.
2. How the appellant ought to declare.
3. How he may be nonsuited.
4. For what faults the writ may be abated.
5. What may be pleaded in bar of an appeal.
6. Where the appellant and his abettors shall render damages to the appellee for a false appeal.
7. Where the appellant is to be fined.

As to the **FIRST POINT**, viz. In what cases the appellant and appellee are to appear in proper person, and where by attorney or guardian.

Sect. 74. It seems, that by the common law, neither (f) plaintiff nor defendant in any appeal whatsoever, whether of felony or mayhem, (g) could make an attorney, but must appear, either by guardian (h) or in proper person, on every (i) day of continuance; except in some special cases, as where the defendant, being convicted in an appeal of felony, prayed the benefit of his clergy, and the

(f) 2 Inst. 313.
Carth. 55, 56.
3 Modern, 268.
Salk. 59. 62. 64.
B. Att. 64. 78.
2 Ri. 3. 13.
B. App. 112.
Rastal, 47.
(g) 2 Inst. 313.
F. Utlag. 34.

(g) Ass. 17.
F. Attor. 39. 90.
40 Ed. 3. 42.
S. P. C. 135.
Vide F. Cor. 13.
(b) 11 H. 4. 11.
S. P. C. 135.
F. Corone, 13.
(c) 21 Edw. 4.
73, 73.
(d) 8 Edw. 4. 3.
F. Attorney, 24.
(e) F. N. B. 26.
(f) Salk, 59,
60.
Carthew, 56.
Skinner, 670.
An appellant
must appear
once personally,
before he can
make an attor-
ney.
Skinner, 48.
Carthew, 394.

the plaintiff replied, that he had been twice married, in which case he might (a) be admitted to go on with the suit by attorney, because he had nothing more to do but to get a certificate of the bigamy from the bishop, which, as it was (b) said, any stranger might procure as well as the plaintiff. *Sed quare*; for it is said, (c) that none can demand execution but the plaintiff, and that the plaintiff cannot do it but in proper person; from whence it seems reasonable to argue, that he ought, in all other cases, as well to carry on his suit in proper person. But it seems (d) clear, that after a defendant is acquitted, he may appear by attorney for the recovery of his damages against the abettors, &c. And it is enacted (e) by 3 Hen. 7. c. 1. "That the appellant, in any appeals of "murder or the death of a man, where battle by the course of "common law lies not, may make attorney and appear in the "same, in the said appeals after they be commenced, to the end "of the suit and execution of the same." But (f) if a defendant or plaintiff appear and plead by attorney where they ought not, and the court receive the plea and adjourn the cause, it seems, that the appeal is discontinued, because such appearance was merely void in law.

(g) S. P. C. 78,
79.
(h) Rastal and
Coke's Entries,
titles Appeal
and Mort.
Trem. 15 to 35.

As to the SECOND POINT, viz. In what manner the appellant ought to declare; I shall refer the reader for precedents of counts in appeal, to Staundford's (g) Pleas of the Crown, and the Book (i) of Entries, and shall in this place consider only the following particulars.

1. In what manner such count must pursue the writ.
2. How it ought to set forth the substance and matter of fact.
3. How the circumstances of time and place.
4. Whether one and the same count ought to be against those who do not appear as well as against those who do appear, and against the accessaries as well as the principals.

As to the FIRST PARTICULAR, viz. In what manner the count in appeal must pursue the writ.

(i) Finch, 337.

(k) R. App. 19.
45 Ed. 3. 23.
21 Ed. 3. 23.
S. P. C. 78.
(l) F. Cor. 110.
Sup. 1. 20.

Sect. 75. I shall take it for granted, that this, like all other counts in other actions, must in substance (i) agree with the writ, which shall be abated, if the count vary from it in any material point. And therefore, in a common appeal of death, if the appellant declare, that the appellee traitorously killed the person deceased, as he was going to succour the king in his wars, the writ shall be abated, (k) because that contains no charge of treason. So also if the plaintiff, in an appeal of mayhem, declare that the appellee beat as well as maimed him, the writ shall be abated, (l) because that mentions not any battery.

As to the SECOND PARTICULAR, viz. In what manner the count in appeal ought to set forth the substance and manner of the fact; I shall observe the following particulars.

Sect. 76. FIRST, That where several are present at the fact,
and

and one only actually does it, and the others abet and encourage him, it is in the election of the plaintiff, either to suppose (a) in his declaration, that every one of them did the fact, because in such a case the act of one is, in the judgment of the law, the act of all; or to shew the special (b) manner of the case as in truth it was, and set forth the fact to have been done only by the person who did it, and the others to have been his abettors, &c.

Rastal, 43. 45. 46. 47. Coke's Entries, 57, &c. See the Case of Midwinter and Sims, Foster, Crown Law, 3d. edit. 415.

Sect. 77. SECONDLY, That no periphrasis, (c) or circumlocution whatsoever, will supply the want of those words of art which the law hath appropriated for the description of the offence; from whence it follows, that an appeal of death cannot (d) amount to a charge of murder without the word *murdravit*, let it be never so exact and particular in setting forth the malice and all other circumstances of the killing; neither (e) can an appeal of rape be sufficient without the word *rapuit*; nor (f) an appeal of larceny without the word *cepit*; nor (g) an appeal of mayhem without the word *mayhemavit*; nor any (h) of the appeals above-mentioned without the word *felonicè*.

96. Summary, 206, 207. 20 H. 7. 7. 1 Bulst. 93. Cro. Jac. 20. Dyer, 202. Qu. F. Endict. 26. Dyer, 69.

Sect. 78. THIRDLY, That in every appeal of larceny (i) it must expressly appear whose the goods were that were stolen; and in every appeal of death, (k) who the person was that was killed; because otherwise it cannot appear that the plaintiff is entitled to the appeal; yet an indictment *de morte* (l) *cujusdam ignoti*, or for feloniously stealing (m) the goods *cujusdam ignoti*, is good; for it is sufficient, that the person injured was under the protection of the law.

(m) F. Endict. 9. 12. Summary, 207. 1 Hale, 512. 2 Hale, 181. S. P. C. 95. 181. Dyer, 99. Keilwood, 25. Moor, 466. 18 Assize, 15. Con. 9 H. 6. 45.

Sect. 79. FOURTHLY, That in an appeal of rape the fact seems to be sufficiently (n) declared, by shewing that the defendant *felonicè rapuit* the woman, without adding the words *carnaliter cognovit*, or any others tantamount, or first shewing the particular manner of the terror or violence, and then concluding, that the defendant *sic felonice rapuit*. Also it seems, (o) that the like general manner of setting forth the fact is sufficient in an appeal of larceny. But it seems to be usual, in appeals of larceny, to set forth the price of the things stolen; but whether this be necessary for any other purpose than to shew, that the crime amounts to grand larceny, and to ascertain the goods, in order thereby the better to entitle the appellant to a restitution, I leave to be considered. But (p) in an appeal of mayhem, it seems necessary; first, to set forth particularly in what manner the hurt was done, and the consequence following it; and then to conclude, that the defendant *sic felonice mayhemavit* the appellor.

Also it seems clear, (q) that in an appeal of death it is necessary, not only from the statute of Gloucester, (r) c. 9. which requires,

Salk. 377. Farresly, 16. (r) 2 Inst. 318, 319. 2 Lev. 140, 141. 5 Co. 120, 121, 122.

(a) 11 H. 13.
4 H. 7. 1.
S. P. C. 44. 80.
Sup. a. 19.
Summary, 187.
Post, c. 29.
(b) 4 Coke, 41.
F. Cor. 97.
40 Assize, 15.
44 Ed. 3. 38.

(c) 5 Co. 121.
(d) Dyer, 261.
Farresly, 16.
Cro. Jac. 20.
Salkeld, 377.
1 Ed. 4. 26.
(e) S. P. C. 82.
24. 96.
9 Ed. 4. 26.
20 H. 7. 7.
1 Inst. 174.
(f) Endict. 26.
S. P. C. 96.
Summary, 207.
(g) Sup. a. 17.
(h) S. P. C. 91.
1 H. 6. 1. Con.

(i) Rastal, 53.
54, 55.
(k) F. Endict.
10.
S. P. C. 95. 181.
22 Assize, 94.
(l) Sum. 207.
22 Assize, 24.
F. Corone, 159.
S. P. C. 94. 181.
1 Assize, 7.
Dyer, 96.

(n) Dyer, 202.
11 H. 4. 13.
F. Co. 86.
S. P. C. 81.
Summary, 187.

(o) Rastal, 53,
54, 55.

(p) Rast. 45, 46.
and Coke's En-
tries, 50, 51, 52,
53.

(q) Rastal, 46,
47, &c.
Coke's Ent. 53,
54, &c.

quires, that an appeal of death shall declare the deed; but also from the common law, first, to set forth in the count all the special circumstances of the fact, and (a) then to conclude, that the appellee *sic felonice murtheravit* the party.

And this being the appeal most in use at this day, it may not be improper to set down these following rules concerning this matter.

Sect. 80. FIRST, That every such count ought to set forth in what part (b) of the body the wound was given; in which respect the same certainty seems to be required in appeals as in indictments; and therefore, if the count say only, that the wound was given *circa pectus*, it seems to be vicious; as it hath been resolved, (c) that an indictment in the like manner uncertain is, because it doth not ascertain the part wounded, which, for what appears, might have been the neck, arm, or belly; and for the like reason such count seems also to be vicious, if it say, that the wound was in the hand, or leg, or arm, without (d) shewing whether it was the right or left; neither (e) is such an uncertainty holden by laying other wounds with sufficient certainty, if there be a general conclusion that the party died of the wounds above-mentioned; because the death being as much imputed to the wound that is insufficiently laid, as to the others, it appears not but that it might be chiefly owing to that which is insufficiently laid, and therefore the whole is insufficient. But it hath been resolved, that it is sufficient in an indictment of death, and therefore it seems also to be sufficient in an appeal, to shew that the wound was given in the left (f) part of the belly, or in the left part of the side, or in the left hand, or in the left arm, or in the face, or in the breast, or in the belly, or even in the fore part of the body, in which case the word "body" shall be understood of the trunk of the body, between the neck and thighs. And it hath been resolved, (g) that where there is such a sufficient certainty, the addition of a further uncertain or unintelligible description, will do no hurt; as where a wound is laid *in sinistra parte ventris circa umbilicum, &c.* in which case the last words shall be rejected as abundant and surplus.

Sect. 81. SECONDLY, Such count ought also (h) to shew the length and breadth of the wound, that it may appear to the court that it was mortal; but it is said, (i) that anciently this was not required: and if a man be shot, or run through the body, with a bullet or sword, &c. it seems (k) sufficient to say, that the defendant with malice, &c. struck the person killed in such a part of his body, and gave him in such part *mortale vulnus penetrans in et per corpus, &c.* for this sufficiently shews that the wound was mortal. Also in some cases it is impossible to shew the length and breadth of the wound where a limb is cut off, and (l) therefore it is plain, that in such cases it cannot be required.

Sect. 82. THIRDLY, It is not safe (m) in any such count to omit the word "*percussit*," where the fact will bear it; and by the authority of some (n) books this cannot be supplied, in such cases, by the words "*dedit mortale vulnus, &c.*" nor by any other: yet in Croke's (o) Reports this opinion seems to be questioned; neither do I find any reason why the word "*percussit*" should

should be of such absolute necessity, for it is not so much as pretended in Long's (a) Case, which seems to be the chief foundation of this opinion, that this is a word of art appropriated to this use; but all that seems there contended for is, that where the death was occasioned by any external violence, coming under the notion of striking, it must expressly appear, that a stroke was given. Nor does the law admit of a less exact certainty, as to the setting forth the fact, where the death was occasioned by any other means, as by poison, &c. for it hath been resolved (b) that an indictment (which in this respect seems not to differ from an appeal) setting forth, that J. S. persuaded the person deceased to take a certain poisonous potion under a notion of a medicine, and that the deceased, *nesciens præd' potum cum veneno fore intoxicatum, sed fidem adhibens dictæ persuasioni dicti J. S. recepit et bibit*, is insufficient, because it doth not expressly say, that the party received and drank the poison. And it was also resolved, that the want of such certainty is not supplied by these words immediately following, "*per quod idem N. immediate post receptionem veneni prædicti per tres horas immediate sequentes languebat et obiit, &c.*" and yet there cannot well be a stronger implication that the poison was taken and drank by him; for it being the strict (c) rule of law in these cases to have the substance of the fact expressed with precise certainty, the judges will suffer no argumentative certainty whatsoever to induce them to dispense with it. For if they should once be prevailed with to do it in one case, the like indulgence would be expected from them in others nearly resembling it, and then in others resembling those, and no one could say where this might end; which could not but endanger the subverting of one of the most fundamental principles of the law, by giving room to judges, by arguments from what the jury have found, to convict a man of a fact which they have not found.

Sect. 83. FOURTHLY, Such count (d) ought also expressly to shew that the party died of the hurt specially set forth; and it hath been resolved, (e) that an indictment, and from the same reason it seems that an appeal, setting forth that the defendant choked the deceased, *qua suffocatione obiit*, instead of *de qua suffocatione, &c.* is erroneous. Yet where the death was caused by divers poisons, or wounds, &c. the count may say in general, that the party died of the several poisons or wounds above-mentioned, without (f) saying, that he died of any one of them in particular; for perhaps the truth of the case might be, that none of them alone, but all together, caused the death. Or the count in such case perhaps may say, that the party died of the first poison or wound, and that he would have died of the second, if he had not died of the first, and also that he would have died of the third, if he had not died of the two first.

Sect. 84. FIFTHLY, If the killing were with a weapon, the count must shew (g) with what weapon in particular; and yet if upon the evidence it shall appear that the killing was not by such weapon, but by some other, the variance (h) is immaterial, and the appellee ought to be convicted, as shall be shewn more at large under the Chapter of Evidence. And if the killing were not

(a) 5 Coke, 172.
Dyer, 99.

(b) 4 Co. 44.
3 Modern, 202.

(c) 4 Co. 44.

(d) 2 Inst. 318.

(e) 1 Roll. 137.

3 Inst. 50. 135.
Qu. 4 Coke, 40.
(f) 44 Edw. 3.

12.
40 Assize, 25.
4 Coke, 40.
S. P. C. 80.
Rastal, 46, 47.
49. 51.

(g) 2 Inst. 318.
3 Mod. 198.
See Stat. Glo.
c. 9.

(h) 2 Inst. 318.
Summary, 265.
9 Coke, 67.

not

not by a weapon, but by some other means, as by poisoning, drowning, suffocating, burning, or the like, the count (a) must set forth the circumstances of the fact as specially as the nature of it will admit. But in such cases, where no weapon was used, it cannot but be absurd to require the mention of one in the appeal, and therefore the statute of Gloucester, c. 9. which directs generally, that in all appeals of death the weapon must be set forth, is to be intended only (b) of such killing in which a weapon was used: For the law is so far from requiring it in other cases, that it will not suffer an appeal of killing by a weapon to be maintained by evidence of killing by any other means in which no weapon was used; neither will it suffer an appeal of killing by any of those means without the help of a weapon, to be maintained by evidence of killing by a weapon, as shall also be shewn more at large in the chapter above referred to.

(c) Smith v. Horden, Mic. 7 Ann. 8.

Sect. 85. It hath been adjudged (c), that the words "*ri et armis*" are not necessary in such appeal, because they are so fully implied.

As to the THIRD PARTICULAR, *viz.* In what manner the count in appeal must set forth the circumstances of time and place.

Sect. 86. It is enacted by the statute of Gloucester, c. 9. "That if an appeal declare the deed, the year, the day, the hour, the time of the king, and the town where the deed was done, and with what weapon, the appeal shall stand in effect, &c." And though this more particularly relates (d) to appeals of death, yet it seems also to be generally a good rule as to the circumstances of time and place in other appeals.

And therefore I shall consider them all together; and first premise (e), that no omission of any of these circumstances, where the law requires them to be expressly set forth, can be aided by the conviction of the defendant.

For the better understanding in what cases the law requires them to be expressly set forth, I shall endeavour to shew what certainty the count in every appeal ought to shew

1. The hour.
2. The day.
3. The year and time of the king.
4. The place where the deed was done.

As to the first of these particulars, *viz.* With what certainty the count in appeal ought to set forth the hour.

(f) Rastal, 53.
54.
(g) Rastal, 55.
(h) Co. Ent. 50,
51, 52.
Rastal, 45.

Sect. 87. It is observable that all (f) the precedents of such counts (excepting only one) (g) in appeals of larceny in Rastal's Entries, which seems to be the only book of authority in which any such counts are to be found, and also all the precedents in Coke and Rastal of such counts in appeals of *mayhem*, (h) take no-
tice

tice of the hour, as well as those in appeals of death; (a) and therefore certainly it is not safe wholly to omit it: yet it hath been holden (b) that such an omission is not fatal, even in an appeal of death, because the common law did not require the mention of the hour, and the statute above-mentioned is in the affirmative. Yet if the hour as well as the day be set forth in the allegation of the offence of the principal, it is said to be fatal to mention the day only of the allegation of the offence of the accessory. But it seems that there is no necessity in any case precisely to allege that the fact was done at such an hour, that it is sufficient to say that it was done about such an hour, as appears from every (c) one of the precedents in Coke and Rastal, in which the hour is mentioned, and also from other good authorities; (d) yet we find the contrary opinion holden by three judges against two in Bulstrode's Reports. (e) But it seems certain (f) that a mistake of the hour will not be material upon evidence.

As to the second of the above-mentioned particulars, viz. With what certainty the count in appeal ought to set forth the day.

Sect. 88. There can be no doubt but that every such count must set forth the day on which the fact was done, as appears from all the precedents cited in the foregoing section; and also from the common form of all other declarations in all actions whatsoever, as well as of indictments, for which it is needless to cite authorities. And if the fact happened in the night, it seems most (g) proper to allege it *in nocte ejusdem diei*. But it is said not to (h) be sufficient to allege the fact done about such a day, or between such a day and such a day, but that the very day must be precisely set forth. And it seems to be insufficient to allege it (i) on the feast day of such a saint, without an addition, if there be another saint of the same name, as on St. John's day, without shewing which saint is meant, viz. the Baptist or the Evangelist. Also (k) it seems to be erroneous to set forth the fact on an impossible day, as on the thirty-first of June, or thirtieth of February, for this is of no more effect than to mention no day at all. Also it seems clear that an appeal of death must not only set forth the day when the hurt was given, but also the day when the party died of it, as appears from all the precedents (l) of this kind both in Coke and Rastal; and also from the manifest reason of the thing, (m) that it may appear that the party died within the year and day after the stroke, in which case (n) only the law intends that the death was occasioned by it.

And it is (o) said not to be sufficient to allege, that the defendant assaulted the party at a certain day, and feloniously struck him, without expressly adding, that he struck him *adunum et ibidem*: and yet both sentences being joined with the copulative, it is the most natural import of the whole, that the stroke and assault were both at the same time, &c. and such certainty seems to be sufficient in declarations (p) in civil actions, and even in indictments (q) of trespasses. But in indictments and appeals of death a more express certainty is said to be required, because the stroke which caused the death, being a crime of a different nature, and much higher than the assault, may be well enough intended to have happened at a different time; and therefore the precise

- (a) Co. Eqt. 53. 56, 57, 59.
- Rastal, 43, 46, 47, 48, 49, 50, &c.
- (b) S. P. C. 80. 1 Bulst. 82. Summary, 487.
- (c) Co. Eqt. 50, 51, 52, 53, 56, 57, 59.
- Rastal, 43, 45, 46, 47, 48, 49, 50, 57.
- (d) 2 Inst. 318. Salkeld, 59.
- Skinner, 443. 553.
- 4 Modern, 292.
- Carthew, 17. 333.
- Trem. 15, 21.
- (e) 1 Bulst. 80, 81, 82, 83. Vide 3 Modern, 158.
- (f) Sum. 264. 2 Inst. 318.
- (g) 2 Inst. 318.
- (h) 2 Inst. 318.
- (i) B. Indict. 47. 3 H. 7. 5.
- (k) Moor, 553.
- (l) See citations in the precedent section.
- (m) 2 Inst. 318. B. Indict. 41.
- (n) B. 1. c. 13. s. 9, 10.
- (o) Dyer, 28, as in the margin. Dyer, 4. See b. 1. c. 28. s. 42. p. 507. Keilw. 100. Qu.
- (p) C. Jac. 302, 443.
- (q) C. Car. 271. 525. C. Jac. 41. See b. 1. c. 28. s. 42. p. 507. 1 Roll. 295.

precise time of each must certainly be expressed. And even this may be vitiated by a repugnancy in the conclusion; as if the assault and stroke be alleged in the premises on the tenth of December, and the death subsequent on the twentieth of December following, and then it be alleged in the conclusion, that the defendant in such manner feloniously murdered the party on the tenth of December aforesaid, the whole is naught for the repugnancy, (a) because the party could not be said to have been murdered, till he was dead: and though to some purposes, by a fiction of law, the offence of the defendant, after the death of the party, is punished as a felony from the time of the stroke, yet in truth and propriety of speech (which must be observed in legal proceedings) it is not a felony, but only a trespass, till the death; yet if in such conclusion it had been alleged that the defendant in such manner feloniously murdered the party on the twentieth of December aforesaid, it had been sufficient. But it is said (b) to be the better way to conclude generally, that the defendant in such manner feloniously murdered the party. And it is certain (c) that a mistake of the day will not be material upon evidence.

(a) 4 Co. 47.
Summary, 207.
3 Inst. 318.
Noy, 45.
Hetley, 33.
Dyer, 50.
Qu. Cro. Eliz.
739.

(b) 4 Co. 42.
2 Inst. 318.
(c) Sum. 264.
2 Inst. 318.

(d) Dyer, 161.
60.
C. Eliz. 176.
Qu. C. Eliz.
739.

(e) 4 Coke, 42.

See Foster's
Crown Law, 63.
67.

(f) 4 Coke, 42.

Sect. 89. It hath been holden that an allegation of the day, *primu facie* somewhat uncertain, may be holpen by the apparent sense of the whole; as where (d) it is alleged that the principal such a day made the assault and gave the stroke, and that the party died on such a subsequent day, &c. and that A. B. was *ad tunc et ibidem abettans* the said principal to do the felony and murder aforesaid; in which case it is said that the words *ad tunc et ibidem*, from the manifest import of the whole, shall be referred to the time of the stroke, because by that only the felony, which A. B. is charged to have abetted, was done. Yet if A. B. had been said to have been present at the time of the felony and murder aforesaid, *scilicet* on the day of the stroke, *tunc et ibidem* abetting the felony and murder aforesaid, &c. it seems (e) that the appeal is insufficient as to the said A. B. for the repugnancy, because he is expressly alleged to have been present, and to have abetted the principal, at the time of the felony and murder, which must be taken for the time of the death, by which the offence, which was before but a trespass, became felony and murder; but by being present at the time of the death, it is impossible he could abet a stroke given so long before, and therefore it is repugnant and inconsistent in such a manner to allege it. Nor is such a repugnancy any way holpen by the subsequent allegation of the very day of the stroke, coming after the word "*scilicet*," for it is apparent that the time of the felony could not be on the day of the stroke, and therefore it rather adds to than helps the fault to allege that it was. But (f) the best way of alleging such abetment had been to have set forth, that the said A. B. was *præsens, auxilians, &c. ad feloniam et murdrum prædictum in formâ prædictâ faciendâ*.

As to the third particular, *viz.* With what certainty the count in appeal ought to set forth the year and time of the king.

Sect. 90. There can be no doubt but that every such count must expressly set forth in what year the fact was done, as appears from the known form of all other counts, and also of indictments.

dictments. And in an appeal of death it is certainly necessary (a) to set forth not only the year in which the stroke was given, but also that in which the death happened, that it may appear that the death happened within the year and day after the stroke. But it seems clear from all the precedents, that it is sufficient to shew in what year of the king's reign the fact was done, and the death happened, without shewing the year of the Lord. Also it hath been adjudged, (b) that it is sufficient to allege the fact in such a year of such a king, without saying it was in such a year of his reign, because it is clearly implied.

(a) 2 Inst. 318, 319.
B. Indict. 41.

(b) 1 Sid. 140.
See 1 Sid. 140.

As to the fourth particular, viz. With what certainty the count in appeal ought to set forth the place where the deed was done.

Sect. 91. There can be no doubt but that every count in an appeal of death must shew (c) the place where the death happened, as well as that where the hurt was given, and this with the same precise (d) certainty and freedom from repugnancy (e) as is required in relation to the time of the death and hurt, for which I shall refer the reader to the 89th and 90th sections of this chapter, wherein what is said in relation to the time of the hurt and death is equally applicable to the place. Also it seems that a mistake of the place is not (f) material upon evidence upon not guilty pleaded, any more than a mistake of the time, provided the fact be proved at some other place in the same county.

(c) Hetley, 35.
C. Eliz. 137.
738, 739.
(d) Dyer, 69.
(e) Noy, 45.
Dyer, 50.
C. Eliz. 196.

(f) Sum. 264, 265.
Salkeld, 288.

Sect. 92. But it seems to be not only necessary in an appeal of death to allege some place both of the death and hurt, and in every count in every other appeal to allege some place where the fact was committed, but also that such allegation be in proper place.

For the better understanding whereof I shall premise, that if the truth will bear it, it is safest (g) to lay it in a town, as the statute of Gloucester above-mentioned directs. But if it were done out of a town, it seems that you may lay it in any other place from whence a *visne* may come.

(g) F. Cor. 80.
2 Inst. 319.
3 Mod. 158.
4 Mod. 290.
Salkeld, 59, 60.

In relation to which matter, the law being in great measure superseded in civil actions by the statute for the amendment of the law, and chiefly in use in criminal clauses, it may not be improper in this place more fully to consider it.

4 Anne, c. 16.

And for that purpose I shall lay it down as a good general rule, that a *visne* may come from any place, which is of so small compass, that all who live in or near it may reasonably be presumed to have some knowledge of the persons living in it, and therefore are esteemed the most proper judges of the facts done within its limits, as being most likely to be proved by witnesses, and charged upon persons with whose integrity and reputation they are best acquainted.

And upon this ground it hath been adjudged, that a *visne* may come not only from a town, but from (h) a ward, (i) parish, hamlet, (k) burgh, manor, (l) castle, (m) or even from a forest, (n) or other

(h) Yel. 159.
1 Sid. 178.
C. Jac. 222.
(i) 6 Coke, 14.

Co. Lit. 125. Salkeld, 60. (k) Co. Lit. 125. C. Eliz. 866. 1 Sid. 226. (l) 2 R. Abr. 612, 613, 614, 618. Coke Littleton, 125. C. Jac. 405. (m) 2 R. Abr. 618, 621. Co. Lit. 125. (n) C. Eliz. 200. 1 Sid. 326. 2 R. Abr. 621. B. App. 19. Vide Co. Lit. 125. Con. B. App. 127.

- (c) 6 H. 7. 3.
Co. Lit. 125.
2 Inst. 319.
1 Sid. 326.
(b) B. Plead. 61.
Co. Lit. 125.
2 R. Abr. 54.
1 Sid. 88.
Con. 1 Sid. 326.
1 Sid. 326.
Carth. 13.
Skin. 554.
(c) C. Eliz. 732.
1 Sid. 326.
(d) B. Plead.
61.
6 H. 7. 3.
2 R. Abr. 621.
7 H. 4. 27.
See 2 R. Abr.
616.
1 Sid. 88.
(e) C. Eliz. 200.
7 H. 4. 27.
2 R. Abr. 621.
(f) See the
cases cited un-
der letter d.
7 H. 4. 27.
Salkeld, 59, 60.
Co. Lit. 125.
4 Coke, 14.
2 Inst. 319.
(g) 2 R. Abr.
622, 623.
8 H. 5. 10. C. Jac. 307, 308. 2 Hale, 262. Con. S. P. C. 135. (h) See the authorities cited un-
der letter n, p. 255. (i) 1 Sid. 178. C. Jac. 307. 2 R. Abr. 622. C. Jac. 150. Qu. C. Eliz. 732.
Con. S. P. C. 154. 2 R. Abr. 617. (k) C. Eliz. 732.
(l) 1 Sid. 88.
2 R. Abr. 617.
Hob. 266.
(m) 1 Sid. 327.
(n) 2 Lev. 307.
Con. 1 Sid. 326.
1 Sid. 327.
(o) 1 Sid. 326.
(p) 2 R. Abr.
618.
Summary, 188.

other place, known(a) out of a town. Also it seems clear,(b) that whatever a place is generally alleged in pleading, the law will intend it to be a vill, unless it be mentioned with some addition which shews the contrary; or (c) be alleged within a city or vill; in which case it would be absurd to take it for a vill of itself. Yet (d) if in truth there be no such town, nor hamlet, nor place known out of a town; or (e) if a fact alleged in a forest were done in some vill in the forest not mentioned in the record, the defendant may plead it in abatement. Also if a fact done in a vill within a parish which contains divers vills, be in the count in an appeal alleged generally in the parish; (e) or a fact done in a city which contains divers parishes, be in the count in an appeal alleged generally in the city, it seems (f) that the defendant may plead such matter in abatement; for otherwise he could take no advantage of the insufficiency of the allegation, because the place named, as it stands on the record, must, till the contrary be shewn, be intended to contain no more than one town or parish, on which supposition a *visne* may well come *de vicineto* (g) *civitatis*, which does not exclude the city, but takes in the city and its neighbourhood within its jurisdiction, whether such city be within a county, (h) or be a county of itself; excepting only the city of London, (i) from whence it seems that no *visne* can come, not only by reason of the largeness of its extent, but also because it hath been the constant usage of pleading to shew the ward and parish in which a fact alleged (k) in London was done.

Sect. 93. It hath been alleged that no *visne* (l) can come from the weald of Sussex, not only by reason of the largeness of its extent, but also because it shall be taken for a wood without inhabitants; and therefore it would seem inconsistent to award the return of a jury from it. And yet it hath been holden (m) that a *visne* may come from a park; also it seems to be the general opinion that a *visne* may come from a forest, as hath been more fully shewn in the precedent section; from whence it may plausibly be argued, that it may come as well from such a weald, supposing it to be a wood. Also it seems (n) to be questionable whether a *visne* may not come from a walk in a forest, being alleged as a place in which a fact was done; but it seems clear that no *visne* can come from it, if it be alleged only as a liberty, for that no *visne* can come from a thing incorporeal, (o) but only from a place. Also it hath been holden that no *visne* (p) can come from the site of a manor, perhaps for this reason, because it doth not properly signify a place, but rather the limits and situation of a place.

As to the FOURTH PARTICULAR, viz. Whether one and the same count in appeal ought to be against those who do not appear as well as against those who do appear, and against the accessories as well as the principals. §

Sect. 94. It is said by Sir Matthew Hale, that in an appeal against A. B. and C. if A. only appear, yet the plaintiff ought to count

count against them all, by the better opinion. And the like seems also to be holden by Sir William Staundford (a) and Coke; (b) yet the point adjudged in the principal case, (c) which seems to be the chief foundation of these opinions, seems to be no more than this, that where an appellant hath had judgment and execution in one appeal, he shall not afterwards have another against persons not named in the first. And all the precedents that I can find, either in Coke (d) or in Rastal, (e) of counts in appeals, wherein some of the defendants have not appeared, do indeed mention the persons absent, as well as those present, and shew in what manner they were guilty; yet are all of them express that the appellant *instantly appellat* those that appear only; and that he would in like manner appeal those that are absent, if they were present; by which it seems clearly to be implied, that when they shall appear there shall be another declaration against them, and that the present declaration is esteemed only as a declaration against those that do appear. Neither do I find any difference in the precedents above-mentioned, as to the form of such counts in relation to this matter, where the persons not appearing are accessaries, from that wherein they are principals. But whether the omitting of a person in one appeal be always a good bar to the charging of him in another, shall be considered in the following part of the chapter, wherein I shall treat of the nature of pleas in bar to appeals.

As to the THIRD PARTICULAR, viz. How the appellant may be nonsuited.

Sect. 95. It is generally holden in some books, (f) that, by the common law, if a plaintiff, in any action whatsoever, be demanded at any day of continuance before judgment, and do not appear, either in proper person, (g) or by attorney or guardian, as the law requires, he shall be nonsuited, whatsoever (h) excuse he may have for his absence. But it is enacted by 2 Hen. 4. c. 7. that if the verdict pass against the plaintiff, the same plaintiff shall not be nonsuited. And since the statute it hath been adjudged, (i) that if a defendant in an appeal of murder be found guilty of manslaughter only, the appellant cannot be nonsuited; but it doth not appear whether this resolution be grounded on the said statute, or on the common law; for it seems difficult to maintain that such a verdict which finds the substance of the fact, shall be said to pass against the appellant, in which case only the nonsuit is taken away by the statute. And therefore perhaps a nonsuit in this case may not be suffered by the common law, which seems not to have permitted a nonsuit after a full verdict, except in such cases only whereupon some doubt remained with the court, as may be reasonably argued from the authorities above cited under letter. (h) But it seems that an appellant may be nonsuited after a special verdict, (k) or after a demurrer (l) and argument thereupon.

As to the FOURTH PARTICULAR, viz. For what faults the writ may be abated.

Sect. 96. I shall premise, that in order to take advantage of a defect

(a) S. P. C. 63.
(b) R. App. 28.
(c) 9 H. 4. 1.
4 Coke, 47.
Dyer, 120.

(d) Coke, 50.
(e) Rastal, 46, 47.
50, 51, 53, 54.
See 47 Assize.

(f) B. Nons.
41.
Co. Lit. 139.
1 Roll. A. 131,
132.
3 Edw. 4. 11.
Con. F. Nons.
15. 34.
Qu. B. Nons. 6
20 H. 6. 41.
2 Bulst. 19.
(g) Vide sup.
s. 74.
(h) Noy, 88.
Latch, 173.
Vide sup. 30.
(i) Moor, 407.
C. Eliz. 465.

(k) 2 Jones, 1.
(l) Co. Lit. 139.
2 Jones, 1.
See 20 H. 6. 41.
and the authorities
cited under
letter (f).

(a) 2 Bulst. 19.
3 Bulst. 343.
(1) Digby v.
Kennedy,
Black. 713.
(b) Widdring-
ton v. Charlton,
agreed Mich.
10 Aves.

defect in the writ itself, the appellee(a) ought to demand over(1) of it, which he must do in open(b) court.(2)

And for the better understanding for what faults such writ shall be abated, I shall consider the following particulars.

1. Where it may be abated by the court *ex officio*.

2. Where upon the exception or plea of the party, but not without such exception or plea.

3. What defects of this kind may be amended, which without such amendment might abate the writ.

As to the first particular, *viz.* Where the writ in appeal may be abated by the court *ex officio*.

(c) Finch, 226.
2 Danv. Abr.
252.
Sup. s. 42.

It seems that the writ may be abated by the court *ex officio*,(c) for the following faults, whether the party take notice of them or not.

(d) Vide sup.
s. 77.

(e) 4 Co. 39.

(f) Sup. s. 77.

(g) Sup. s. 18.
77.

(h) F. Brief,
219. 231.

(i) Yel. 120.

(k) Sup. s. 75.

(l) Sup. s. 76,
&c.

(m) Sup. s. 86,
&c.

Cro. El. 196.

(n) Sup. s. 35.
47. 71.

B. Appeal, 38.

(o) Sup. s. 60.

Sect. 97. FIRST,(d) Where a writ or declaration wants those words of art which are appropriated by law for the description of the offence; as where an appeal of burglary(e) has the word "*burgaliter*" instead of "*burgulariter*" or "*burglariter*;" or an appeal of rape wants the word "*rapuit*;"(f) or any appeal wants the word "*felonicè*."(g)

Sect. 98. SECONDLY, Where the declaration varies from the writ; as(h) by laying the offence in the reign of a present king, where the writ supposed it to have been in the reign of a former king: or by giving the defendant a name different from that in the writ; as where the writ(i) calls him A. B. of C., *Alderman*, and the declaration A. B. of C., *Esquire*: or where the declaration is otherwise defective(k) in not pursuing the writ, or in not setting forth both the substance(l) and the circumstances(m) of the fact with that certainty which the law requires: or in(n) laying the offence in a different county from that in which the writ was brought.

Sect. 99. THIRDLY, Where(o) the declaration doth not conclude *contra formam statuti* in such cases where by law it ought.

(p) F. Cor. 121.
S. P. C. 82.

(q) 9 H. 7. 16.

(r) 10 Ed. 3. 1.

(s) Sum. 189.

(t) S. P. C. 82.

5 Coke, 121.

(u) 2 H. 4. 8.

Sect. 100. FOURTHLY, Where the sense is defective for want of a material word in the writ; as(p) if the conclusion be "*ibi hoc breve, &c.*" without the word "*habeas*;" or where there is a false concord in the writ, as *hos*(q) or *hanc breve*; or the singular(r) number instead of the plural; or (as some(s) seem to hold generally) any other false Latin, or even the use of a word which is not Latin, though(t) by the change or addition of a letter it might be made so. But it seems that such faults in the declaration are not fatal if the writ or bill on the file be right, as shall be shewn more at large in the following part of this chapter.

Sect. 101. FIFTHLY, Generally where the writ or declaration are

(2) The writ in an appeal is an original issuing out of chancery returnable into the King's Bench only; and for the return thereof, the Court of Chancery may set it aside, where it appears to have been erroneously or improvidently, by some error

extrinsic to the writ itself; but for any error or defect on the face of it, it may be quashed after it is returned into the King's Bench. Bac. Abr. 126; and see Eq. Cas. Abr. 416.

are any otherwise defective in not observing the legal form; as (a) where in a writ of appeal sued by a husband and wife the conclusion is in the name of the wife only: or where the writ omits (b) either the name of baptism or the surname of the appellant or appellee, being under the degree of nobility, which alone can give so high (c) a name of dignity as to supply the want of a surname.

(a) F. Brief, 152.

(b) Finch, 255. 27 H. 6. 3. 2 Inst. 665.

(c) Finch, 253. 8 Ed. 4. 24. 2 Inst. 666.

25 Ed. 3. 39.

As to the second particular, viz. Where the writ may be abated upon the plea or exception of the party, but not without such plea or exception, I shall endeavour to shew,

1. Where it may be so abated for the want of fifteen days between the *teste* and the return of the writ.

2. Where for a *misnomer* or wrong addition.

3. Where for a defect in the addition of the appellant or appellee.

4. Where for the multiplicity of action.

5. Where for making of J. S. a defendant, where there is no such person.

6. Whether the defendant may have more than one of such pleas or exceptions.

As to the FIRST POINT, viz. Where a writ of appeal may be abated upon the exception or plea of the party for the want of fifteen days between its *teste* and return.

Sect. 102. If the party, before he hath pleaded in chief, do especially shew to the court such a defect in the writ, the latter authorities (d) seem to incline that it ought to be abated, because the writ is the foundation of the whole proceeding, and the law seems to be in nothing more curious than in strictly keeping up its legal forms. Yet it hath been resolved, (e) that such a defect is salved by the party's coming in and pleading in chief without taking advantage of it: also it hath been adjudged, that where the original is right, all defects in the *memorandum* process are salved by the party's appearance, as shall be shewn more at large in the chapter concerning *process*.

(d) Salkeld, 63. 2 Inst. 667.

C. Jac. 424. 1 Ventris, 7.

1 Sid. 406. Con. 12 Ed. 4.

11. B. Error, 169.

(e) Salkeld, 63.

As to the SECOND POINT, viz. Where a writ of appeal may be abated, upon the exception or plea of the party, for a *misnomer* or wrong addition.

Sect. 103. It seems to be agreed, (f) that if there be a mistake in the writ or declaration as to the name of baptism, (g) or surname (h) of the appellant (i) or appellee; or (k) as to the town, parish or county, estate, degree or mystery, whereof they are said be; as where (l) one who is neither by birth, office, creation, or reputation, an esquire or gentleman, is named with either of those additions; or where a gentleman by birth, who follows the trade of husbandry, is named (m) with the addition of the trade of husbandry, and not of gentleman; or where a peer, who has more than one name of dignity, is not named (n) by the most noble; or

(f) Finch, 163. 364.

(g) 9 H. 5. 1.

(h) Sum. 217.

Rast. Ent. 19.

51. 54.

(i) 9 H. 5. 1.

(k) B. App. 14.

Rastal, 108.

11 H. 6. 11.

55 H. 6. 55.

10 Ed. 4. 12.

2 Inst. 667, 668.

6 Inst. 668.

7.

(m) 14 H. 6. 15. 2 Inst. 668, 669.

(n) 2 Inst. 669.

(a) 2 Inst. 668.
 (b) 5 H. 7. 16.
 10 Ed. 4. 16.
 Rastal, 108.
 Thelou, l. 11.
 c. 4. s. 19.
 (c) 3 Mod. 267.
 Salkeld, 59.
 (d) Finch, 434.
 21 Ed. 4. 7. 2.
 (e) 9 H. 5. 1.
 B. App. 38.
 (f) B. App. 44.
 (g) Rast. Ent.
 50. 54.

(h) 1 Sid. 325.
 Vide 10 Ed. 4.
 12.
 4 H. 6. 4.

where a gentleman or gentlewoman(a) is named spinster, or (b) a yeoman is named a gentleman; or (c) if there be no such town, parish, nor hamlet, nor place known out of a town, as that whereof either the appellant or appellee are said to be, and the appellee before (d) imparlance plead such matter in abatement, and thereon issue be joined and found for him, the writ ought to be abated. And it seems (e) also to have been holden, that if the appellant, after imparlance, confess that he hath brought his appeal by a wrong name, the writ shall be abated: but it is said (f) to be no fault to give an esquire the addition of gentleman, *et sic è converso*. Also if one (g) who is usually known and called by the surname of B. be so named in the appeal, and the appellee plead that his name is C. and not B., and the appellant reply that the appellee is, and at the time of the purchase of the original was, as well known by the name of B. as by the name of C., and this be confessed and found for him, it avoids the plea of the *misnomer*. And if one who had his usual abode at B. and hath been some time seen at C. be named of C. in an appeal, it hath been questioned (h) whether this be such a fault as will abate the writ, because sometimes appellees may not have any known dwelling; but if that happen to be the case, surely it is the safest to reply it, and then there seems to be little doubt but it may make good the naming of the party of any place wherein he has at any time been. And if a place where he dwells, and is a housekeeper, and also another place where he keeps his wife and family, he well known, it seems that the writ may name him of either of such places, or perhaps of both of them, but is abateable unless it name him of one of them.

As to the THIRD POINT, *viz.* Where a writ of appeal may be abated, by the exception or plea of the party, for a defect in the addition of the appellant or appellee.

(i) 2 Inst. 665,
 666.
 11 H. 4. 40.
 11 H. 6. 11.
 10 Ed. 4. 16.
 (k) 11 H. 4. 40.
 14 H. 6. 14.
 (l) Hob. 129.
 2 R. Ab. 469.
 2 Inst. 666,
 667.
 Con. Lat. 169.
 (m) Sup. s. 101.
 (n) 32 H. 6. 29.
 Con. 24 E. 3.
 25, 26.
 28 Ed. 3. 53.

Sect. 104. It seems that the common law in no case (i) requires any other description of an appellant or appellee, but by their name of baptism and surname, unless they be of the degree of a knight, (k) or of some higher dignity; in which cases, whether the name or dignity be ancient, or (as some say) (l) of a new creation, as that of baronet, &c. it ought to be added to the name of baptism and surname; and if it be of the degree of nobility, it ought (m) to supply the place of the surname. And it seems that the law was (n) so curious in this particular, that if a plaintiff, in any action, gained a new name of dignity hanging a writ, he made it abateable; but this inconvenience is remedied by 1 Edw. 6. c. 7. s. 3. by which it is enacted, "That if any plaintiff in any manner of action shall be made a duke, archbishop, marquis, earl, viscount, baron, bishop, knight, justice of either bench, or serjeant at law, depending the same action, that such action for such cause shall not be abateable or abated." But it hath been holden (o) that the dignity of a baronet is not within this statute, because there was no such dignity at the time of the making of it.

(o) 1 Sid. 40.
 Jit. Rep. 81.
 C. Car. 104.
 (p) 26 E. 4. 72.
 2 Inst. 870.
 3 Hale, 176.
 177.

Sect. 105. To prevent (p) the inconvenience of troubling one person for another, which cannot but often happen if there be no other additional description of the defendant, it is enacted by 1 Hen. 5. c. 5. "That in every original writ of actions personal, "appeals,

"appeals, and indictments, and in which the exigent shall be awarded to the names of the defendants in such writs original, appeals, and indictments, additions shall be made for their estate or degree, or mystery, and of the towns or hamlets, or places and counties of the which they were or be, or in which they be or were conversant. And if by process upon the said original writs, appeals, or indictments, in which the said additions be omitted, any outlawries be pronounced, that they be void, frustrate, and holden for none. And that before the outlawries pronounced, the said writs and indictments shall be abated by the exception of the party wherein the said additions be omitted."

For the better explication of this statute, so far as it relates to the subject of this treatise, I shall first premise,

Sect. 106. That (a) generally such additions in English are as good as in Latin; and where there are several defendants of different names, and the same addition, it is (b) safest to repeat the addition after each of their names, applying it particularly to every one of them; and where a father hath the same name and the same addition with a defendant being his son, the writ is (c) abateable unless it had the addition of *puisne* to the other additions; but where the father is the defendant, it is said that there is no need of the addition of *eigne*. (d) And if the son be in *custodiui mureschalli*, and so declared against, it is said that the count is good without the addition of *puisne*, unless the father of the same name and addition be also in the custody of the marshal. (a) 1 Sid. 101.
1 Keble, 12.
(b) B. Add. 3.
(c) 37 H. 6. 29.
39 H. 6. 46.
1 Ed. 3. 31.
(d) Salkeld, 7.

And for the better understanding of the nature of the several additions required by the statute above-mentioned, I shall endeavour to shew,

1. What is a sufficient addition of the estate or degree.
2. What is a sufficient addition of the mystery.
3. What of the town, hamlet, place, or county, of the appellee.
4. How the defect of an addition may be salved.

As to the first particular, *viz.* What is a sufficient addition of the estate or degree of the appellee, I shall observe,

Sect. 107. FIRST, That it is necessary to shew the present estate or degree of the appellee (e) at the time of the writ; in which respect this addition, and also the addition of the mystery differs from that of the place, which is sufficiently set forth by naming the appellee late of such a place. (e) 9 Ed. 4. 2.
22 Ed. 4. 13.
21 H. 6. 3.
2 Inst. 670.

Sect. 108. SECONDLY, That such addition must be expressed in such a manner that it may plainly appear to refer to the appellee; for it hath been resolved, that to name the appellee "son of A. B. butcher," is insufficient, because "butcher" refers to A. rather than to the appellee.

Sect. 109. THIRDLY, That (f) a bishop of an Irish diocese may (f) The Thelo.
1. 6. c. 13. s. 8.

may be as well described by the addition of his bishopric, as an English bishop may by the addition of an English one (as it seems to be admitted in the Year Book of 21 Hen. 6. 3. pl. 4.): But it seems (a) clear, that no one can be well described by the addition of a temporal dignity in Ireland or any other nation besides our own, because no such dignity can give a man a higher title here than that of esquire.(3)

(a) 2 Inst. 667.
(b) Thelol. l. 6. c. 15. s. 12.

Sect. 110. FOURTHLY, That the degree of a serjeant (b) at law is a good addition; from whence it may reasonably be argued that a degree in either university is also a good addition, as it is holden by Sir Edward Coke (c) without question; yet this is made a quære by Thelol (d); and it is holden in the Year Book of 35 Hen. 6. pl. 55. and admitted by Sir Edward Coke in the very place above cited, that a doctor in divinity may have the addition of "clerk," which seems not easily reconcileable with the opinion that the degree of a doctor is a good addition; for if it were, why should not the writ be abateable for having the addition of "clerk" instead of it, contrary to the allowed rule (e) in other cases, that the most worthy addition is to be used?

(e) Vide sup. s. 102.

(f) 2 Inst. 667. 688.

B. Add. 44. 50.

(g) 2 Inst. 667.

B. Add. 44. 50.

(h) 2 Inst. 668.

(i) 2 Inst. 668.

B. Add. 3. 47.

50.

(k) B. Add. 5.

39.

(l) F. Add. 5.

B. Add. 64. 66.

Thelol. l. 6. c.

15. s. 4. (m) F. Addition, 5.

14 Ed. 4. 7.

B. Add. 64. 66.

Thelol. l. 6. c. 15. s. 4.

(n) 1 H.

4. 5. 11. 6. 1.

Qu. Cro. E. 198.

Dyer, 47.

(o) Dyer, 46, 47. 88.

1 Siderfin, 247.

(p) 2 Inst. 668.

(q) 2 Inst. 668.

B. Add. 42. 50.

55. 56. Con. 5.

Sect. 111. FIFTHLY, That "generous" (f) or "armiger" (g) are, either of them, good additions for the estate and degree of a man; "generosa" (h) for that of a woman; and "yeoman" (i) and "labourer" (k) are also good additions for the estate and degree of a man, but not for that of a woman; and widow (l) or single (m) woman, or, as some (n) say, "wife of J. S." are all of them good additions of the estate and degree of a woman, but no such like addition is good for the estate and degree of a man. And "spinster" (o) is a good addition for the estate and degree of a woman, and perhaps also for that of a man.

Sect. 112. SIXTHLY, That "burgess" (p) and "citizen," and "servant," (q) are all of them too general, and therefore not good additions of the state or degree either of man or woman.

As to the second particular, viz. What is a sufficient addition of the mystery of an appellee.

(r) 2 Inst. 668. 669.

(s) B. Add. 41.

Sect. 113. Having first premised that the word "mystery" (r) includes all lawful arts, trades and occupations; and (s) that if one under the degree of a gentleman have divers of such arts, trades, or occupations, he may be named by any of them; I shall endeavour to shew,

1. What additions of this kind are clearly good.
2. What are clearly insufficient.
3. What are questionable.

(t) F. Add. 41. 50.

(u) B. Add. 41.

50. 66.

(v) 9 H. 6. 63.

Thelol. l. 6. c. 15. s. 5.

Sect. 114. And FIRST, The following additions of this kind clearly seem to be good, as "husbandman, (t)," "merchant (u)," "broker (x)," "taylor (y)," "point-maker (z)," "smith (aa)," "miller

(y) B. Add. 15. 39. (z) 7 H. 6. 1. (aa) 21 H. 6. 54. 22 H. 6. 53.

(3) See Mary Graham's case, referred to the twelve Judges in July, 1791. Cases in Crown Law. 2d edit. p. 444. See also Salk. 451, and the case of Goodere and Mahoney, 6 St. Trials, 805.

"miller (a)," "carpenter (b)," "cook (c)," "brewer (d)," "baker (e)," "butcher (f)," "parish clerk (g)," "mercator (h)," "fishmonger (i)," "over (k)," "schoolmaster (l)," "scrivener," and such like.

15. s. 6. (d) F. Ulag. 32. 37. 5 H. 5. 7. (e) 6 Ed. 4. 5. (f) B. Add. 42. (g) B. Add. 52. 62. (h) 2 Inst. 668. (i) 19 H. 6. 51. (k) 5 H. 5. 7. (l) 2 Leon. 186.

Sect. 115. SECONDLY, The following additions of this kind clearly seem to be sufficient, as "maintainer (m)," "extortioner (n)," "thief (o)," "vagabond (p)," "heretic (q)," "common informer," and such like.

(m) 9 H. 6. 65. 2 Inst. 668. 22 Ed. 4. 1. 2 Inst. 668. (n) 9 H. 6. 65. (o) 22 Ed. 4. 1. (p) 1 Roll. 190.

Sect. 116. THIRDLY, The following additions of this kind seem to be questionable; as "farmer," which by the better opinion seems to be an insufficient addition, because if any mystery be implied in the notion of it, it is that of husbandry, of which "husbandman" is the proper addition.

Sect. 117. FOURTHLY, "Chamberlain," "butler," and "pantler," are holden (s) to be insufficient additions, because they denote only a special kind of officer, or servant, and imply nothing which in the common understanding of the words comes under the notion of mystery. And from this ground it seems to follow, that neither "groom" (t) nor "page" are good additions; and yet in some (u) of the old books they seem to have been so admitted.

Sect. 118. FIFTHLY, "Hosteler" hath been holden (r) to be a good addition, and seems properly enough to come under the notion of a mystery. And though it hath been resolved, (y) that any one who keeps an inn may be sued by the addition of "a labourer," upon the custom of the realm for want of due care of the goods of his guests; because whoever keeps a common inn, is in that respect liable to answer for such defects, by whatsoever addition he may be styled, yet this does by no means prove that such person may not as well be sued by the addition of "hosteler," but only that he may be sued as well under any other addition.

As to the third particular, viz. What is a good addition of the town, hamlet, place, or county of the appellee; I shall observe,

Sect. 119. FIRST. That it is a good addition of this kind to name the appellee late (z) of such a town, in which respect this addition differs from that of the estate, degree or mystery. And it is said, that if a defendant be named of A. and late of B. it is sufficient to prove either addition.

(z) Vide sup. s. 107. 21 Ed. 4. 15. 19 H. 6. 66. 1 Ed. 4. 1. 1 Ed. 4. 2. Dyer, 213. 9 H. 6. 66. Thelol. b. 6. c. 11. s. 17.

Sect. 120. SECONDLY, That the constant course of precedents hath made it a sufficient addition of this kind, to name the defendant of a city which is a county (aa) of itself, as "de Londino," (bb) "de Norwico," &c. without more; by which it shall be intended that he lives in the county as well as city of London and

(aa) 2 Inst. 669. (bb) 4 Ed. 4. 16. 21 Ed. 4. 15. 27 H. 6. 4. 35 H. 6. 17.

and Norwich, &c. unless he shew the contrary, though part of each of these cities lie out of their counties. However, it is certain, that it is not sufficient to name a defendant *Londini* (a) or *Bristolie*, &c. because that imports only that he belongs to such town, and not that he resides there. Also it seems clear, (b) that it is not sufficient to name a defendant of any town which is not a county of itself, without shewing in what county it lies. Also if (c) if a man be named of a parish which contains more towns, or hamlets, or places known out of any town or hamlet, the defendant may plead such matter in abatement, because such an addition does not pursue the statute; but a parish shall be intended to contain no more than one town, unless the contrary be shewn.

Sect. 121. THIRDLY, That if there be two towns in a county of the same principal name, with different additions to distinguish them from one another, as Great Dale, and Little Dale, or Upper Dale and Lower Dale, and the defendant be named only of the principal town without any addition, as of Dale only, the defendant may plead (d) that there are two Dales in the same county called Great Dale and Little Dale, and none without an addition, &c. Or according to some opinions (e) either in this case where there are two different towns called Dale; or even where there is but one town, sometimes called Southdale, and sometimes Northdale, but never simply Dale without an addition, the defendant may plead that there is no such town as Dale in the same county, because parcel of a name cannot be said to be the name. But if there be two towns of the same name in a county without any addition to distinguish them, as it sometimes happens where they lie at a distance from one another, I do not find any authority that it is not sufficient in such case to name the defendant generally of either of such towns, without adding any thing to distinguish it from the other.

Sect. 122. FOURTHLY, That if an appellee live in the hamlet of a town, it is said (f) to be in the election of the appellant to name him either of the hamlet or of the town; but it seems that that this is to be intended only of such hamlets which are so far esteemed to be parts of a town, that those who live in them are, in common speech, indifferently styled sometimes of the hamlet, and sometimes of the town; for I see not how the addition of the town can be proper, where the party lives in a place known by a distinct name, and not parcel of it.

Sect. 123. FIFTHLY, That if an (g) appellee live in the place known by a special name, and lying out of any town or hamlet, he may be well named of such a place; but if he live in any place known within a town or hamlet, it is said to be safest to name him of the town or hamlet.

Sect. 124. SIXTHLY, That the addition of the place of habitation of a wife is sufficiently shewn, by shewing that of the husband, because it shall be intended that the wife lives where the husband does.

As to the fourth particular, viz. How the defect of an addition may be saved.

.*Sect.*

Sect. 125. It hath been adjudged, (a) that if an appellee, named with an insufficient addition, or without any, appear and plead to the appeal, he cannot afterwards take advantage of the defect of the addition, because by his appearance and plea he admits himself to be the person intended. And some have holden, (b) that the party by his bare appearance saves the want of an addition, or a bad one: but this seems contrary to almost all the authorities above cited in relation to this matter, which seem to admit that the party, before other matter pleaded, may take advantage either of the want of an addition or of a bad one. And accordingly it was lately (c) adjudged in an appeal of death between Reeve and Trundal, that the want of an addition of the appellee was a good plea in abatement, and the writ of appeal was abated by such plea.

As to the **FOURTH POINT** above-mentioned, viz. Where a writ of appeal may be abated upon the exception or plea of the party for the multiplicity of action.

Sect. 126. It seems (d) clear, that after an appellant hath appeared on a writ of appeal, or even on a bill of appeal removed into the court of king's bench from before the sheriff and coroners by *certiorari*, if he commence a new appeal for the same matter, the appellee may plead in abatement that such prior appeal is still depending, &c. But it seems (e) clear, that it is no plea in abatement of a writ of appeal, that the appellant hath brought a bill of appeal for the same matter before the sheriff and coroners, because such bill is not of so high a nature as a writ of appeal, but it is said to be only in nature of a plaint till it be removed into the king's bench, which seems (f) to depend on the statute of Magna Charta, 17, since which statute the sheriff and coroner cannot proceed to trial upon a bill of appeal, as perhaps they might have done by the common law. But after such bill of appeal before the sheriff and coroners is removed into the king's bench, if the plaintiff bring a writ of appeal for the same matter, it is holden (g) by Staundford, and seems to be admitted in the Year Book of 4 Hen. 6. pl. 14, 15. and both by Fitzherbert (h) and Brook (i) in their Abridgments of the Year Book, that the appellee may plead in abatement that such bill of appeal is depending, because after it is removed into the king's bench, it is of as high a nature as a writ of appeal. Yet Sir Matthew Hale (k) seems to be of opinion, that such bill so removed is not pleadable in abatement till the plaintiff hath appeared thereon; perhaps for this reason, that before the plaintiff hath appeared, it doth not appear of record, that he hath prosecuted the suit in the king's court, because the *certiorari* might have been taken out by a stranger. Upon which ground it seems to have been resolved, (l) that it is no good plea in abatement of an appeal, that the plaintiff hath purchased another writ of appeal returnable at such a day, &c. and that such writ was delivered of record to the sheriff, because it might be, for what appears upon the record, that the first appeal was so far prosecuted by a stranger; but in the same case it is admitted that such prior appeal depending will abate the second, where it appears on record that the same plaintiff hath appeared and sued it, as in praying of process, &c.

(a) 35 H. 6. 12.
H. Error, 69.
C. Jac. 610.
2 Roll. 225.
1 R. Abr. 780.
2 Inst. 670.
7 H. 6. 39.
seems con.
(b) 1 Sid. 247.
1 Keble, 885.

(c) Pasch. 3
Gr. 1.
1 Stra. 402.
S. C. Comy.
Rep. 257.

(d) S. P. C. 82.
Summary, 189.
B. Brief, 192.
C. Pl. 695.
F. Brief, 548.
771.

(e) 10 H. 4. 4.
S. P. C. 82.
F. Cor. 269.
105.
See 4 Ed. 3. 9.

(f) Sup. c. 9.
s. 10, 41.

(g) S. P. C. 82.

(h) F. Cor. 4.
(i) B. App. 44.

(k) Sum, 189.

(l) 7 H. 7. 6.
F. Brief, 192.
B. App. 87.
S. P. C. 82.
2 Hale, 149.

As to the FIFTH POINT, viz. Where a writ of appeal may be abated for the making of J. S. the defendant, where there is no such person.

(a) Dyer, 348.
Summary, 189.
S. P. C. 82.
Rast. 49. 52.
F. Cor. 15. 43.
64.
26 H. 6. 6.
21 H. 7. 34.
7 H. 4. 27.
(b) B. App.
111.
6 H. 7. 7.
21 E. 4. 71. 72.
(c) S. P. C. 82.
See the books
above cited.
(d) 21 H. 7. 31.
5 Ed. 4. 3.
7 H. 4. 27.
S. P. C. 82.

Sect. 127. It seems clear, that if there be divers defendants in an appeal, and one of them who does not appear be misnamed either as to the surname, or name of baptism, or be described by a wrong addition, or were dead before the writ purchased, any of the defendants who do appear may plead, "that whereas the appeal is sued out against A. B. of C. in the county of D. yeoman, there was not at the time of the purchase of the writ, nor hath been since, any such person as A. B. *in rerum natura*, as by the writ is supposed; (a)" whereon if issue be joined, if the appellant cannot prove that there now is, or was at the time when the writ was purchased, such a person of such name and addition as by the writ are supposed, it seems that the verdict ought to go against him, whereupon the writ shall be abated as to all the defendants. But it is not (b) advisable in such a case to plead that there was not at the time of the purchase of the writ, &c. any such person as A. B. of C. in the county of D. yeoman, because it implies a negative pregnant. Also if a defendant, misnamed or described by a wrong addition, do appear, it seems to be agreed (c) that no other defendant besides himself can plead the misnomer or wrong addition. But I do not find it to be agreed, (d) that such a plea by one defendant shall abate the writ as to any other besides himself; but if such matter, when pleaded by another on the non-appearance of the defendant, will abate the writ as to all, it seems difficult to give a reason why it should not have the like effect when pleaded by the party himself.

As to the SIXTH POINT, viz. Whether the appellee may have more than one such plea or exception.

(e) Finch, 363,
364. 385.
4 H. 6. 15. 16.
B. Appeal, 44.
(f) S. P. C. 82.
(g) Finch, 364.
Qu. 4 H. 6. 16.
B. App. 44.
(h) Finch, 363,
364. 385.
21 Ed. 4. 71.
Reeves v.
Trundal, Pasc.
3 Geo. 1.
Dyer, 88.
Rastal, 49.
3 Mod. 266,
267.
26. 6 H. 7. 7.
Shower, 47.
(i) B. App. 49.
66.
1 H. 6. 1.
27 Assize, 3.
(k) C. Eliz. 693.
10 H. 4. 4.
4 H. 6. 15.
1 H. 6. Rastal, 47. (l) Finch, 363, 364. 385. 27 Assize, 3. 1 H. 6. 1. 2 Hale, 232.

Sect. 128. There seems to be no doubt but that if a defendant in an appeal, or even in an indictment of felony, think it proper to make use of never so many pleas or exceptions of this kind, requiring all of them the same kind of trial, he may take advantage of them all, (e) unless (f) they be repugnant to one another. Also it seems to be the better opinion, (g) that he shall have the like advantage, where such pleas or exceptions do not all of them require the same kind of trial, but some of them are triable by matter of record, and others by the country. And if such pleas or exceptions be all of them triable by the country, it seems to have (h) been generally agreed, that the defendant must at the same time plead also with them all his matters in bar, if he have any such, and also plead over to the felony (unless where he hath admitted the fact by the matter pleaded in bar): but if the plea in abatement be triable by matter of record, it is holden in some books, (i) that the defendant is not bound to plead over to the felony, till such plea in abatement be found against him. But (k) the greater number of precedents, and common practice of late seem to be otherwise. However it seems clear, (l) that whatsoever matters

matters are pleaded in abatement of an appeal, or indictment of felony, and found against the defendant, yet he may afterwards plead over to the felony. (4) And in these respects such an appeal and indictment differ from appeals (a) of *mayhem* and all civil actions whatsoever, except only assizes of *mort d'ancestor* (b), *novel disseisin* (c), *nusance* (d), and *juris utrum*; (e) for it seems to be a settled rule, that in appeals of *mayhem* and all other civil actions, those above-mentioned only excepted, if a plea in abatement, triable by the country, (f) be found against the defendant, he shall not (g) be suffered afterwards to plead any new matter, but final judgment shall be given against him. Also it seems to be agreed (h) that in all other actions, except those abovementioned, if a defendant, together with a plea in abatement, plead also a plea in bar, or the general issue, he waves the plea in abatement; and the plea in bar or general issue only shall be tried.

385. (c) 40 Ed. 3. 29. Finch, 363 585. (f) Vide C. Eliz. 203. Dyer, 228. Yelv. 252. 1 Lev. 163. 1 Inst. 33. Yelv. 112. Aleyn, 65, 66. (h) C. Eliz. 495. Owen, 59. Noy, 36. Moor, 457. Pop. 115. Vide Thel. b. 15. c. 5.

(a) C. Eliz. 495. Pop. 115. Owen, 59, 60. Moor, 457. Noy, 36. (b) Finch, 385. 418. 40 Ed. 3. 29. 39 Assize, 13. (c) 1 Ed. 3. 11. Dyer, 310. 4 H. 6. 16. 1 Jones, 413. S. P. C. 82. C. Car. 520. Finch, 363, 364, 385. (d) Finch, 363. 36. (g) 1 Sid.

And now I am in the third place to consider, What faults of this kind are amendable, which without such amendment would abate the writ.

Sect. 129. It is to be observed, that appeals are expressly excepted out of 8 Hen. 6. c. 12. which is the principal statute of amendments: Also it seems (i) to be generally taken for granted, that no criminal prosecution whatsoever is within any other statute of amendments, or any of the statutes of *jeofails*; from whence it follows that no defect is amendable in an appeal, but such only as is amendable by the common law. And therefore it seems to be the better opinion, that no false (k) Latin in a writ or bill of appeal, nor omission of a word, (l) nor even of a letter, (m) nor other defect or variance (n) from the proper legal form, can be amended, because no such fault is amendable by the common law, without the consent (o) of the parties, except only in actions wherein the king (p) is a party. It seems indeed to be generally holden in some books, (q) that such faults in a writ are amendable where the cursitor varies from his instructions, in the names or (r) additions of the parties, or other like matters which he must take from his instructions. But what is said in such books in relation to this matter seems to be intended of such writs only as are within the purview of the statutes of amendments, and therefore cannot be applied to appeals; yet it seems that a misprision in the count is amendable by the common law, as well in an appeal as in any other action, before it is entered on the record; and so it seems that the Year (s) Book of 7 Hen. 4. pl. 27. is to be intended, in which a mistake in the declaration in laying the fact in an improper *visne*, was suffered to be amended. Also it seems that after the count is entered on the record, a variance in it from the writ, if a mere misprision, may be amended

(i) Vid. Salk. 51. 6 Modern, 269. 1 Bulst. 142. 144. (k) 9 H. 7. 16. 1 Bulst. 142. 143. 4 H. 6. 16. B. Amend. 62. (l) F. Cor. 121. 13 Assize, 10. (m) F. Amend. 60. (n) F. Vari. 59. 8 Coke, 186. 4 H. 6. 16. (o) F. Amend. 63. (p) 8 Coke, 156. 4 H. 6. 16. 40 Assize, 26. (q) Moor, 566. 1 Roll. 138. C. Eliz. 644. Qu. Hob. 128. (r) 2 Ven. 64. 49. 150. 152. 1 Sidury, 412. Hobart, 118. Hutton, 56, 57. C. Car. 74. Littleton's Rep. 50. (s) F. Cor. 80.

(4) It seems from Carther, 56. that if the appellee plead in abatement, and doth not plead over to the felony, that the appellant ought to move the Court for judgment against the defendant.

But in that particular case, the plea being accepted by the plaintiff, it was held good without pleading over.

(a) Mich. 7
Ann.
2 Ld. Ray.
1288.

amended by it, as it seemed to be agreed in an appeal of death between Smith and Bowden, (a) wherein the word *murdrum* in the count on the record was adjudged to be amendable by the *murdrum* in the bill on the file.

As to the FIFTH GENERAL POINT, viz. What may be pleaded in bar of an appeal.

(b) S. 22, 23,
24, 25, 26.

Having already in the former part (b) of this chapter endeavoured to shew what may be pleaded in bar of an appeal of *mayhem*, and intending in the latter part of the book to consider the learning relating to pleas in bar of criminal prosecutions in general, I shall in this place only examine the nature of pleas in bar of appeals of felony in particular. And for that purpose having premised that, by the better opinion (c) at this day, no special plea in justification of the killing shall be admitted in an appeal of death, but that in every such case the general issue is to be pleaded; I shall consider,

(c) See B. 1.
c. 10. s. 3.

1. What pleas will be good bars of an appeal of felony, by shewing that the plaintiff had never any right to bring it.

2. Whether a *retraxit* or nonsuit in a former appeal of this kind will be a good bar of another.

3. Whether a discontinuance.

4. Whether an abatement of a former appeal.

5. Where the bringing of an appeal of this kind against one person shall be a bar of any subsequent appeal against any other person not named in the first appeal.

6. Where a release will be a good bar of an appeal of this kind.

7. Where the appellant may be barred as to one appellee, and continue his suit against the rest.

8. Whether any, and which of these pleas, are consistent with the general issue.

As to the first particular, viz. What pleas will be good bars of such an appeal by shewing that the plaintiff had never any right to bring it.

(d) S. P. C. 98.
Summary, 190.

Sect. 150. It seems to be a good general (d) rule, that any plea of this kind is good which shews that the plaintiff wants any of those requisites which the law makes necessary to entitle him to the appeal. And therefore in an appeal of death by a woman it is a good plea, that (e) she was never lawfully married to the deceased; or (f) that she hath not continued a widow since his death, but hath taken another husband. Also in an appeal of death by one as heir, it is a good plea, that A. B. at the time (g) of the writ was and still is heir of the deceased; or (h) that one of the defendants was the wife of the deceased, and made a defendant by covin to exclude her from her appeal; or that the plaintiff is a bastard (i) and not legitimate. And where one brings an appeal as brother and heir, it is a good plea

(e) Sup. v. 36.
S. P. C. 98.
(f) Sup. v. 38.
S. P. C. 98.

(g) Rastal, 50.
(h) Rastal, 50.

(i) Rastal, 17.

plea that he is not (a) brother and heir, as by his writ and declaration he hath supposed, or (b) that he hath an elder brother by the same father and mother still alive; or where one brings an appeal as cousin and heir, viz. brother of A. B. father of the deceased, it is a good plea that he is not cousin (c) and heir, viz. brother of A. B. father of the deceased, &c. as by his writ and declaration he hath supposed. Also (d) it is a good plea in any appeal of death, that the plaintiff hath slipt his time in not bringing the appeal within the year and day after the death of the person supposed to have been killed. Also it is a good (e) plea in an appeal of robbery, that the plaintiff is a villein to the defendant. And it is a good (f) plea in an appeal of rape by a man and a woman, that the plaintiffs were never lawfully married. And (g) it is a good plea in bar of any appeal of felony, that the plaintiff is an idiot, or that he was born deaf and dumb. Also it is said by Sir William Staundford, (h) that it is a good plea in bar of any such appeal, that the plaintiff is attainted of treason or felony; however (i) it seems that such attainder is no perpetual bar, but only during the time it continues in force.

As to the second particular, viz. Where a *retravit* or nonsuit in a former appeal of this kind will be good bars of another appeal.

Sect. 131. I take it to be clear, (k) that a *retravit* of any such appeal is a bar of all subsequent appeals of the same kind; for it seems to be a general settled rule, that a *retravit* of any action whatsoever is a bar of all others of the like or inferior nature. Also it seems to be certain, that a nonsuit on a bill (l) of appeal, whether commenced in the court of king's bench, or before justices (m) of gaol delivery, or before the sheriff (n) or coroners, or a nonsuit after (o) declaration on a writ of appeal, is a bar of all other appeals of the same kind; because no such bill or declaration shall be received, unless (p) the appellant have first appeared in proper person; and it seems to be agreed by all the books, that a nonsuit after such an appearance is peremptory. Also it is holden generally in some books, (q) that a nonsuit after an appearance is a peremptory bar to the appellant, without adding that he must also have declared. From whence, and also from the general reason of the thing, it may be reasonably argued, that if it any way appear on record that the appellant, who was nonsuited in a former appeal, did actually appear and prosecute such appeal, as by paying (r) of process on it, &c. he shall be barred in any other appeal of the same kind. But it seems (s) that the bare taking out of a writ of appeal, and causing it to be delivered of record to the sheriff, and a nonsuit upon it, is no bar of a second appeal, because it doth not appear of record but that it might be done by a stranger. And notwithstanding some books (t) seem to hold generally, that any nonsuit in appeal is peremptory, yet it seems to be in a great measure settled (u) at this day, that such nonsuit ought to be after an appearance in proper person of record.

As to the third particular, viz. Whether a discontinuance of a former appeal of this kind will be a good bar of another appeal.

Sect.

- (a) Rastal, 49.
- (b) Supra, s. 40.
- (c) Rastal, 49.
- (d) S. P. C. 98.
- (e) Supra, s. 44.
- (f) Supra, s. 62.
- (g) Supra, s. 32.
- (h) S. P. C. 98.
- (i) Supra, s. 32.
- (k) 1 Inst. 136.
- (l) Summary, 190.
- (m) 8 Coke, 58. 62.
- (n) S. P. C. 140.
- (o) 10 H. 4. 4.
- (p) S. P. C. 148.
- (q) Sum. 190.
- (r) S. P. C. 148.
- (s) C. Eliz. 605.
- (t) Salkeld, 64.
- (u) Vide P. N. B. 26.
- (v) 22 Assize, 97.
- (w) 47 Ed. 3. 16.
- (x) B. App. 28. 71.
- (y) F. Cor. 184.
- (z) 1 Inst. 139.
- (aa) Vide 4 H. 6. 16.
- (ab) Supra, s. 26.
- (ac) 9 H. 4. 2. 3.
- (ad) 47 Assize, 7.
- (ae) Vide 7 H. 7. 6.
- (af) S. P. C. 184.
- (ag) 7 H. 7. 6.
- (ah) 1 Sid. 32.
- (ai) 27 Assize, 7.
- (aj) C. Eliz. 605.
- (ak) Vide 4 H. 6. 16.
- (al) 1 Sid. 32.
- (am) See the books cited to the other points of this section.

(a) 16 E. 4. 11.
B. Appeal, 103.
S. P. C. 59.

Sect. 132. It is holden (a) by the reporter of the Year Book of 16 Edw. 4. that a discontinuance of one appeal is a bar of any other, because the life of the appellee was once put in jeopardy by the first appeal; but this reason proves as strongly that the abatement of an appeal where the writ is good shall be a bar of another; for by an appeal so abated the life of the appellee is as much put in jeopardy as by an appeal that is discontinued; and yet it seems to be agreed at this day, that such an abatement of an appeal cannot regularly be a bar of another, as shall be more fully shown in the next section. Nor can I find it any where adjudged, that the discontinuance of one appeal is a bar of another. It is true indeed, that in the case of *Bradley (b) v. Banks*, the appellee was totally discharged upon a discontinuance. But the reason hereof seems to have been, not that the discontinuance would be of itself a bar to any other appeal, but because the year and day were passed, and consequently there could be no other appeal; and the appellee had also been convicted on an indictment, and had his clergy, and consequently could not be proceeded against at the suit of the king. However, granting the opinion afore-mentioned to be law, that the discontinuance of one appeal shall be a good bar of any other, surely it is to be intended of such a discontinuance only, as happens after the appearance of the appellant, for the reasons given in the precedent section in relation to a nonsuit.

(b) 1 Bulst. 141.
C. Jac. 283,
284.
Yel. 204.

As to the fourth particular, viz. Whether an abatement of a former appeal of this kind will be a good bar of another appeal.

(c) Vide S. P. C. 147.
Summary, 200.
(d) Sup. sect. 38, 39, 41.
(e) 6 H. 4. 6.
B. Appeal, 10.
(f) 50 Ed. 3. 1.
B. Appeal, 16.
(g) 9 H. 5. 1.
B. Appeal, 38, 44.
4 H. 6. 16.

Sect. 133. It seems clear, that if an appeal by a wife abate by her taking another husband, or an appeal by an heir abate by his death, there can be no (c) other appeal. But the reason hereof seems not so much to depend on the abatement, as on the marriage in the first case, and the death in the second; which, as it seems the better (d) opinion, would of themselves have abated a subsequent appeal, whether any had been brought before or not. Yet I find it holden generally in some (e) of the old books, that an appeal once determined cannot revive; and in (f) others, that where an appeal of *mayhem*, which in this respect seems not to differ from other appeals, is abated without the default of the party, he may have a new one; by which it seems to be implied, that if it abated by his default he cannot have a new one; and this opinion seems also to be confirmed by some other (g) old books, but it is denied (h) by others. However, I take it to be settled (i) at this day, where there continues to be a plaintiff not disabled to prosecute, he shall not be barred in a second appeal by an abatement of the first.

(h) B. Appeal, 53, 118, 146.
13 Assize, 10.
(i) Sup. s. 4.

As to the fifth particular, viz. Where the bringing of an appeal of this kind against one person will be a bar of any subsequent appeal against any other person not named in the first.

Sect. 134. It is said, (k) that anciently one might have had two appeals for the same fact, one against the principal, the other against the accessory. And even at this day, if one be robbed of the same goods at several times, or receive different (l) maims, whether at the same or at several times; or a woman be ravished whether

(k) S. P. C. 65.
(l) 9 H. 4. 2.
11 H. 4. 14.
B. Appeal, 70.

more than once, whether by the same or by different persons; it seems that several appeals lie for each distinct offence. But it seems to be generally (a) agreed at this day, that after one hath brought an appeal of felony against one person, who is thereon attainted and hanged; he may be barred by it in any subsequent appeal, for the very same crime, against any other person not named in the first, whether such subsequent appeal, against the person so omitted in the first, be brought against him as principal, or accessory (b) before the fact, or even as accessory after the fact, unless where he happens to be so accessory after the first appeal was commenced; in which case it is certain that he is liable to such second (c) appeal, because it was impossible to charge him in the first. But otherwise after an attainder had on the first appeal, the law seems to disallow the bringing of a second; for this reason, that where an appellant has so far had his revenge in one appeal he shall not be indulged in the bringing of another, which his own laches only made necessary.

(a) B. Appeal, 32.
11 H. 4. 13, 14.

(b) Saut 190.
S. P. C. 65. 98.
B. App. 14. 28.
4 Co. 47.
Sup. c. 6. s. 3.
(c) Keilw. 83.
seems contrary
as to appeals
of robbery.

Also it seems to be (d) clear, that if one bring an appeal of felony against another, who is either acquitted by verdict, or otherwise finally discharged by any other matter, which will peremptorily bar any other appeal against him by the same appellant for the same fact, the appellant may also be barred in any other appeal for the same fact against any (e) other person whatsoever; perhaps for this reason, that he who appears to have brought an ill-grounded action of so high a nature, or to have so far made default in the prosecution of such an action, as to be for ever barred from bringing another against the same defendant, shall not be thought worthy to bring another against any other person whatsoever.

(d) 28 Edw. 3.
90.
26 Assize, 42.
Keilw. 83.
4 Co. 44. 46.

(e) 47 Ed. 3. 16.
F. Cor. 104.
9 H. 4. 2.
Summary, 188.
190.
S. P. C. 98.
47 Assize, 7.

But I cannot be satisfied with the reason which some of the books seem to give why all the defendants must be named in one appeal; which is this, that the statute of Magna Charta, c. 34. by which it is provided, "That none shall be imprisoned upon the appeal of a woman, for the death of any other than her own husband," speaks only of appeal in the singular number; from whence it is said to be collected, that all the defendants must be named in one appeal. But by what kind of argument this collection is made, I do not find; nor do I see why twenty appeals brought by the same woman, if the law would permit so many, are not as much within the letter and meaning of the statute as one appeal. And where the law does permit the bringing of a second appeal against the same person, as it is clear that in some cases it does, it may reasonably be argued, that he may as well bring it against others also; as (f) where the first is abated, and there still continues to be a plaintiff not disabled to prosecute, (g) and in some other cases: for if an appellant be not barred by the abatement of his first appeal, from bringing a second against those who had vexation by the first, and were legally discharged from it, why should he be barred by it, as to those who were not concerned in it?

(f) 28 Ed. 3.
90.
4 Coke, 48.
(g) See the pre-
cedent section.

As to the sixth particular, viz. Where a release shall be a good bar of an appeal of this kind.

Sect. 135. It seems clear, that a release of ~~any~~ manner of actions," or of all "actions (a) criminal," or of ~~all~~ actions (b) mortal," or of "all actions concerning pleas of the crown," or of "all (c) appeals," or of "all (d) demands," will be a good bar of any such appeal. But it (e) seems that a release of "all actions personal" will not bar such an appeal, because that an appeal in which the appellee is to have judgment of death, is higher than an action personal, and not properly called an action personal. Also it seems (f) clear, that whatsoever the nature of the release may be, it shall not wholly discharge the appeal, unless it were made before it was commenced; for if it be subsequent to the appeal, it shall only discharge it as to the suit of the plaintiff, and after judgment given for such discharge, he shall be arraigned on the appeal at the king's suit, as shall be shewn more at large in the chapter of Indictments. Also it is (g) certain, that no release shall discharge a person attainted, without the king's pardon.

As to the seventh particular, viz. Where the appellant may be barred as to one appellee, and continue his suit against the rest.

Sect. 136. It (h) seems, that if he be barred by release given, or *retraxit* entered as to one, or by being vanquished in battle by one, yet he may continue his suit against the rest, because he is to have a several execution against every one of them. Yet in an appeal against divers, whether they plead the same or several issues, it hath been adjudged, (i) that a nonsuit against one, at the trial of any one of the issues, is a nonsuit as to all; of which this seems to be the best reason, that (k) such a nonsuit operates in nature of a release of the whole. But whether (l) the discontinuance of an appeal as to one appellee, shall have the like construction as to all, may deserve to be considered.

As to the eighth particular, viz. Whether any, and which of the pleas above-mentioned are consistent with the general issue.

Sect. 137. It seems agreed at this day, that if the defendant in an appeal of death, by a (m) wife, plead *ne unques de couple in loial matrimony*; (n) or in an appeal of death by one as heir, plead that the appellant is a bastard, (o) or that he hath an elder brother of the whole blood alive, or in (p) any appeal of death, plead that the person supposed to have been killed, was dead above a year before the purchase of the writ, or that (q) the appellant had formerly brought an appeal for the same fact against another person, who was thereon attainted and hanged, or generally (r) any other plea not amounting to an implied confession of the fact, as a release, &c. whether it be trial by matter (s) of record, or by *pais*, and whether it (t) deny that the appellant had ever any right to the appeal, or admit that he once had a right, but shew that he is now barred, he may, together with such plea in bar, plead also not

(a) Lit. s. 500.
501.

(b) 1 Inst. 287.
288.

(c) Lit. s. 501.

(d) Lit. s. 508.

(e) Lit. s. 500.

501.

Con. F. Rel. 46.

Qu. B. App. 29.

21 Ed. 4. 72.

9 H. 4. 2.

Sup. sect. 25.

(f) F. Cor. 12.

S. P. C. 148.

Summary, 200.

Rastal, 43. 48.

(g) Sup. s. 38.

42.

(h) Sum. 190.

21 Ed. 4. 72.

2 R. 3. 9.

B. Appeal, 111.

120.

(i) C. Eliz. 460.

Dyer, 120.

7 H. 6. 27.

27 Ed. 3. 87.

2 R. Abr. 133.

1 Inst. 139.

1 Sid. 378.

B. Dis. de Pro.

20.

(k) Hob. 180.

(l) Vide 7 H. 6.

30 Assize, 36. 39 Ed. 3. 3. 38 Assize, 17. 27 Ed. 3. 37.

(m) 3 Leon. 268.

Cro. Eliz. 223.

(n) 7 Ed. 4. 15.

Qu. 14 Ed. 4. 7.

(o) Rastal, 49.

7 Ed. 4. 15.

Qu. 14 Ed. 4. 7.

21 H. 6. 29.

(p) 22 Ed. 4.

39.

(q) 9 H. 4. 2.

(r) 21 H. 6. 29.

22 Ed. 4. 39.

40.

Rastal, 49, 50.

58. 584.

S. P. C. 98.

Keilw. 188, 189.

(s) 21 H. 6. 28.

29. 4 H. 7. 5.

9 H. 4. 2. 35 H. 6. 37. 8 Ed. 4. 3. Con. B. App. 14. 48. 4 H. 7. 5. 6.

(t) 7 Ed. 4. 14. 21 H. 6. 29.

not guilty to the felony. And if such plea be triable by the common law, the appellant reply both to that, and also to the plea of *autrefois*; he discontinues the appeal; but (a) if it be not triable by the common law, the defendant need only to reply to it, and not to the felony, until after such plea has been tried. But it is holden in many books (b) of good authority, that a man shall not be admitted to plead a release, and the general issue also, because it is repugnant at the same time to insist that the crime is released, and yet (c) that there was no such crime committed to be released. But I do not find this point any where adjudged: and as to the argument above-mentioned, from the repugnancy of the plea of a release to the general issue, it may be answered, that a man may reasonably take a release to free himself from trouble, from the suspicion of a crime of which he would by no means own himself guilty; and in appeals of death after a plea of (d) *autrefois* convict by verdict, and even after the plea of (e) *autrefois* convict by confession, and clergy thereon had, the general issue has been received; and yet such pleas as much imply a confession of the fact, as the plea of release. And in Smith's case, who was indicted of high treason in the beginning of his late majesty's reign, for the murder of Colonel Parks, after a plea of a pardon the general issue was received. However, I do not find it any where holden, that the plea of a release may not be pleaded, if the defendant think fit, without pleading the general issue.

Also it seems questionable, (f) whether any other plea in bar, whether triable by matter of record, or by *parol*, may not also be received without pleading the general issue, as it seems clear, that in some cases it may; (g) as where it declines the jurisdiction of the court, (h) or would be prejudicial to the defendant by enfranchising the plaintiff, as where a villein brings an appeal of robbery against his lord, who pleads the villenage in bar, in which case he shall not be compelled to plead not guilty, because that would amount to an enfranchisement of the plaintiff, by supposing that the fact, if committed, needs a defence; which it cannot do unless the plaintiff have a property, which, if he be a villein, he cannot have against his lord.

Also it seems clear, that (i) if any of the bars above-mentioned, except that of a release, be suffered to be pleaded without the general issue, and be found against the defendant, they do not conclude him from pleading the general issue afterwards; and as to the plea of a release, whether that being pleaded without the general issue, and found against the defendant, do conclude him at this day to plead the general issue afterwards, may deserve to be considered, for the reasons above-mentioned. (k) But it seems, that if a demurrer to the court be adjudged against an appellee, he shall not be admitted to plead either in bar, or the general issue, but shall be condemned, as shall be shewn more at large in the chapter of Demurrers.

Summary, 190. 243. Finch, 385, 386.

As to the SIXTH GENERAL POINT, *viz.* Where the appellant shall render damages to the appellee for a false appeal.

(a) C. Eliz. 223.
3 Leon. 268.

(b) S. P. C. 68.
Finch, 385, 386.
Sum. 190, 191.
Hob. 170, 171.
(c) Hob. 270,
271.

(d) 1 Bulst. 141.
Yclerton, 204.
Cro. Jac. 283.
(e) 4 Co. 45.
1 Andr. 68.

(f) Finch, 305.
S. P. C. 151.
22 Ed. 4. 39, 40.
Show. 47.
(g) Widdington
v. Charlton, Tr.
11 Ann.
50 Ed. 3. 15.
28 Ed. 3. 91.
27 Assize, 41.
35 H. 6. 57.
11 Ed. 4. 3.
(h) Kidw. 175.
91 186.
Rastal, 51.

(i) 18 Ed. 3. 32.
Carthew, 56.
Summary, 191.
S. P. C. 98.
Litt. s. 192.
193, 194. 208.
(k) 14 Edw. 4.
7.
50 Ed. 3. 15, 16.
28 Ed. 3. 91.
S. P. C. 98.
F. Coram, 429.
27 Assize, 3.
Con.
7 Ed. 4. 15.
Kidw. 100.
14 Ed. 4. 7.

Sect. 138. Having premised that by the common law a defendant may (a) recover damages for a false and malicious appeal, against the appellant and his abettors, by a writ of conspiracy or an action on the case, in the nature of such writ, as hath been more fully shewn in book the first, (b) I shall here endeavour to shew in what cases and in what manner he may, if he choose rather so to proceed, recover such damages by the statute of Westminster the second, c. 12. which was made for his speedier remedy, and is enacted as followeth:

(a) 2 Inst. 383.
Keilw. 27.
S. P. C. 167.

(b) B. 1. c. 27.
tit. "Conspiracy."

Sect. 139. "Foras much as many through malice, intending to grieve others, do procure false appeals to be made, of homicides and other felonies, by appellors, having nothing to satisfy the king for their false appeal, nor to the parties appealed for their damages;" it is ordained, "That when any, being appealed of felony, surmised upon him, doth acquit himself in the king's court in due manner, either at the suit of the appellor or of our lord the king, the justices before whom the appeal shall be heard and determined, shall punish the appellor by a year's imprisonment: and the appellor shall nevertheless restore to the parties appealed their damages, according to the discretion of the justices, having respect to the imprisonment or arrestment that the party appealed hath sustained by reason of such appeals, and to the infamy that they have incurred by the imprisonment or otherwise; and shall nevertheless make a grievous fine unto the king. And if peradventure such appellor be not able to recompense the damages, it shall be inquired by whose abetment, by malice, the appeal was commenced, if the party appealed desire it. And if it be found by the same inquest, that any man is abettor through malice, he shall be distrained by a judicial writ at the suit of the party appealed to come before the justices. And if he be lawfully convict of such malicious abetment, he shall be punished by imprisonment and restitution of damages, as before is said of the appellor."

And for the better understanding this statute, I shall endeavour to shew how the several parts of it have been expounded.

Sect. 140. And FIRST, Whereas the words of the preamble are, "that many through malice procure false appeals to be made by appellors, having nothing, &c." and in the purview it is said, "that it shall be inquired by whose abetment, by malice, the appeal was commenced, &c. and if it be found that any man is an abettor through malice, &c." in all which places the malice is expressly referred to the procurers and abettors only, and in no part of the statute to the appellant; it is holden by (c) some, that wherever an appellee is acquitted of an appeal of felony, he shall recover damages by force of this statute against the appellant, except only where he hath been indicted of the same felony before; and it must be confessed, that in the (d) Reports and Entries (e) relating to this matter, damages seem generally of course to have been awarded against the appellant, on the acquittal of the appellee in all other cases, without any finding that the appeal was malicious. Yet it is holden by (f) others, that the appellant is no more within the intent of the statute than his abettors,

(c) Co. Lit. 139.
2 Inst. 384.
Vide Litt. s. 208.
22 Ass. 39.
26 H. 8. 3.

(d) See the books cited under this and the following sections.

(e) Rast. Ent. 56.

(f) S. P. C. 168.

See L. Quin. Ed. 4. 126.
40 Ed. 3. 42.

abettors, unless his appeal was grounded on malice. And if it be considered that where the appellant is to render damages by force of the statute, he is also, by the express words of it, to have a year's imprisonment, and to be grievously ransomed to the king; surely it cannot be imagined that the makers of the statute intended in any case to expose him to so severe a punishment for a legal prosecution, which he has reasonable evidence to induce him to commence, though it may not be sufficient to induce a jury to convict the defendant.

Neither do I see any reason why the bringing an appeal against one who hath been before indicted, by a sufficient indictment (a) of the very same (b) crime, which is agreed (c) not to be within the meaning of the statute, should be the only excepted case; especially considering that any other case, wherein the appellant plainly appears to proceed on a probable ground of suspicion, is within the reason given in many books (d) for the favour shewn to the appellant where the appellee has been indicted before; which is this, that the appellant had cause and evidence to pursue the appeal, and it appears to the court that it was not merely founded on malice. And this is also one of the reasons given in the (e) books, why the appellant is not to render damages by the intent of the statute, where the appellee in an appeal of murder is found guilty of homicide *se defendendo* only. As to the general expressions of the books above-mentioned, in which damages seem of course to be awarded against the appellant without any inquiry whether his appeal were malicious or not, it may be answered, that the books speak as generally in relation to the recovery of the damages against the abettors, and yet it seems (f) plain from the whole purport of the statute, that they are not within the purview of it, unless their abetment were founded on malice. And some (g) seem to have gone so far as to hold, that the heir who abets his mother in bringing an appeal for the death of his father, can be in no case within the statute, by reason of such abetment, because nature and duty oblige him in such a case to abet his mother.

But this reasoning, if strictly examined, seems to prove no more than this, that in such case the heir shall *prima facie* be intended to have abetted the appellant rather out of duty than malice, and that therefore he shall not be taken to be within the purview of the statute, without very strong evidence of his malice. But surely it cannot be denied, that in some cases it may be notorious, that an heir abets such an appeal, not out of duty but malice; as where he himself, without the least probable ground of suspicion, is the first promoter of the prosecution; or where he causes it to be carried on by violent and unfair methods, not for the sake of justice, but oppression; in which cases it seems harsh to say, that he is not as well within the meaning as letter of the statute.

SECT. 141. SECONDLY. In the construction of the words "homicides and other felonies," in the preamble of the statute, it hath (h) been adjudged that the purview of it extends to a rape, which was made a felony by another (i) branch of the same statute;

- (a) 20 Edw. 4.
6.
2 Inst. 384.
(b) 20 H. 3.
33 H. 6. 1.
40 Ed. 3. 42. 24.
14 H. 7. 2.
40 Ass. 10.
(c) 22 Ass. 39.
26 H. 3. 3.
33 H. 6. 1.
40 Ed. 3. 42.
14 H. 7. 2.
20 Ed. 6.
40 Ass. 10.
F. Damages, 67.
(d) 40 Ed. 3.
42.
14 H. 7. 2.
(e) 21 Ass. 77.
2 Inst. 301.
(f) 2 Inst. 384.
S. P. C. 160.
Plowden, 60.
seems contrary.
Vide Dyer, 120.
(g) F. Champerty, 10.
Plowden, 60.
2 Inst. 384.

- (h) P. Corone,
273. 382.
Plowden, 124.
(i) Sup. s. 59,
60.

and

(a) 2 Inst. 384.
S. P. C. 198.

and it is (a) holden, both by Coke and Staundford, that it in like manner extends to offences made felonies by any subsequent statute.

Sect. 142. THIRDLY, In the construction of these words, "When any being appealed of felony surmised upon him, doth acquit himself in the king's court in due manner, either at the suit of the appellor or of our lord the king;" it seems to have been generally agreed, that no acquittal is within the intention of the statute, (b) unless it be had on an appeal, (either at the suit of the party, or of the king, after a nonsuit of the party,) and be of such a nature as (c) finally to bar all other prosecutions for the same felony, whether at the suit of the king, or of the same, or any other party. And therefore it seems clear, that no damages shall be recovered on the (d) abatement of an appeal, nor on the bare (e) nonsuit of the appellant, nor where the appellant is barred either by a (f) demurrer, or by a (g) plea, shewing that he is not entitled to the appeal, nor on any acquittal on an insufficient (h) original; because in all these cases the appellee is liable to another prosecution for the same felony. And if a person appealed of murder, be found guilty (i) of homicide by a misadventure, or *se defendendo*, which will be a bar of any other prosecution for the same killing, yet it hath been resolved that he shall not recover damages, not (k) only because it appears that the appeal was not groundless, but also because the appellee is not totally acquitted.

(b) S. P. C. 169.
2 Inst. 385.
14 H. 7. 2.
(c) S. P. C. 169.
(d) 4 Co. 47.
S. P. C. 169.
9 H. 4. 2.
Vide 9 H. 5. 1.
(e) 2 Inst. 385.
F. Consp. 25.
But 33 H. 6. 1.
F. Cor. 102.
48 Ed. 3. 22.
seem doubtful.
(f) 2 Inst. 385.
F. Cor. 12.
S. P. C. 169.
(g) 27 Ass. 25.
2 Inst. 385.
S. P. C. 169.
(h) 4 Co. 45.
47.
F. Cor. 444.
9 H. 5. 2.
S. P. C. 169.
(i) 22 Assize,
77.
2 Inst. 385. S. P. C. 199. (k) Vide sup. sect. 138.

(l) 41 Ass. and
24.
F. Cor. 275, 381.
Damages, 77.
(m) F. Cor. 98.

But it is (l) clear, that the appellee is entitled to his damages, where he is acquitted on an appeal at the suit of the king, after a nonsuit of the plaintiff, where he vanquishes (m) the appellant in a trial by battle. Also if two be appealed, the one as principal and the other as accessory, and the jury being charged on the accessory as well as the principal, do acquit the principal, it seems to be (n) agreed, that the accessory shall recover damages by the intent of the statute, without an express verdict concerning him, because he is impliedly acquitted by the acquittal of the principal; for it is impossible that there should be an accessory where there is no principal. And this reason seems to hold as strongly for the damages, where the accessory doth not appear on the trial or acquittal of the principal; because in such case the acquittal of the principal is as (o) much an acquittal of the accessory, as where he doth appear.

(p) 2 Inst. 385.

(q) S. P. C. 169.
Vide 41 Ass. 24.

(r) Vide sup.
sect. 53.

But it is holden (p) by Sir Edward Coke, that such an accessory shall not recover damages, because no jury can be returned to assess them; and Sir William Staundford (q) seems to be of opinion, that such an accessory shall not recover damages, unless he be expressly acquitted by verdict, after the acquittal of the principal. Yet whether (r) the justices themselves may not, in a case of this nature, if they think fit, assess the damages without any jury, or else assess them by an inquest of office, may deserve to be considered. Also it seems to be to little purpose to require an actual acquittal of a person, where it appears by the acquittal of another, that he could not be guilty. However it seems

seems clear, that a person appealed as accessory to two principals, shall not (a) recover damages by the acquittal of one of them; because for what appears he might be accessory to the other. Neither (b) shall he recover damages where he is discharged by the death of the principal before his attainder, because it doth not appear that he might have been guilty.

(a) 2 Inst. 385.
Dyer, 120.
F. Cor. 463.
(b) S. P. C. 173.
33 H. 6. 1.

Sect. 143. It seems at this day, that if a defendant, appearing upon erroneous process to a good appeal, be acquitted, he shall recover damages by the intent of the said clause, because such an acquittal is a good bar of any other prosecution for the same felony, and the life of the appellee was put in danger by the (c) appeal. But there were formerly some opinions, that the appellee in such a case should not recover damages, because his life was not in danger at the time of the trial, for that he might have taken advantage of the error in the process.

(c) 9 H. 5. 2.
2 Inst. 386.
Qu. S. P. C. 169.
F. Cor. 441.
Yelverton, 204.
Cro. Jac. 281.
4 Co. 15.

But granting it to be a good rule, that the defendant shall not recover damages where his life is not in danger at the time of the trial, which yet I find not confirmed by any authority, besides the Year Book of 9 Hen. 5. c. 2. it may be answered, that in the case in question the defendant's life is in danger at the time of the trial, because the error in the process is saved by his appearance; as shall be shewn more at large in the chapter concerning Process.

Sect. 144. If a person who has taken a release, or prayed the benefit of clergy, waive such release, or benefit of clergy, and put himself on his trial and be acquitted, it is said, (d) that he shall recover his damages, notwithstanding the objection that the taking such release or making such prayer, seem to carry with them an implied confession of guilt.

(d) S. P. C.
169. 173.
Vide F. Cor.
386. & 33 H.
6. 1.
Sup. sect. 135.

Sect. 145. Wherever any person is so far acquitted on an appeal carried on at the suit of the party, as to be entitled to his damages, (e) he shall have judgment for them without any process to bring in the party to answer to the damages, because he is still in court; but where he is so acquitted on an appeal carried on at the suit of the king after a nonsuit of the party, he shall not recover damages, without a *scire facias* to bring in the party, because he was out of court by the nonsuit.

(e) S. P. C. 162.

Sect. 146. FOURTHLY, In the construction of these words, "The justices before whom the appeal shall be heard and determined, shall punish the appellor by a year's imprisonment, and the appellor shall nevertheless restore to the parties appealed their damages, according to the discretion of the justices, having respect to the imprisonment, or arrestment, that the party appealed hath sustained by reason of such appeals, and to the injury that they have incurred by the imprisonment, or otherwise, &c." the following points have been holden.

FIRST, That justices of *nisi prius* (f) have no power to give judgment for such imprisonment or damages, upon an acquittal before them, whether before or since the statute of 14 Hen. 6.

(f) 10 Ed. 4.
14.
22 Ed. 4. 10.
S. P. C. 119.
by 2 Inst. 386.

by which it is enacted, "That such justices shall have power, in
 "all cases of felony or treason, to give their judgments as well
 (a) S. P. C. 169. "where a man is acquitted, as where he is attainted." For (a)
 the words above-mentioned in the statute of Westminster the
 second are to be intended of such justices only before whom the
 whole plea of the appeal is heard and determined, and therefore
 in strictness can extend to the justices of the king's bench only,
 where the appeal is commenced before them, (for that the whole
 appeal is in such case heard and determined before them, either
 in person, or else by others delegated by, and representing them,)
 and not to the justices of *nisi prius*, who have nothing to do
 with the appeal before the trial, nor any original power to try it.
 And the statute above-mentioned of 14 Hen. 6. hath been con-
 strued to intend only to enable justices of *nisi prius* to give the
 principal judgment, and not to transfer to them from the court of
 king's bench a power in collateral matters. Yet (b) justices of
 (b) 4 Co. 95.
 2 Inst. 386.
 Dyer, 120.
 B. Appeal, 113.
 F. Corone, 463.
 8 H. 5. 6.
 (c) 22 Ed. 4. 19.
 B. Appeal, 113.
nisi prius have by usage, not now to be disputed, gained a power
 to assess the damages, and to inquire of the sufficiency of the
 plaintiff to answer them, and also of the abettors. But I do not
 find that they have ever given judgment for the damages. Yet
 there is no doubt (c) but that, if such justices be also justices of
 assize, and as such have an appeal commenced before them, they
 may, as justices of assize, upon the acquittal of the appellee, not
 only inquire of the damages, &c. but also give judgment for them,
 both by the letter and meaning of the statute.

Sect. 147. SECONDLY, That if a jury give too small damages
 to the appellee, the court may increase (d) them; from which it
 seems to follow, that if a jury give too large damages, the court
 may abridge them. And surely no less can be implied by the
 statute's ordering, "that the damages shall be given according
 (e) 3 H. 6. 29.
 14 H. 4. 9.
 8 H. 4. 23. p. 9.
 3 H. 4. 4. p. 16.
 7 H. 6. 31.
 9 H. 6. 31.
 19 H. 6. 10.
 B. Abr. 36.
 Vide 27 H. 3. 2.
 Sup. s. 52.
 (f) 27 H. 8. 2.
 19 H. 6. 42.
 19 H. 6. 10. p. 28. 3 H. 6. 23.
 "to the discretion of the justices, respect being had to the im-
 prisonment, &c." And this construction also seems agreeable
 to the rules of law in other cases, by which the court is said (e)
 to have a general discretionary power, except in some special
 cases, as local (f) trespasses, &c. either to increase or abridge the
 damages found by an inquest of office; and where a jury, which
 hath acquitted an appellee, inquires afterwards of the damages, it
 seems in respect of such inquiry to be no more than an inquest
 of office, though it were returned to try the cause.

Sect. 148. THIRDLY, That if there be several appellees, and
 (g) S. P. C. 170.
 Dyer, 120.
 11 H. 4. 16.
 12 Coke, 126.
 2 Inst. 386.
 41 Assize, 21.
 F. Damages, 77.
 8 H. 5. 6.
 all of them acquitted, the damages ought to be severally (g) as-
 sessed as to every one of them; and this doubtless is agreeable
 both to the letter and meaning of the statute, which provides that
 in the giving the damages, respect shall be had to the imprison-
 ment and infamy, and other damage sustained by reason of the
 appeal; and these being several, and receiving different aggra-
 vations from the different circumstances of the person's particular
 case, it cannot but be reasonable that the damages be assessed
 severally also.

Sect. 149. FOURTHLY, That a monk or *feme covert*, being ap-
 pealed

pealed without the abbot or husband, cannot have judgment for the damages on their acquittal, because they are disabled by the law to recover any damages without the abbot or husband; and the general words of a statute shall not be construed to enable persons in a point wherein the common law hath disabled them. But the authority of this opinion, as to a wife, is questioned by Hobart; (a) neither do any of those (b) who seem to give it greater weight, bring any other proof of it than a note in Fitzherbert's Abridgment, of a resolution to such purpose in the time of Edward the Third as to the case of a monk; and an assertion that the law is the same in the case of a wife.

(a) Hob. 98.
(b) 2 Inst. 393.
11 Coke, 77.
9 Coke, 73.
1 Roll. 170.
S. P. C. 170.
F. Corone, 176.

Against which it may be plausibly argued, that since the imprisonment and infamy sustained by a *feme covert*, in a malicious appeal against her, are far from being less grievous in respect of her coverture, and are a good (c) ground of a writ of conspiracy at the common law, brought by the husband and wife; and since the wife may take any thing to the benefit of her husband, and it appears to the court that the appellant by his own act, without any default either in the husband or wife, gives them a good title to the damages; and since no express judgment can be given for the husband, being not a party to the record, and it is most for his advantage, as well as his wife's, that a present judgment be given; it may perhaps be thought no unreasonable construction of the statute, that in this particular case judgment should be given for the wife to recover the damages, which would as much enure for the benefit of herself and her husband, as an express judgment for them both on a writ of conspiracy.

(c) 2 Inst. 386.
24 Ed. 3. 73.
1 Inst. 132.

However it is certain, (d) that if the husband and wife are both of them appealed and acquitted, they shall have a joint judgment for the damage done to the wife, for which the wife alone shall sue execution if the husband die without suing it, and the husband alone shall have judgment for the damage done to himself.

(d) F. Judg.
108.
2 Inst. 385, 386.
11 H. 4. 16, 17.
S. P. C. 170. b.

FIFTHLY, In the construction of the words, " And if peradventure the appellor be not able to recompense the damages, it shall be inquired by whose abetment, by malice, the appeal was commenced, if the party appealed desire it; and if it be found by the same inquest, that any man is abettor through malice, he shall be distrained by a judicial writ, at the suit of the party appealed, to come before the justices, &c.," the following points have been holden.

Sect. 150. FIRST, That (e) the abettors are in no case liable to render damages, where the appellant himself is not liable, though never so sufficient; and this is confirmed by experience, and the manifest purport of the statute, which by directing that the abettors be inquired of, where the appellant appears insufficient to answer the damages, plainly intimates that they are to be inquired of in such cases only, wherein the appellant must have answered them if he had been able; and agreeably hereto it seems to be settled, (f) that a release of damages to the appellant will discharge the abettors, if they can produce it.

(e) S. P. C. 170.
171.
2 Inst. 386.

Sect. 151. SECONDLY, That (g) unless the appellant be found by the jury to be insufficient, the abettors shall not be inquired of; and

(f) 20 H. 7. 7.

(g) 2 Inst. 386.

and yet the statute doth not expressly direct that the jury shall inquire of the sufficiency of the appellant. But it being the general method of the law in other cases of the like nature, to make an inquiry by a jury, it is certainly a reasonable construction of the general words of the statute, that such inquiry may be made in the present case. Yet, whether the justices themselves may not, if they think fit, make such inquiry without a jury, it being but an inquiry of office, may deserve to be considered for the reasons in the 52d and 147th sections of this chapter. However, there can be no doubt but that the insufficiency of the appellant must appear by one or the other of these inquiries, before the abettors can be inquired of.

(a) S. P. C. 171.
Qu. 8 Ed. 4. 3.
12 Coke, 126.
2 Inst. 386.
Rastal, 44.
B. Appeal, 96.
(b) S. P. C. 170.

Sect. 152. THIRDLY, That (a) the abettors may traverse the jury's finding the appellant to be insufficient, or that they abetted him, &c. for it is hard that a man should be concluded by any matter whatsoever, found to his prejudice in an action to which he is no way privy. Also it is holden by Staundford, (b) that if a jury on the acquittal of one defendant, find that there were no abettors, yet they may afterwards, on the acquittal of another defendant, find that there were abettors, because there is no reason that the first inquest shall bind one who is not privy to it, and has no remedy against it. But the contrary hereto is holden in the Book of Assizes, (c) where the court refused to inquire of the abettors on the acquittal of a defendant, because it had been found on the acquittal of another, that there were no abettors: but this case, if thoroughly examined, seems repugnant to itself; for the jury were permitted on the second acquittal to tax the damages, which yet are said to have been taxed before; but to what purpose should this be done, unless it were first found that the appellant was sufficient, or else that there were abettors, which could not but controul the first finding, as also the second taxation of the damages must do, unless it were wholly the same with the first.

(c) 41 Assize,
24.

(d) 12 Coke,
126.
S. P. C. 170.
8 Ed. 4. 3.
8 H. 5. 6.
26 H. 8. 3.
2 Inst. 386.
F. Cor. 29. 386.
463.
B. Appeal, 96.
Contra, 41.
Assize, 8.
F. Corone, 219.
B. App. 74.
(e) F. Cor. 13.

Sect. 153. FOURTHLY, That (d) if the appellant be found sufficient to render part of the damages, and not the whole, judgment shall be given against the abettors for the whole, and not for part against them, and for the other part against the appellant; for that these words of the statute, "If peradventure the appellor be not able to recompense the damages," must be understood of all the damages.

Sect. 154. FIFTHLY, That (e) the appellee after his acquittal may sue for the damages by attorney.

(f) F. Act. s. 10
stat. 28.
2 Inst. 386, 387.
S. P. C. 171.
Co. M. 300.

Sect. 155. SIXTHLY, That (f) though the statute expressly give only judicial process for the recovery of the damages against the abettors, yet the appellee may, if he think fit, take out an original writ of abetment, grounded on the statute, and therein count to greater damages than were found by the jury; which in respect of such finding, being but in nature of an inquest of office, shall not conclude the appellee.

(g) S. P. C. 171.
2 Inst. 386, 387.

Sect. 156. SEVENTHLY, That (g) if the appellee chuse rather to proceed for the recovery of his damages by judicial process than by original, it is safest for him to make use of a distress, which is given

given by the express words of the statute; yet there is a note(a) of an old case, wherein a *venire facias* was first awarded; but it is(b) questionable whether this be justified by the statute or not.

Sect. 157. EIGHTHLY, That(c) it is time enough for the appellee to shew the time and place of the abetment, when the abettors appear upon such process; and by such shewing he supplies the omission of the jury in not finding any time or place, on their inquiry of the abetment, &c.

Sect. 158. NINTHLY, That(d) the nonsuit of an appellee, either in an original writ, or process against the abettors, whether before or after appearance, is no bar of a second writ or process.

As to the SEVENTH GENERAL POINT, viz. Where the appellant is to be fined.

Sect. 159. There can be no doubt but(e) that by the express words of the above-expounded statute of Westminster the Second, c. 18. wherever the appellant, or his abettors, are by the purport thereof to render damages to an appellee, they are also to be fined to the king, and imprisoned for a year.

Also it seems clear from the general purport of the books,(f) that an appellant appearing to have brought an ill-grounded appeal, whether of felony or *mayhem*, (g) shall be fined, in many cases wherein he is not liable to render damages by the statute above-mentioned; as where he is nonsuit,(h) either against all, or part(i) of the appellees only, whether after, or, as some(k) have holden, before appearance, or where the writ abates through the default(l) of the appellant in wilfully suing by a(m) wrong name, or(n) a vitious writ, &c.; and even a *feme covert*,(o) suing an appeal known by her to be groundless, as for the death of a husband whom she knows to be alive, shall be fined.

(i) 22 Assize, 82. F. Corone, 182. (k) F. Fines, 107. (l) 8 Coke, 60. (m) 9 H. 5. B. Fines, 16. (n) F. Cor. 121. (o) B. Appeal, 25. 8 H. 4. 17.

But it is certain that where a writ abates by the act(p) of God, or for any other cause no way imputable to the appellant, he shall neither be fined nor amerced.

Also it is certain that an infant is in no case to be fined for a false appeal; but some(q) have holden that he may be amerced, which is contradicted by others, who say(r) that an infant can in no case be amerced.

(a) F. Cor. 102.
(b) S. P. C. 171.
2 Inst. 386, 387.
(c) S. P. C. 171.
2 Inst. 386.
F. Cor. 45.

(d) S. P. C. 171.
1 Inst. 139.
F. Corone, 386.

(e) S. P. C. 170.
F. Fines, 2.
1 Assize, 9.
22 Assize, 39.
8 H. 4. 17.

(f) See the books cited in the following part of this section.
F. Cor. 137.
8 Coke, 60.
S. P. C. 170.
seems contrary.
(g) 10 Assize, 1.
F. Corone, 114.
(h) F. Fines, 19.
41 Assize, 8.
F. Corone, 219.
Damages, 77.
1. F. Fines, 26.

(p) F. Brief, 612.

(q) B. Fines for Contempt, 37.
41 Assize, 14.
(r) Co. Lit. 127.
Cro. Car. 161.
Vide 1 Danv.
Abr. 462, 465.

CHAP. XXIV.

OF APPROVER.

HAVING gone through the several kinds of appeals by innocent persons, I am now, in the second place, to consider the nature of an appeal by an offender confessing himself to be guilty, who is commonly called a *proter* or *approver* (s) in English, or a *probator* in Latin, because he must, at his peril, prove his appeal in every point, and for so doing is pardoned of course.

(s) S. P. C. 142.
1 Inst. 120.
2 Hale, 425,
226.

For the better understanding the nature of such appeal, I shall examine the following particulars.

1. When a man may be said to become an approver.
2. Who may be admitted to be approvers, and who not.
3. In what cases a person may be an approver.
4. Of what offences a person may be an approver.
5. Against what offenders a person may be an approver.
6. Before what justices a person may be an approver.
7. How they are to be ordered and demeaned, both before and after the appeal.
8. What process is to be awarded against the appellees.
9. In what manner the court is to proceed upon, and after the trial.
10. How the approver is to be rewarded for making good his appeal.

As to the FIRST POINT, viz. When a man may be said to become an approver.

(a) 2 Hale, 228,
229.
3 Inst. 129, 130.
Cowper, 335.

Sect. 2. It seems agreed, (a) that a man is then properly an approver, when being indicted of treason or felony, before competent judges, and in prison for the same, and capable of being an approver, he confesses the indictment, and is sworn to reveal all the treasons and felonies he knows, and then before a coroner enters his appeal against all who were partners with him in the crime in the indictment, being at the time of the appeal within the realm.

As to the SECOND POINT, viz. Who may be admitted to be approvers, and who not, I shall observe,

(b) 3 Inst. 129.
Summary, 192.

Sect. 3. FIRST, That (b) a peer of the realm cannot be an approver.

(c) 3 Inst. 129.
Summary, 192.
S. P. C. 146.
B. Cor. 81, 211.
F. Cor. 112.
127, 167, 387.
443, 445.

Sect. 4. SECONDLY, (c) That neither the person attainted of treason or felony, nor even one outlawed in a personal action, as some say, (d) can be an approver, because by his attainder or outlawry he is out of the law, and his accusation shall not be of such credit, as to put any person upon his trial.

11 Assize, 27.
17 Assize, 4.
(d) B. App. 27.
Sup. c. 23, s. 32.
B. Cor. 175.
(e) 3 Inst. 129.
S. P. C. 147.
Sup. c. 23, s. 32.
(f) 3 Inst. 129.
147.

Sect. 5. THIRDLY, That an idiot, (e) or person born deaf and dumb, or any one who is *non compos* at the time, or an infant under the age of discretion, cannot be an approver, because no such person ought to be admitted to take the oath before the coroner, without which there can be no approvement.

(g) 3 Inst. 129.
(h) Sup. c. 23, s. 32.
2 Hale, 228.

Sect. 6. FOURTHLY, That is holden both by Staundford, (f) Coke, (g) and Hale, (h) that no woman nor infant can be an approver. But it is observable that the opinions of Staundford and Coke seem chiefly to be grounded on this foundation, that the appellee may have such like exceptions against approvers as the defendant may have on appeal brought by a lawful person, and therefore may except that the approver is within age, or a woman, &c.

&c. because such persons cannot wage battle; but it being settled at this day, that these are no good exceptions to an appeal brought by a lawful person, as hath been more fully shown in the precedent chapter, (a) it seems to be justly questionable, whether they are now to be admitted as good exceptions to an appeal by an approver. To which may be added, that in the opinion of Hale, (b) contrary to that of Staundford (c) and Coke, (d) a man above the age of seventy, or maimed, may be an approver, though he cannot wage battle; from whence it follows clearly, that in the judgment of Hale, there is no necessity that an approver should be able to wage battle.

Sect. 7. FIFTHLY, That it seems to be agreed, (e) that a person in holy orders cannot be an approver, because it is a rule, that no member of the clergy can sue any appeal whatsoever, in a matter or cause of death.

As to the THIRD POINT, viz. In what cases one may be admitted to be an approver, I shall observe,

Sect. 8. FIRST, That no one (f) shall be admitted to be an approver, till he hath confessed the crime charged against him in his indictment.

Sect. 9. SECONDLY, That it is holden (g) in some books, that he who hath once pleaded *not guilty* cannot be an approver, but shall be hanged, because he is found false, and his confession contradicts his former plea; yet the contrary hereunto is holden by others, (h) and Staundford (i) admits that the court, of grace, may admit such persons to be approvers, and this is as much as can be contended for in any other case; for it seems agreed, (k) that the court is not bound of right to admit any person whatsoever to be an approver.

Sect. 10. THIRDLY, That it is agreed, (l) that any one indicted of treason or felony may be an approver, but that unless the crime with which the person is charged amount either to felony or treason, he cannot be an approver.

Sect. 11. FOURTHLY, That it is also agreed, (m) that no person accused of treason or felony can be an approver, unless he be actually indicted for it; because his confession amounts not to a conviction until he be indicted, and consequently puts it not in the power of the court to give judgment against him, when his appeal shall be rejected or falsified, as every approvement ought to do.

Sect. 12. FIFTHLY, That it seems also to be generally agreed, (n) that if a person indicted be also appealed of the same felony, he can no longer be an approver; the reason whereof seems to be, that though the king may, in his discretion, by admitting a person to be an approver, respite the judgment and execution of one prosecuted by indictment, which is his own suit, yet he cannot delay them in an appeal, which is the suit of the party; and *à fortiori* therefore it follows, that (o) if a person be appealed only, and not indicted, he cannot be an approver.

Sect. 13. SIXTHLY, That notwithstanding the appeal of an approver may in some respects be looked upon as the suit of the king,

(a) Sect. 30, 31.

(b) Sum. 192.

2 Hale, 233.

Com.

(c) S. P. C. 147.

(d) 3 Inst. 129.

Vide Cowp.

536. Mrs.

Rudd's case.

(e) S. P. C. 147.

8 Inst. 139.

(f) F. Cor. 50.
251. 441.

(g) 3 Inst. 129.

Summary, 193.

S. P. C. 144.

F. Cor. 440.

21 Edw. 3. 10.

19 H. 6. 47.

(h) Finch, 387.

12 Edw. 4. 10.

Vide 2 H. 7. 3.

(i) S. P. C. 145.

(k) 3 Inst. 129.

Summary, 194.

12 Edw. 4. 10.

11 Hen. 7. 5.

2 Hale, 226.

228. 229.

21 H. 6. 34.

(l) 19 H. 6.

47.

3 Inst. 129.

21 Edw. 3. 18.

Finch, 387.

F. Corone, 236.

448.

B. Corone, 41.

2 Hale, 227.

(m) 3 Inst. 129.

Summary, 193.

2 Hale, 228.

S. P. C. 143.

F. Corone, 231.

seems contrary.

(n) 3 Inst. 129.

Finch, 387.

Summary, 193.

2 Hale, 228.

S. P. C. 143.

181.

(o) S. P. C. 143.

251.

1778.

B. Corone, 236.

B. Corone, 442.

40 Aulse, 39.

seems contrary.

(a) F. Cor. 113. king, and equivalent to an indictment, yet the appellee(a) of an
S. P. C. 147. approver cannot become an approver himself, not only because it
2 Hale, 228. would falsify the appeal of the first approver, in supposing that
11 H. 4. 93. he had omitted some of his partners, but also because it would
seems contrary. cause an infinite delay; for the appellee of such an approver
might as well become an approver of others, and so on.

As to the FOURTH POINT, viz. Of what offences a person may be admitted to approve another.

(b) S. P. C. 143. Sect. 14. It seems agreed, (b) that no one can approve another
2 Hale, 227. of any other offence, but the very crime contained in the indict-
Summary, 194. ment, and therefore that he cannot approve a man of a crime of a
3 Inst. 129, 150. different nature, (c) nor even of being accessory, before (d) or
2 Inst. 629. after, (e) to the same crime, because no man can abet or receive
Finch, 387. himself. But it seems also to be agreed, that inasmuch as the
(c) F. Cor. 127. oath of an approver is general, (f) to discover all the treasons and
217. felonies he knows, if he accuse any persons of crimes of a differ-
40 Assize, 39. ent nature from his own, whether in the same or a foreign
11 H. 4. 93. county, (g) his accusation will be a reasonable ground to carry on
(d) 27 Assize, a prosecution against them for such crimes, though it (h) be not
69. of itself of force sufficient to put them on their trials.
10 Edw. 4. 14. Summary, 194. Cowper, 335. 12 Edw. 4. 10. F. Cor. 37, 387. (g) F. Cor. 137.
F. Cor. 35, 208. (f) 2 Inst. 629. (h) F. Cor. 126,
B. Corone, 154. 127, 387.
(e) F. Cor. 126.
(f) 2 Inst. 629.
(g) F. Cor. 126, 137, 387.

As to the FIFTH POINT, viz. Against what offenders a person may be admitted to become an approver.

(i) F. Ass. 416. Sect. 15. It seems clear (i) that a man may be an approver
F. Cor. 460. against any person whatsoever within the realm, whether he live
S. P. C. 154. in the same or in a foreign county, provided he be named of the
(k) S. P. C. 145. county wherein he dwells. But it is said, that if it appear either
1 Edw. 4. 16. by the confession (k) of the approver, or the return (l) of the she-
F. Cor. 153. riff, or the testimony (m) of persons of credit in the county, (n)
(l) Sum. 194. that there are no such persons as some of those named in the ap-
21 H. 6. 34. peal, in *rerum natura*, or within the (o) realm, or even (p) within
(m) Sum. 195. the county whereof they are named in the appeal, the approver
S. P. C. 145. shall be hanged, unless the court, (q) in mercy, will spare him, be-
F. Cor. 133. cause his appeal in respect of such persons appears to be false,
(n) B. Cor. 49. or to no purpose.
21 H. 6. 34.
Summary, 195.
(o) 1 Edw. 3.
16.

As to the SIXTH POINT, viz. Before what justices a person may be admitted to be an approver.

(p) F. Co. 46. Sect. 16. It seems to be a settled rule, (r) that a man may be
(q) S. P. C. 145. an approver before any justices who have power to assign a coro-
1 Inst. 130. ner to take the appeal; and for this reason it seems to be
S. P. C. 143. agreed, (s) that one may be an approver before the justices of the
Summary, 194. King's Bench, and justices of goal delivery, and justices in eyre.
2 Hale, 229. And upon this ground it is holden in Sir Edward Coke's third
F. Assize, 416. Institute, (t) and also in Sir Matthew Hale's (u) Pleas of the
(r) 3 Inst. 130. Crown, under the chapter of Approver, that a man may be an
(s) Sum. 194. approver before justices of *oyer* and *terminer*. But the founda-
2 Hale, 229. tion of this opinion seems to be overthrown by what is said by
Con. both these authors (x) in other places, wherein it is holden that
(t) Sum. 194. justices of *oyer* and *terminer* cannot assign a coroner, because it
(u) Sum. 194. is not within their commission: and it seems to be (y) a general
S. P. C. 145. rule, that those only can receive the appeal of an approver who
can

can assign a coroner to take it; and therefore it seems to be agreed, that neither a court-baron, (a) nor justices of peace, (b) nor any other special justices, (c) can receive such appeal, unless their commission extend to it. And for the like reason it seems to be the opinion of Sir Edward Coke, (d) that the Lord High Steward of England cannot receive such an appeal; but this is contradicted by Sir Matthew Hale. (e)

As to the SEVENTH POINT, viz. In what manner an approver is to be ordered and demeaned, both before and after the appeal, the following particulars seem most remarkable.

Sect. 17. FIRST, It seems to be agreed, (f) that wherever a person indicted of treason or felony confesses the indictment, whether he appealed others or not, he puts it entirely in the discretion of the court either to give judgment and award execution against him, or to respite them until he shall have made good his appeal.

Sect. 18. SECONDLY, That (g) whenever a person is admitted to become an approver, the court shall assign a coroner to receive his appeal, and shall take an oath from him to discover *all* the treasons and felonies that he knows.

Sect. 19. THIRDLY, That (h) the court which admits a man to become an approver, ought to limit him a certain number of days to make his appeal in; during which it is holden by some, (i) that he is to have a penny a-day as his wages from the king; but by others, (k) that he ought not to have it until he has made good his appeal, by convicting the appellees.

Sect. 20. FOURTHLY, That the approver during all the time assigned him for making his appeal, ought (l) to be at his liberty, and out of prison; for (m) he may disavow an appeal made by duress of imprisonment; but if he allege that an appeal was extorted from him by such duress, and such allegation be found to be false, either by the examination of the coroner, or by an inquest of office, the approver shall be hanged.

Sect. 21. FIFTHLY, That (n) the approver ought to make his appeal before the coroner on every one of the days limited for the making of it; for if he fail on any one of them, and the coroner record such failure, judgment shall be given against him. And so shall it be also, (o) if after he have formed his appeal before the coroner, he make the least variation in his repeating it before the court, and the coroner record such variation.

As to the EIGHTH POINT, viz. What process is to be awarded against the appellees.

Sect. 22. It seems agreed, (p) that the coroner may award process to the sheriff, against any appellee in the same county, until it come to the exigent; but it is certain that (q) he cannot award it to any other officer except the sheriff, nor to any sheriff out of his own county. And it seems questionable (r) whether he be not restrained by the statute of Magna Charta, c. 17. to award the exigent to the sheriff of his own county. But it seems agreed, (s) that the justices of the King's Bench, or justices in eyre, might by the common law as well award process of outlawry as any other process

(a) Sum. 194.

S. P. C. 144.

(b) 9 H. 4. 1.

2 H. 4. 19.

10 Coke, 76.

B. App. 18.

Sum. 194.

2 Hale, 299.

(c) S. P. C. 144.

(d) 3 Inst. 130.

(e) Sum. 194.

3 Cowp. 336.

(f) 21 H. 6. 34.

19 H. 6. 35.

B. Cor. 48, 49.

F. Cor. 66, 67.

417.

3 Inst. 129.

2 Hale, 226.

Cowper, 336.

(g) 2 Inst. 629.

S. P. C. 143.

F. Corone, 37.

12 Edw. 4. 10.

(h) 2 Hale, 229.

S. P. C. 145.

12 Edw. 4. 10.

F. Cor. 37, 439.

26 Assize, 19.

(i) F. Cor. 439.

S. P. C. 145.

B. Cor. 34.

11 H. 4. 93.

(k) 21 H. 6. 34.

Vide 2 Hale,

230.

(l) F. Cor. 439.

S. P. C. 145.

(m) F. Cor. 218.

169, 255.

12 Assize, 29.

S. P. C. 145.

(n) B. Cor. 99.

26 Assize, 19.

S. P. C. 195.

(o) 2 Hale, 230.

S. P. C. 145.

Cowper, 335.

(p) 2 Hale, 231.

S. P. C. 146.

(q) F. Cor. 462.

2 Hale, 231.

29 Edw. 3. 42.

(r) 2 Hale, 231.

S. P. C. 146.

(s) 2 Hale, 230.

S. P. C. 146.

Cowper, 460.

(a) Sum. 196.
2 Hale, 233.
C. 146.

(b) 2 Hale, 37.

process against appellees in any county whatsoever. And it is certain^(a) that justices of gaol-delivery may award process in a county, to apprehend and try them by force of 28 Edw. 1. commonly called the statute *de Appellatis*; but whether this statute do empower such justice to award process of outlawry into a foreign county, may deserve to be considered. (b)

As to the NINTH POINT, viz. In what manner the court is to proceed upon, and after the trial, I shall observe,

(c) Sum. 196.
S. P. C. 142.
3 Inst. 130.
47 Edw. 3. 5.

Sect. 23. FIRST, That it is the election^(c) of the appellee, either to put himself upon his country, or to wage battle with the approver.

(d) S. P. C. 180.
2 Hale, 233,
234.

Sum. 196.
47 Edw. 3. 5.
19 H. 6. 335.
3 Inst. 130.

(e) Sum. 196.
S. P. C. 74.
106. 149. 180.
11 H. 4. 93.

21 H. 6. 34, 35.
B. Cor. 31. 49.
3 Inst. 130.
F. Corone, 143.

7 Edw. 3. 12.
(f) S. P. C.
108.
(g) F. Cor. 98.

Sect. 24. SECONDLY, That let there be never so many appellees, if they wage battle, the approver must fight them all. (d) But on the contrary, it seems to be generally agreed, (e) that if a person appealed by several approvers of one and the same felony, vanquishes any one of them, he shall be acquitted against them all, and all of them shall be condemned in the same manner as if every one of them had been actually vanquished. But if an approver having appealed several of the same crime, be vanquished by one of them, it seems to be holden^(f) that his appeal is still in force against the rest. But the note in^(g) Fitzherbert's Abridgment, which seems to be the foundation of this opinion, seems rather to be intended of an appeal by an innocent person, than of an appeal by an approver, in relation to whom it seems to be a general rule, that being once falsified as to any one of the appellees, he ought to be condemned, as hath been more fully shewn in the 9th and 15th sections of this chapter.

(h) 47 Ed. 3. 16.
47 Edw. 3. 5.
F. Cor. 103.
Summary, 201.
3 Inst. 130.
S. P. C. 149.

(i) Sum. 201.
B. Corone, 49.
21 H. 6. 33.

Sect. 25. THIRDLY, That if the king pardon the approver or appellee, hanging the appeal, the approvement ceases, (h) and the appellee shall be discharged. For in the first case, by the pardon the felony is extinct, and a man can no longer be an approver than while he is under the guilt of the crime whereof the approvement is made, and liable to be condemned by the court whenever his appeal shall be falsified, &c. And in the second case, (i) it cannot be doubted but that the king's pardon will discharge the appellee, because an approvement is rather the suit of the king than of the party.

(k) F. Cor. 128.
369.
F. Assize, 421.
Sum. 197. con.
21 Edw. 3. 17.
B. Corone, 38.
F. Corone, 447.
(l) B. Cler. 5.

Sect. 26. FOURTHLY, That whether the appeal of an approver be falsified by the confession^(k) or the vanquishment^(l) of the approver, or verified by the conviction or the vanquishment of the appellee, if the offence be within the benefit of clergy, neither the approver in the first case, nor the appellee in the second, are excluded from it, any more than in the case of an indictment.

11 H. 4. 93.
(m) Sum. 197.
2 Hale, 233.
S. P. C.
3 Inst. 130.
Con. 19 H. 6.
33.
F. Corone.
(n) Vide 19 H.
19.

As to the TENTH POINT, viz. How the approver is to be awarded for making good his appeal.

Sect. 27. It is said, (m) that if an approver convict all the appellees, whether by battle or by verdict, the king *ex merito justitie* ought to pardon him as to his life, and also give him his wages⁽ⁿ⁾ from the time of the appeal to the time of his conviction. But it

it seems (a) that anciently he ought not to be suffered to continue in the kingdom. (c) S. P. C. 142.

And it is recited by 5 Hen. 4. c. 2. "That divers notorious felons, for safeguard of their lives, had become provors, to the intent, in the mean time, by brocage and great gifts, to pursue and have their pardons, and then, after their deliverance, had become more notorious felons than they were before; and thereupon it is enacted, "That if any person pray or pursue, or cause to be prayed or pursued, for any such felon so attainted by his own confession, to have any charter of pardon, the name of him that pursues such charter be put in the same charter, making mention that the same charter is granted at his instance. And if he to whom such charter is granted become a felon in, the party who pursued the charter shall forfeit one hundred pounds." (1)

Vide the case of Margaret Car. Field, Cowper, 331.

(1) The doctrine of approvement has long been out of use, but in analogy to it, the modern practice has been, in cases of felony, where there is likely to be a defect of evidence to convict the guilty parties, to admit an accomplice as a witness on the part of the crown. The accomplice, however, is not entitled as matter of right to a pardon, on the conviction of his guilty associates, but it

has always been usual to recommend him to the crown for pardon on his giving full and fair testimony, but in order to entitle himself to that recommendation he must make a full and ample disclosure of the whole transaction of which he undertakes to give evidence. See Radd's case, Leach's Cases in Crown Law.

CHAP. XXV.

OF INDICTMENT.

AN indictment is an accusation, at the suit of the king, by the oaths of twelve men of the same county wherein the offence was committed, returned to inquire of all offences in general in the county determinable by the court into which they are returned, and finding a bill brought before them to be true.

But when such accusation is found by a grand jury, without any bill brought before them, and (b) afterwards reduced to a formed indictment, it is called a *presentment*. (b) Lamb. 6. 4.

And when it is found by jurors returned to inquire of that particular offence only which is indicted, it is properly called an *inquisition*.

For the better understanding the nature of such proceedings, I shall consider the following particulars:

1. Whether a grand jury may find part of a bill brought before them true, and part false.

2. Whether an indictment be merely the suit of the king.

What matters are indictable.

3. Where a man may be tried at the suit of the king for a capital offence, without any indictment.

5. Whether a man may be arraigned on an indictment while an appeal is depending against him for the same offence.

6. Who

6. Who may and ought to be indictors, and in what manner they ~~are~~ to be returned.

7. Within what place the offences inquired of must ~~arise~~

8. Of the form of the body of an indictment.

9. Of the form of the caption of an indictment.

10. Upon what proof it may be found.

11. In what cases it may be quashed.

12. What may be pleaded to it, and in what manner.

~~As to~~ the FIRST POINT, viz. Whether a grand jury may find part of the bill brought before them true, and part false.

Keilway, 50.
2 Keble, 80.
(a) 2 Roll, 52.
3 Bulst. 206.
1 Roll, 407, 408.
(b) 2 Roll, 52.
(c) 3 Bulst. 206.
1 Roll, 408.
1 Siderfin, 230.
(d) Leon. 287.
(e) Yelv. 99.
1 Siderfin, 414.
Vide B. 1. c. 28.
p. 506.
C. Jac. 151.
Con. 1 Sid. 99.
(f) Yelv. 15.

Sect. 2. It seems to be generally agreed, that they must either find *billu vera*, or *ignoramus*, for the whole; and that if they take upon them to find it specially, or conditionally, or to be true for part only, and not for the rest, the whole is void (1), and the party (a) cannot be tried upon it, but ought to be indicted anew. And accordingly it hath been resolved, that if a grand jury indorse a bill of murder (b), *billu vera se defendendo*; or *billu vera* for manslaughter (c), and not for murder; or if they indorse a bill upon the statute of News, *billu vera* (d), but whether *ista verba prolata fuerunt malitiosè, seditiosè, vel è contra, ignoramus*; or if they indorse an indictment of forcible entry, and forcible detainer, *billu vera* (e) as to the forcible entry, and *ignoramus* as to the forcible detainer; or if they indorse (f) that if the freehold were in J. S. or the possession were in J. S. then they find *billu vera*, the whole is void.

As to the SECOND POINT, viz. Whether an indictment be merely the suit of the king.

(g) 1 R. Abr.
280.
2 R. Abr. 83.
C. Car. 531.
558.
(h) C. Car. 558.
Vide c. 1. s. 3,
4, 6, 7, 8.
(i) 1 R. Abr.
280.
1 Jones, 380.
C. Car. 448.
(k) 1 Keble,
487.

Sect. 3. It is every day's practice, that it is so far esteemed the king's suit, that the party who prosecutes it is a good witness to prove it. Also it seems to be agreed (g), that no damages can be given to the party grieved upon an indictment, or any other criminal prosecution (h), notwithstanding the king, by his commission erecting a new court, expressly direct, that the party shall recover his damages by such a prosecution. Also, where, by statute, damages are given to the party grieved by the offence intended to be redressed, it (i) seems that they ~~cannot~~ be recovered on an indictment grounded on such statute, ~~unless~~ such method of recovering them be expressly given by the statute; but that they ought to be sued for in an action on the statute, in the name of the party grieved. But it seems (k) certain, that the court of king's bench, having the king's privy seal for that purpose, may give to the prosecutor the third part of the fine assessed on a ~~criminal~~

(1) This rule relates only to cases where the grand jury take upon themselves to find part of the same indictment to be true, and part false, and do not either affirm or deny the fact submitted to their enquiry; but where there are two distinct counts, viz. one for a riot, and the other for an assault, and

the grand jury find a true bill as to the assault, and indorse *ignoramus* as to the riot, this finding on the indictment as to the count found, just as if it had been originally that one count only. Rex v. Fieldhouse, Cowper, 325. Trin. 13 Geo. 3. B.R.

criminal prosecution, for any offence whatsoever. Also, it is every day a practice of that court, to induce defendants to make satisfaction to prosecutors for the costs of the prosecution, and also for the damages sustained by the injury whereof the defendants are convicted, by intimating an inclination on that account to mitigate the fine due to the king.

As to the **THIRD POINT**, viz. What matters are indictable.

Sect. 4. There can be no doubt, but that all capital crimes whatsoever, and also all kinds of inferior crimes of a public nature, as misprisions, and all other contempts, all disturbances of the peace, all oppressions, and all other misdemeanors whatsoever of a public evil example against the common law, may be indicted; but no injuries of (a) a private nature, unless they some way concern the king.

Vide 3 Com. D. 199. and 501. (a) 27 Ass. 90. B. Indict. 16. Presentment, 26. Carthew, 277. Strange, 792. 2 Burr. 1127. 3 Burr. 1698. 1706. 1727. 1731. 1 Wils. 301.

Also it seems to be a good general ground, that wherever a statute prohibits a matter of public grievance to the (b) liberties and security of a subject, or commands a matter of public (c) convenience, as the repairing of the common streets of a town, an offender against such statute is punishable, not only at the suit of the party aggrieved, but also by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it.

(b) 2 Inst. 55. 163. C. Jac. 577. 10 Coke, 73. 2 Croke, 577. 1d. Raymond, 347. 711. 991. 10 Mod. 336. 12 Mod. 30. 104. 117. 223. 446. 502. 614.

(c) 1 Mod. 34. 1 Sid. 209. 230. 1 Keble, 809. Fitzg. 47. 65. Strange, 828. Burrow, 828. 2 Sess. Ca. 19. Vide note (3) infra.

Yet if the party offending have been fined to the king in the action brought by the party, as it is said (d) that he may in every action for doing a thing prohibited by statute, it seems questionable, whether he may afterwards be indicted; because that would make him liable to a second fine for the same offence.

(d) 8 Co. 60. 2 Inst. 131.

Also, if a statute extend only to private (e) persons, or if it extend to all persons in general, but chiefly concern disputes of a private nature, as those relating to (f) distresses made by lords on their tenants, it is said that offences against such statute will hardly bear an indictment. (1)

(e) 1 Sid. 209. 1 Mod. 34. denied to be law in 1 Bur. 545. (f) 1 Mod. 71. 288.

1 Levinz, 299. 146. Raymond, 205. 1 Vent. 104. 2 Inst. 131, 132. 2 Keble, 687. 697.

Also, where a statute makes a new offence, which was no way prohibited by the common law, and appoints a particular manner of proceeding against the offender, as by commitment, or action of debt, or information, &c. without mentioning an indictment, it seems

(1) It is not an indictable offence to impede the public intercourse by delivering handbills in the street, 3 Burr. 516; nor to throw down skins into any way which accidentally occasions a person's injury, Strange, 190; nor for killing a hare, 1 Burr. 679; nor for an offence made penal by statute, without it directs to whom the penalty is payable, &c. Strange, 828: nor for acting, unqualified, as a justice of peace, Cro. Jac. 643; nor for entering a yard, erecting a shed, unthatching a house,

or by numbers keeping another out of possession if unattended with violence, or riot, &c. 3 Burr. 1698. 1706. 1727. 1731; nor for selling short measure, &c. 1 Wils. 301. 3 Burr. 1697; nor for excluding commoners by inclosing, C. Eliz. 90; nor for an attempt to defraud, if neither by false tokens or conspiracy, Strange, 793. 866. 6 Mod. 104; nor for secreting another, 1d. Raym. 1368; nor for bringing a bastard child into a parish, Strange, 644. 3 Burr. 1645. 2 Vesey, 450.

(a) *Bond's Case*, 3 Geo. 1. *Show.* 398, 399. 3 *Keb.* 34. 273. *C. Jac.* 643, 644. 3 *Modern*, 79. 4 *Mod.* 144. *Carthow*, 263. *Palmer*, 388. 1 *Sid.* 439. 6 *Mod.* 396. 2 *Roll.* 477, 48. 398. *Sess. Case*, 395. *Ld. Ray.* 682. 991. 10 *Mod.* 537. 12 *Mod.* 104. 446. 502. 634. *Fitz.* 47. 65. *Str.* 62. 679. 828. 1256. (b) *Rex v. Dixon*, *Trin.* 3 Geo. 1. 10 *Mod.* 335. (c) 3 *Modern*, 118. 1 *Siderfin*, 192. seems contrary. (d) *The Norwich Case*, *adj. Pasch.* 3 Geo. 1. 2 *Hale*, 171. *contra*.

As to the FOURTH POINT, *viz.* Where a man may be tried at the suit of the king for a capital offence without any indictment,

I shall endeavour to shew,

1. Where one may be so tried as having been taken with the *mainour*.
2. Where one may be so tried upon a verdict.
3. Where upon an appeal not prosecuted.
4. Whether one may be so tried upon a sheriff's return.

As to the first particular, *viz.* Where one may be so tried as having been taken with the *mainour*.

(e) *Ante*, c. 15. 3. 41. 7 *H.* 4. 43. 26 *Assize*, 32. 1 *Edw.* 3. 13. *S. P. C.* 28, 29. 148. 179. *Summary*, 198. 1 *Hale*, 187. 349. 2 *Hale*, 146. 159. *B. App.* 130. 1 *Assize*, 5. *F. Cor.* 156. 357.

(9) Where new-created offences are only prohibited by the general prohibitory clause of an act of parliament, an indictment will lie. But where there is a prohibitory particular clause, specifying only particular remedies, there such particular remedy must be pursued, *Lord Mansfield*. 1 *Burr.* 345; and by *Mr. Justice Denison*, where an offence, not so at common law, is made an offence by act of parliament, an indictment will lie where there is a substantive prohibitory clause, though there be afterwards a particular provision and a particular remedy given; but it is otherwise where the act is not prohibitory, but only inflicts the forfeiture and specifies the remedy. *Ibid.* The true rule seems to be this: Where the offence was punishable before the statute prescribing a particular method of punishing it, then such particular remedy is cumulative (*Burrow*, 799.), and does not take away the former remedy; but where the statute only enacts, "that the doing an act, not punishable before, shall for the future be punishable in such and such a particular manner," there it is necessary to pursue such particular method, and not the common law method of indictment. *Ld. Mansfield*,

2 *Burrow*, 805. 834; see also *Hartley v. Hooker*, *Cowp.* 524. *Rex v. Balme*, *Cowp.* 650. If a statute enjoin an act to be done, without pointing out any mode of punishment, an indictment will lie for disobeying the injunction of the legislature, *Rex v. Davis*, *Sayer*, 133; and this mode of proceeding in such case is not taken away by a subsequent statute, pointing out a particular mode of punishment for such disobedience, *Dougl.* 441. 446. *Rex v. Boyal*, 2 *Burr.* 832. *Rex v. Balme*, *Cowp.* 648; for the court of king's bench cannot be ousted of its common law jurisdiction without negative words or necessary implication, *Cates v. Knight*, 3 *Term Rep.* 442. Therefore where a new offence is created by statute, and a penalty annexed to it by a separate and substantive clause, the prosecutor is not confined to sue only for the penalty, but he may indict on the prior offence, as for a misdemeanor in disobeying the injunction of the legislature, *Rex v. Harris*, 4 *Term Rep.* 402; and wherever a statute forbids the doing of an act, the doing it wilfully, although without any corrupt motive, is indictable, *Rex v. Sainsbury*, 4 *Term Rep.* 451.

goods so found upon him had been brought into the court with him, he might be tried immediately without any indictment; and this is said to have been the proper method of proceeding in such manors which had the franchise of *infangenthefe*, but seems to be altogether obsolete at this day (3).

As to the second particular, viz. Where one may be so tried upon a verdict.

Sect. 6. It is (a) said, that in an action of trespass in the king's bench, *de muliere abductu cum bonis viri*, if the defendant be found guilty of having carried away the woman and goods with force, and feloniously, or (b) in a common action of trespass in the said court for goods carried away, if it be found that the defendant feloniously stole them, he shall be put to answer the felony without any further accusation; for such a charge by the oath of twelve men, on their inquiry into the merits of a cause in a court which has jurisdiction over the crime, is equivalent to an indictment, and the king being always, in judgment of law, present in court, may take advantage of any matter therein properly disclosed for his benefit. But such a verdict in a court which has (c) no jurisdiction over criminal matters, seems to be of little force, because such court has nothing to do with such matters.

And it seems (d), that even in the king's bench, if on any indictment whatsoever, except only an inquisition of death, found before a coroner on his view, a person not mentioned in it be found guilty of the crime whereof others are indicted, yet such finding shall not serve for an indictment against him, because it was wholly extrajudicial (e). But such finding of others guilty, whether in the king's bench, or other court of criminal jurisdiction, upon an inquisition of death, found before a coroner on view, is of greater force, because the jury acquitting the party so indicted (f), ought to inquire what other person did the fact; because it appears by a record of the highest credit, that a person is killed (g).

Also, if a person be declared against in a proper court, for having been guilty of a misdemeanor, *simul cum A. B. et C.* and thereupon the jury find A. B. and C. guilty, it seems that such verdict will serve for an indictment against them, because it was not wholly extrajudicial.

As to the third particular, viz. Where one may be so tried upon an appeal not prosecuted, the following particulars seem most remarkable.

Sect. 7. FIRST, That an appeal by an innocent person, and an appeal by an (h) approver, are equally favoured in this respect.

Sect. 8. SECONDLY, That regularly where a person is indicted and appealed of the same (i) crime, and the appeal is not prosecuted,

(a) 209.
3.
151.
S. P. C. 94, 95.
F. Corone, 182.
F. Udgary, 46.
13 Assize, 6.
B. Corone, 77.
(b) Sum. 199.
S. P. C. 94.
F. Indict. 31.

(c) S. P. C. 94.
F. Indict. 31.

(d) 13 Ed. 4. 3.
F. Corone, 39.

(e) 13 Ed. 4. 3.

(f) Supra, c. 9.
s. 33.

(g) B. Indict. 13.
28 Assize, 68.

2 Hale, 149.
150.

(h) S. P. C. 147.
148.
Sum. 199, 200.
B. Cor. 3. 16. 49.

(i) Sum. 199.
31 H. 6. 11.
F. Corone, 18.
S. P. C. 107.

(3) It is said that proceedings upon the main-
our are wholly taken away by 25 Eliz. c. 4.

28 Ed. 3. c. 3; and 42 Ed. 3. c. 2. Vide 2
Hale, 149.

(a) 2 Hale, 221. 33 Hen. 6. 1. 4 Ed. 4. 10. B. App. 92. 149. S. P. C. 147. F. Corone, 114. cuted, he shall not (a) be arraigned upon the indictment, but upon the appeal.

(b) S. P. C. 148. Sum. 199. B. App. 67. 130. F. Corone, 156. 198. 357. 384. (c) See c. 23. s. 86, 87, &c. (d) See c. 23. s. 26. 131. (e) S. P. C. 148. B. App. 67. 130. 27 Assize, 7. 1 Assize, 5. F. Corone, 156. 198. 357. (f) S. P. C. 148. Summary, 199, 200. B. Appeal, 67. Sect. 9. THIRDLY, That (b) if an appellant be nonsuit in an appeal by writ, before he hath declared, the appellee cannot be arraigned at the king's suit on the writ of appeal; not only because it contains no certainty of the circumstances of the fact, which is the proper (c) office of the declaration to ascertain; but also because, for what appears to the contrary by the record, the writ might (d) have been purchased by a stranger; and therefore in such case it seems to be in the discretion (e) of the Court, either to dismiss the appellee, or to bail him, till it shall appear whether there will be any other prosecution against him. But if an appellant, by writ, be nonsuit after declaration, or any appellant by bill or approver, be nonsuit, it seems (f) that regularly the appellee shall be arraigned at the king's suit, on the bill or declaration; because they must be as certain as an indictment, and cannot be commenced but in person.

(g) S. P. C. 148. B. Appeal, 118. F. Corone, 369. B. Corone, 35. 9 H. 5. 2. (h) S. P. C. 148. Sum. 200. B. Appeal, 27. F. Corone, 12. (i) Sum. 199. S. P. C. 147. C. Eliz. 460. F. Cor. 25. 381. B. N. Prius, 2. F. Utlog. 47. 147, 148. (k) S. P. C. (l) Dyer, 120. (m) S. P. C. 148. F. Corone, 103. 3 H. 6. 50. 13 Assize, 10. Sum. 200. 47 Edw. 3. 5. B. Corone, 3. 16. 49. 78. B. Appeal, 53. (n) 21 H. 6. 34. S. P. C. 148. Sum. 200. (o) S. P. C. 147. 21 Ed. 3. 17. (p) S. R. C. 147. Sum. 200. Sect. 10. FOURTHLY, It seems to be a settled rule, that where ever an appeal is once well commenced, and afterwards so far determined, without a full acquittal, that neither the same, nor any (g) other plaintiff, can never bring another appeal against the same appellee, he may be arraigned upon the bill or declaration, at the suit of the king; as where an appellant, having a good title to the appeal, makes a release (h) to the appellee, hanging the action, or suffers a (i) nonsuit, or (k) retraxit, or (l) demurs to a good plea or issue tendered by the appellee, which demurrer is adjudged against him; or where such an appellant or approver, (m) confess their appeal to be false (n), unless they make such confession in the field, upon a trial awarded by battle; for such confession amounts to a vanquishment of the appellant or approver, and consequently is a full acquittal of the appellee; after which his life shall not be brought again into danger for the same crime. And this seems to be the only reason why after such a vanquishment, or a verdict in his favour, an appellee shall be discharged, as well against the suit of the king, as that of the party. But it seems, that in all other cases whatsoever, an appellee, in an appeal well commenced, being wholly discharged of the suit of the party, may be arraigned upon the appeal, at the suit of the king, whether such discharge were merely owing to the act of the party, as in the cases above-mentioned, or to the act of the Court; as (o) where an approver is judged to be hanged before he hath perfected his appeal; or (p) partly to the act of law, and partly to the act of the party, as where an appeal by a woman for the death of her first husband, is abated by her marrying a second; or where an appellee is discharged of an appeal, for not (q) having been made a defendant in a former appeal, brought by the same appellant for the very same fact; or whether such discharge is merely owing to the act of God, as (r) where an appellant dies a natural death, while the appeal is depending. It seems indeed to be holden in the Year Book (s) of 4 Hen. 6. as a general rule, that wherever a writ is abated, the declaration depending upon it is determined

determined also, and consequently, that the appellee cannot be arraigned upon it. But to this it may be answered, that in the very same place it is allowed, that after a nonsuit in an appeal, the appellee may be arraigned at the suit of the king; and it seems difficult to give a reason why a writ is not as much determined upon a nonsuit as upon an abatement. To which may be added, that the point adjudged, which was this, that where a writ abates for a misnomer, the defendant shall not be arraigned at the suit of the king, seems plainly to go on this ground, that where a suit is ill-commenced, the king shall not have a greater advantage from it than the party might have had; and therefore the opinion above-mentioned, being also contradicted by the best (a) authorities, seems to be of little weight. (a) S. P. C. 147.

Sect. 11. FIFTHLY. That wherever (b) an appeal abates for an insufficiency of the writ, or is barred for want of a good title in the appellant, or for any other matter which shews it was ill-commenced, the defendant shall not be arraigned upon it at the suit of the king, because it never had a good foundation, and cannot give a greater advantage to the king than to the party himself who sued. And, therefore, it seems to be agreed, that if an appeal be abated for want of form apparent in the writ, as (c) for the omission of the word "*habeas*," or false (d) Latin, or for any other (e) apparent defect; or if it be abated for a defect not apparent of itself, but disclosed by the pleadings of the parties, as for a (f) misnomer, or wrongful addition, or any such like insufficiency; or if it be abated on account of the disability of the appellant, as by the plea of outlawry (g) for felony or trespass; or if it be put without day upon a plea of excommunication of the appellant; or (h) if it be barred by a release made before the commencement of the suit; or by reason that the time for bringing it was elapsed (i) before it was commenced; or because the appellant appears to have never had any right to bring it, as where in an appeal by one as wife, it is found that she was (k) never lawfully married to the deceased; or in an appeal by one as heir (l) to his father, it is found that he hath an elder brother alive by the same father, &c. the appellee shall not be arraigned upon the appeal at the suit of the king, but shall be wholly discharged of it. But where an appeal is put without day on the plea of (m) excommunication, the appellee shall be mainprised from day to day till the plaintiff be absolved. And notwithstanding it seems to be holden generally in some (n) books, that where an appeal is abated for any of the insufficiencies above mentioned, or barred, the appellee shall be set at large, and be discharged, as well against the king as the party, yet (o) surely this must be understood only by such cases wherein it appears that neither any indictment is preferred, nor intended to be preferred by the king, nor any other appeal preferred, nor intended to be preferred by the same or some other party; for otherwise surely it cannot but be intended, that it must be in the discretion of the Court, upon consideration of the circumstances of the case, either to commit or bail the appellee for

(b) B. App. 3.
F. Corone, 68.
B. Corone, 35.
Contra, 41.
Assize, 11.
F. Age, 74.
(c) F. Cor. 121.
S. P. C. 140.
13 Assize, 10.
B. Appeal, 53.
(d) Sum. 200.
(e) B. Cor. 78.
S. P. C. 140.
(f) B. App. 44.
F. Cor. 12. 103.
4 H. 6. 15. 16.
S. P. C. 140.
Sum. 200.
(g) S. P. C. 149.
F. Utlag. 47.
B. Appeal, 57.
118. 146.
17 Assize, 26.
F. Corone, 175.
(h) S. P. C. 140.
F. Corone, 12.
Vide sup. s. 10.
(i) S. P. C. 148.
Sum. 200.
(j) S. P. C. 149.
F. Corone, 3.
(k) S. P. C. 149.
27 Assize, 25.
B. Appeal, 68.
F. Cor. 201. 384.
Con. B. App. 53.
13 Assize, 10.
(m) S. P. C. 149.
13 Ed. 4. B. 3.
3 Assize, 12.
F. Mainpr. 6.
(n) 18 Edw. 3.
55. 15.
B. App. 146.
11 Assize, 27.
17 Assize, 26.
F. Utlag. 47.
F. Corone, 12.
68. 167. 175.
201. 384.
B. Nonability,
357. F. Error,

23. (o) Sum. 200. Vide S. P. C. 149. B. Appeal, 67. 130. F. Corone, 156. 190.
58. 27 Assize, 7. 1 Assize, 3. 32 Assize, 8. 2 H. 7. 5.

(a) F. Cor. 387. for a reasonable time, in order to answer such further prosecution;
S. P. C. 149. or (a) to bind him to his good behaviour for a certain time, &c.

Sect. 12. SIXTHLY, That whatsoever may be pleaded by an appellee either in bar or in abatement of an appeal, while it is carried on at the suit of the party, may (b) as well be pleaded by him, when it is prosecuted at the suit of the king; as (c) that the appellant suing an appeal of death as wife to the deceased, was never married to him, or (d) that she is outlawed, &c. which depends upon the reason taken notice of in the precedent citations, viz. that an appeal shall not give the king a greater advantage than the party himself who sued it.

(e) F. Mon. de
faits, 128.
Sum. 201.
S. P. C. 104.
F. Corone, 25.
11 H. 4. 41.
c. 24. s. 25.
(f) S. P. C. 101.
Sum. 201.
4 Ed. 4. 10.
F. Corone, 25.

Sect. 13. SEVENTHLY, That (e) wherever an appellee is arraigned upon the suit of the king, he may plead the king's pardon, in the same manner as if he had been arraigned upon an indictment; but if an appellee, who by pleading such a pardon discharges himself of an appeal at the suit of the king, be also indicted, it is adviseable (f) to take care at the same time when he is in such manner discharged of the appeal, to have a *cesser* of process entered on the indictment, to prevent the vexation of a causeless prosecution upon it.

As to the fourth particular, viz. Whether one may be tried at the suit of the king for a capital offence, without any indictment upon a sheriff's return.

(g) 2 Hale, 151.
Sum. 201.
2 Inst. 50.
(h) S. P. C. 31.
94. 95.
2 Ed. 3. 1.
1 H. 7. 6.
F. Cor. 48. 149.
B. Corone, 130.
Sup. c. 19. s.
15.
(i) 9 H. 3. c.
29.
25 Ed. 3. de proditionibus, c. 4. 28 Edw. 3. 3. 37 Edw. 3. 18.

Sect. 14. It seems to be generally agreed (g), that neither the sheriff's return of a rescous or an escape, or of any other matter, nor any other record whatsoever, except only an appeal or indictment, or something equivalent thereto, as the verdict of twelve men, finding a man guilty in such manner as is above set forth in the sixth section of this chapter, can, at this day, put a man upon his trial for a capital offence, as being contrary not only to the common law, but to (h) MAGNA CHARTA, and other (i) statutes made in affirmance of it.

As to the FIFTH POINT, viz. Whether a man may be arraigned on an indictment, while an appeal is depending against him for the same offence.

Sect. 15. It seems (k), that it was the common practice before the statute of 3 Hen. 7. c. 1. whether any appeal were depending or not, not to try any man, upon an indictment of murder, before the year and day were passed, lest thereby the suit of the party should be prevented. And if such regard were had to an appeal where none was depending, it cannot be thought but that much (l) greater was had to one actually depending whether before or after the year and day were passed (m). Yet it seems, that the Court was never in any case peremptorily bound to suspend the proceedings on an indictment in respect of an appeal, but might always in discretion, whenever it should seem proper, proceed on an indictment, hanging an appeal. And accordingly we find, that

(k) See Pream.
3 H. 7. 1.
S. P. C. 107.
F. Cor. 44. 82.
7 H. 4. 36.
(l) 44 Ed. 3. 30.
31 H. 6. 11.
21 Ed. 3. 23.
F. Cor. 18. 114.
F. Respon. 36.
(m) 4 Coke, 43.
7 H. 4. 34. 35.
21 H. 6. 28. 29.
F. Conspir. 6.
F. Corone, 82. Qu. F. Cor. 114. B. Appeal, 41.

in many instances (a) in the old Books, where it is holden, that in an appeal by an infant, the parol (b) should demur till his full age. The Court have proceeded to try a man upon an indictment, where an appeal by an infant was depending against him, to prevent the delay, which could not but be occasioned, if the proceedings should be deferred till the appellant should come to full age. Also (c), where a writ of appeal of robbery hath been sued out against a person under an indictment for the same robbery, and ready to be tried, the Court have refused to put off the trial of the indictment in respect of such writ of appeal; because before the appellant hath declared, it doth not judicially appear that both the indictment and appeal are for the very same fact. But if there was no such special reason to induce the Court to proceed upon an indictment while an appeal is depending, it seems to have been the general (d) practice to suspend the proceedings on the indictment till the appeal were determined.

(a) F. Corone, 278, 279.
38 Assize, 8.
41 Assize, 14.
Appeal, 75.
F. Cor. 114.
21 Ed. 3. 23.
B. Appeal, 105.
119.
(b) 13 Ass. 10.
F. Age, 41. 47.
17 Ed. 4. 2.
B. Appeal, 105.
Sup. c. 23. s. 30.
(c) 31 H. 6. 11.
F. Corone, 18.

(d) Dyer, 296.

As to the SIXTH POINT, viz. Who may be, and ought to be INDICTORS, and in what manner they are to be returned.

I shall endeavour to shew;

1. How these matters stand by the common law;
2. How by statute.

As to the first particular, viz. Who ought to be grand jurors, and how returned by common law.

Sect. 16. It seems clear, that by the common law every indictment must be found by twelve (e) men at the least, every (f) one of whom ought to be of the same (g) county, and returned by the sheriff, or other proper officer, without the nomination of any other person whatsoever; and ought also to be a freeman, and a lawful liege subject; and consequently neither under a (h) attainder of any treason or felony, nor a (i) villein, nor alien, nor outlawed, whether for a criminal matter, or, as (k) some say, in a personal action.

(e) C. Eliz. 654.
Vide 2 Bar.
1088.
3 Inst. 30.
2 Inst. 387.
C. Lit. 156.
(f) See Pream.
11 H. 4. 9.
3 Inst. 32, 33,
34.
12 Coke, 99.
3 Inst. 32.

(g) 2 Roll. 82. (h) 3 Inst. 32. (i) Popham, 202. 1 Inst. 156. (k) 2 Hale, 135. 21 H. 6. 30. Vide F. Pro. 208. Qu. C. Car. 134, 147. 1 Jones, 190, 191.

And from hence it seems clear, that if it appear by the caption of an indictment, or otherwise, that it was found by (l) less than twelve, the proceedings upon it will be erroneous (m).

(l) C. Eliz. 654.
(m) 11 H. 4. 41.
B. Cor. 189.
B. Indict. 2.

21 H. 6. 30. Qu. C. Car. 134, 135, 147.

Also it seems, that any one who is under a prosecution for any crime whatsoever, may, by the common law, before he is indicted, challenge any of the persons returned on the Grand Jury, as being outlawed for felony, &c. or villeins, or returned at the instance of a prosecutor, or not returned by the proper officer, &c.

Sect. 17. Also many indictments in inferior (n) courts have been quashed for want of the words "*proborum et legalium hominum*," in the caption of the indictment, setting forth by what person

(n) 1 Kebble, 629.
2 Kebble, 471.
1d. Raymond, 592, 609.
3 Modern, 122.

(o) C. Eliz. 751. C. Jac. 656. Palm. 222. 2 Roll. 400. 2 R. Abr. 82. Popham, 202.

(a) 1 Keble, 679.
 2 Keble, 471.
 1 Evins, 208.
 (b) 2 Keb. 135.
 208.
 1 Keb. 50.
 C. Jac. 41. 1 Sid. 106. 367. Qu. 2 R. Ab. 82.

person it was found (a). But this is said to be no exception to an indictment found in the court of king's bench, or in sessions, or counties palatine, and hath been often (b) overruled as to indictments in other courts; because all men shall be intended to be honest and lawful until the contrary appear.

(c) 11 H. 4. 41.
 F. Indict. 25.
 Corone, 89.
 B. Indict. 2.
 Infra, a. 27.
 (d) S. P. C. 88.
 12 Coke, 99.
 Sum. 202.
 3 Inst. 32, 33.
 34.
 Vide C. Car.
 134, 135.

Sect. 18. It is resolved in the (c) Year Book of 11 Hen. 4. by the advice of all the justices, that one outlawed on an indictment of felony, may plead in avoidance of it, that one of the indictors was outlawed for felony, &c. But it seems to be the general (d) opinion, that this resolution is rather grounded on the statute of 11 Hen. 4. c. 9. which was made in the same term in which this resolution was given, than on the common law; but it appears by the very same Year Book that when this plea was first proposed it was disallowed; from whence, as I suppose, it is collected, that the subsequent resolution was founded on the authority of the said statute, which may be intended to have been made after the plea was disallowed, and before the subsequent resolution by which it was adjudged good. Yet, considering that the said resolution was given in the beginning of Hilary Term, and that the parliament which made the said statute was not holden before the beginning of the same term, and therefore it is not likely that the said statute was so soon made; and also considering, that the said resolution was given by the advice of all the judges, who seem to have been consulted about the validity of the plea above-mentioned at the common law, and takes no manner of notice of any statute, but only of the law in general, it may deserve a question, Whether such plea be not good at the common law?

Vide 2 R. Ab.
 647, 648.
 C. Eliz. 413.
 C. Jac. 672.

Sect. 19. I do not find it any where holden, that none but freeholders ought to be returned on a Grand Jury (4). But how far the law is in this respect altered by the statute, shall be shewn in the twenty-first section.

As to the second particular, viz. How the matters above-mentioned stand by statute.

Sect. 20. It is enacted by the statute of Westminster the Second, c. 28. "That old men above the age of seventy years, persons perpetually sick, or infirm at the time of the summons, or not dwelling in the county, shall not be put in juries or lesser assizes." And the equity thereof, and the reason of the thing, seem plainly so far to extend to grand juries, that if it shall appear, that any of the persons above-mentioned be returned on a grand jury, the court, into which they are returned, will easily excuse their non-appearance. But it seems clear (c), that any such persons being returned on a grand jury, may lawfully serve upon it, if they think fit. Neither do I find that they can have an action on the said statute for being so returned; for the writ (f) in the register grounded on and reciting the statute, mentions

(c) 2 Inst. 448.

(f) Reg. 180.
 F. N. B. 166.
 Vide 2 Inst.
 447, 448.

(4) They ought to be freeholders, but what value it is uncertain. 2 Hale, 156.

mentions the prohibition of it to be, that men above the age of seven years shall not be put in *assisis, juratis, vel recognitionibus aliquibus*, which expressions seem proper for petit juries only; whereas the (a) writ grounded on the statute of *Articuli super Chartas*, set forth at large in the twenty-first section, recites the prohibition thereof to be, that none of the persons in the writ mentioned shall be put in *inquisitionibus, nec juratis*, which expression seems to be of a large extent, and to take in grand as well as petit juries, by which it seems clearly to be implied, that in the judgment of those who formed the said writ, the statute last mentioned is more general than the former.

(a) Regist. 178.
F. N. B. 165.

Sect. 21. It is farther enacted by the above-mentioned statute of Westminster the second, c. 38. "That none shall be put in "assizes or juries, though they ought to be taken in the proper "county, who have less tenements than to the value of twenty "shillings yearly." And it is required by the statute of 21 Edw. 1. commonly called the statute *De his qui ponendi sunt in assisis*, "that they should have tenements to the value of forty shillings "yearly;" Provided, "that before justices in eyre for common "pleas in their eyres, and also in assizes, and juries, which shall "be taken in cities and burghs, and other trading towns, the same "may be done as was accustomed:" And this exception is likewise mentioned in the (b) writ in the Register, which seems to be grounded on both these statutes; by which it appears, that neither by the common law nor by these statutes there was any necessity in proceedings before justices in eyre, &c. that petit jurors should be freeholders; and if so, it seems probable that there is no greater necessity that grand jurors making an inquiry before them should be freeholders; and if a grand juror before such justices need not to be a freeholder, why should there be a greater necessity that a grand juror before other justices should be a freeholder? And it is farther remarkable, that the above-mentioned writ in the Register, which seems to be grounded on these statutes, mentions only persons put in *assisis, juratis, vel recognitionibus aliquibus*: To which may be added, that the (c) several subsequent statutes, which require that none but freeholders and copyholders of lands of such a value shall be returned on juries, expressly extend only to juries returned for the trial of issues, except only the (d) statutes concerning indictments in the sheriff's torn, which require, that every juror finding such indictment shall have twenty shillings yearly of freehold, or twenty-six shillings of copyhold, and also except 3 Hen. 7. c. 1. which requires, that every juror of an inquest, by which justices of peace shall inquire of concealments by other inquests, shall have tenements of the yearly value of forty shillings, and also except 33 Hen. 6. c. 2. which requires, that every indictment in the county palatine of Lancaster, of persons supposed by the same indictment to live in some other county, and also every indictment in any other county, of persons in the same indictment, supposed to live in the said county of Lancaster, shall be taken by such jurors only as have lands to the value of one hundred shillings: all which seems to make it doubtful, whether there be any necessity either by the common law or statute, that a grand jury in any other case must be a freeholder (e).

(b) Regist. 181.
F. N. B. 166.
Vide 2 R. Abr.
647, 648,
C. Eliz. 413.

(c) 2 Hen. 5.
st. 2. c. 3.
35 H. 6. c. 6.
27 Eliz. c. 6.
4 & 5 W. and
M. c. 24.
7 & 8 W. 3. 32.
3 Geo. 2. c. 25.
(d) Vide sup. c.
10. s. 65, 66,
67, 68.

(e) Vide supra,
note to section
nineteen.

Sect. 22. It is enacted by 28 Edw. 1. commonly called the statute of *articuli super chartas*, cap. 9. "That no sheriff, nor bailiff, shall impanel in inquests, nor in juries, or many persons, nor others, nor otherwise than as is ordained by statute: And that they shall put in those inquests and juries, such as be next neighbours, most sufficient and least suspicious."

And the like is enacted almost in the very same words by 42 Edw. 2. c. 11. And it is farther enacted by the said statute of *articuli super chartas*, "That he who doth contrary, and is attainted thereupon, shall pay unto the plaintiff his damages double, and shall be grievously amerced to the king."

2 Inst. 561.

And the said statute of *articuli super chartas* is said by Sir Edward Coke to extend to all suits or proceedings, either criminal or civil, real, personal, or mixed, public or private, assizes or inquests: and surely that part of it which ordains, "that the most sufficient and least suspicious shall be returned on all juries," is so agreeable to common right and natural justice, that it cannot but be thought to be in affirmance of the common law, and equally to extend to grand and petit juries, and consequently if any officer shall be wilfully guilty of an offence against it in the return of any jury, he cannot but be punishable for his contempt, at the suit of the king.

And it is enacted by 23 Edw. 3. c. 6. "That justices of assize shall have commissions sufficient to inquire in their sessions of sheriffs, &c. for putting into panels jurors, suspect and of evil fame."

And it is farther enacted by 34 Edw. 3. c. 4. "That all panels shall be made of the next people, which shall not be suspect nor procured. And that the ministers which do against the same, shall be punished before the justices, who take the inquest, according to the quantity of their trespass, as well against the king as against the party for the quantity of the damage which he hath suffered in such manner;" and both these statutes seem equally to extend to the undue return of grand and petit juries.

But it is observable, that the clause of the above-recited statute of *articuli super chartas*, which ordains, "That the sheriff, &c. shall render double damages," extends only to juries returned between party and party, because it says, that he shall render them to the plaintiff, which is a denomination never given to the king or prosecutor, where the proceeding is by way of indictment; and accordingly we find that the writs in the (a) Register grounded on this statute expressly relate to suits between party and party.

(a) Regist. 178.
F. N. B. 165.

Sect. 23. But the principal statutes relating to the return of grand juries are 11 Hen. 4. c. 9. and 3 Hen. 8. c. 12. the first whereof is as followeth, "Because that now of late inquests were taken at Westminster, of persons named to the justices, without due return of the sheriff, of which persons some were outlawed before the said justices of record, and some fled to sanctuary for treason, and some for felony, there to have refuge, by whom, as well many offenders were indicted, as other lawful liege people

"people of our lord the king, not guilty, by conspiracy, abetment, and false imagination of other persons, for their special advantage and singular profit, against the course of the common law used and accustomed before this time." Our said lord the king, for the greater ease and quietness of his people, willeth and granteth, "That the same indictment so made, with all the dependence thereof, be revoked, annulled, void, and holden for none for ever: And that from henceforth no indictment be made by any such persons, but by inquest of the king's lawful liege people, in the manner as was used in the time of his noble progenitors, returned by the sheriffs, or bailiffs of franchises, without any denomination to the sheriffs, or bailiffs of franchises before made by any person, of the names, which by him should be impanelled, except it be by the officers of the said sheriffs or bailiffs of franchises sworn and known to make the same, and other officers to whom it pertaineth to make the same according to the law of England: and if any indictment be made hereafter in any point to the contrary, that the same indictment be also void, revoked, and for ever holden for none."

In the construction of this statute the following points have been resolved:

Sect. 24. (a) FIRST, That where a person not returned by the sheriff on a grand jury procures his name to be read among those of others who were actually returned, whereupon he is sworn of the grand jury, &c. he may be indicted, either in the King's Bench (b) or before justices of *oyer and terminer*, for his contempt of the statute; and being found guilty, may be fined and imprisoned; and yet the statute doth not expressly provide that any such person shall be any way punished, but only that the indictment shall be void, &c.

Sect. 25. (c) SECONDLY, That indictments of offences not capital, are as much within the statute as indictments of treason or felony; and also indictments before justices of peace as much as indictments before superior justices; but it hath been questioned, whether a coroner's inquest be within the purview of it.

Sect. 26. THIRDLY, That a person arraigned upon any indictment taken contrary to the purview of the statute (c), may plead such matter in avoidance of the indictment, and also plead over to the felony.

Sect. 27. FOURTHLY, That a person outlawed upon any such indictment without a trial, may also shew in avoidance of the outlawry, that the indictment was taken contrary to the purview of the statute, as seems fully to appear from the (f) above-mentioned Year Book of 11 Hen. 4. pl. 41. But if a person, who is tried upon such an indictment, take no such exception before his trial, it may be (g) doubtful whether he may be allowed to take such exception afterwards, because he hath slipped the most proper time for it; except it can be verified by the records of the same court wherein the indictment is depending, as by an outlawry in such court of one of the indictors, &c. in which case it is (h) said, that any one, as *amicus curie*, may inform the court of it.

(a) 11 H. 4.
41. pl. 8.
Sum. 202.
S. P. C. 88.
3 Inst. 33.

Sect. 28. (a) FIFTHLY, That if any one of the grand jury, who find an indictment, be within any one of the exceptions in the statute, he vitiates the whole, though never so many unexceptionable persons joined with him in finding it.

(b) Cro. Car.
134. 147.
1 Jones, 198.
3 Inst. 34.

Sect. 29. SIXTHLY, That if a prisoner, indicted of felony, offer to take any such exception, he shall, upon his prayer, have (b) counsel assigned him for his assistance in it.

(c) C. Car. 147.

Sect. 30. (c) SEVENTHLY, That the court needs not admit of the plea of the outlawry of an indictor, in avoidance of any such indictment, unless he who pleads it have the record ready.

(d) Jones, 198.
C. Car. 134.
147.
Vide sup. s. 16.
2 Hale, 155^o.

Sect. 31. It seems somewhat questionable (d), whether outlawry in a personal action be within the purview of the statute.

For other particulars relating to juries, vide 4 & 5 W. & M. c. 24.
7 & 8 W. 3. c. 32.
3 & 4 Ann. c. 18.
3 Geo. 2. c. 25.
4 Geo. 2. c. 7.
s. 3.

Sect. 32. It is recited by the above-mentioned statute 3 Hen. 8.

c. 12. "That many oppressions had been, by the untrue demeanour of sheriffs and their ministers, done to great numbers of the king's subjects, by means of returning, at sessions holden for the bodies of shires, the names of such persons, as for the singular advantage of the said sheriffs and their ministers would be wilfully forsworn and perjured, by the sinister labour of the said sheriffs and their ministers; by reason whereof of many substantial persons (the king's true subjects) had been wrongfully indicted of divers felonies and other misbehaviour by their covin and falsehood; and also sometimes by labour of the said sheriffs, divers great felonies had been concealed, and not presented by the said persons, by the said sheriffs and their ministers partially returned, to the intent to compel the offenders to make fines, and give rewards to the said sheriffs and their ministers."

N. B. If the inhabitants of a hundred have enjoyed an immemorial exemption from serving upon juries, they are not liable to be summoned under any of the different statutes relative to jurors.
Douglas, 188.

And thereupon it is enacted, "That all panels be returned, which be not at the suit of any party, that shall be made and put in by every sheriff and their ministers afore any justice of gaol-delivery, or justices of peace, whereof one to be of the quorum, in their open sessions, to enquire for the king, shall be reformed by putting to, and taking out of the names of the persons which so be impanelled by every sheriff and their ministers, by the discretion of the same justices, before whom such panels shall be returned. And that the same justice and justices shall command every sheriff, and their ministers in his absence, to put other persons in the same panel by their discretions: and that the same panels so reformed by the said justices be good and lawful. And that if any sheriff, or any their minister, at any time do not return the same panels so reformed, that then every such sheriff and minister so offending shall forfeit for every such offence twenty shillings, &c."

2 Hale, 156^o.
3 Inst. 33.
Con. S. P. C.
88.
4 St. Tr. 183.

Sect. 33. It hath been resolved, that this statute doth not take away the force of the above recited statute of 11 Hen. 4. in any point wherein it doth not expressly vary from it; from whence it follows, that if any of the jurors who find an indictment be outlawed, or returned by a sheriff or bailiff, at the nomination of any other person, the indictment may be avoided in the same manner as before, by force of 11 Hen. 4. except such nomination be made

made by the justices authorized by 3 Hen. 8. to reform that panel.

As to the SEVENTH POINT, viz. Within what place the offences inquired of must arise.

Sect. 34. Notwithstanding it was anciently (a) holden, that if one who had committed a robbery in the county of A. were taken with the *thainour* in the county of B. he might be put to answer in the county of B. (by which I suppose it is intended that he might be put to answer on an indictment found in the county of B.) and then tried by a jury from the county of A. yet it seems to be generally (b) agreed at this day, that by the common law, no grand jurors can indict any offence whatsoever, which doth not arise within the limits of the precincts for which they are returned. And upon this ground it hath been resolved to be a fatal exception to an indictment, that it doth not appear by it that the offence arose within the (c) county, or (d) riding, or (e) other special division, or (f) precinct, for which the jury which found it was returned: and *a fortiori* therefore it must be a (g) good exception, that it expressly appears by the indictment that the offence arose in a county, &c. different from that for which the jury was returned. And it is (h) holden, that even the finding of a collateral matter, expressly alleged in the indictment to have happened in a different county, is void. But (i) some have holden, that if the county be expressed in the margin of an indictment, the vill or vills in which the offence is laid, shall be intended to be in the same county. But the greater (k) number of authorities require a greater certainty, as by expressly alleging such vill or vills to be in the county named in the margin, or *in comitatu predicto*, which seems to be sufficient where but one county is named before; but to be (l) uncertain where a county is named in the body of the indictment different from that in the margin. But it seems from the authority of (m) Baud's case, that if a fact be alleged in B. *justa D. in comitatu E.* being the same county for which the jury is returned, the county is set forth with sufficient certainty, because B. shall be intended to be in the same county with D. Also if one be indicted for a rescous from an arrest in the county of B. it hath been (n) holden, that it is needless to express the county wherein the rescous was done with greater certainty, because it shall be intended to have been in the same county wherein the arrest was (o); *a fortiori* therefore, if a fact be alleged at B. in the parish of C. in the county of D. it cannot but be intended that B. as well as C. is in the county of D.

Sect. 35. But of whatsoever nature an offence indicted may be, whether local or transitory, as seditious words, or battery, &c. it seems to be (p) agreed, that if upon "not guilty" pleaded it shall appear, that it was committed in a county different from that in which the indictment was found, the defendant shall be acquitted, as shall be shewn more at large in the chapter concerning Evidence.

Sect. 36. And therefore at the common law, if a man had died in one county of a stroke received in another, it seems to have been

(a) 26 Ass. 32.
F. Cor. 194.
Sup. 2. 5.
(b) 3 Inst. 49.
Sum. 203.
4 Comm. 303.
(c) 1 Bulst.
203. 205.
C. Eliz. 157.
Dyer, 69.
2 Keble, 302.
(d) C. Jac. 276.
(e) C. Jac. 276.
(f) Keilw. 89.
33.
(g) C. Eliz.
157.
(h) C. Jac. 17.
(i) 1 Bulst. 203.
1 Sid. 312.
Keilwood, 33.
C. Jac. 167.
(k) 1 Sid. 345.
Cro. Eliz. 606.
677. 758. 751.
C. Jac. 96. 276.
2 Keble, 302.
3 P. Will. 459.
(l) C. Eliz.
100. 184. 456.
confirmed in the
case of Rex v.
Fonnet, Easter
Term, 12 Will.
3.
1 Pere Wms.
497.
(m) C. Jac. 41.
(n) C. Jac. 345.
P. Cor. 45.
F. Attach. 1.
F. Ret. de
Visc. 32.
B. Ret. de
Brief, 97.
3 H. 7. 11.
3 H. 7. 17.
10 Edw. 4. 15.
Dyer, 69.
(o) C. Eliz. 108.
Andrews, 162.
(p) Sum. 203.
Kelynge, 15.
2 Hale, 163.

(a) *Vide* R. 1.
c. 43. s. 13.
6 H. 7. 10.
10 H. 7. 28.
F. Indict. 23.
See *Præ*.
3 Edw. 6. 21.
164.

been the more (a) general opinion, that regularly the homicide was indictable in neither of them, because the offence was not complete in either, and no grand jury could inquire of what happened out of their own county.

Con. F. Cor. 373. Indict. 21. 7 H. 7. 8. 10 H. 7. 20. F. Corone, 446. 2 Hale,

But this inconvenience is remedied by 2 and 3 Edw. 6. c. 24. by which it is enacted, "That where any person shall be feloniously stricken or poisoned in one county, and die of the same stroke or poisoning in another county, that then an indictment thereof found by jurors of the county where the death shall happen, whether it shall be found before the coroner, upon the sight of such dead body; or before the justices of peace, or other justices or commissioners, which shall have authority to inquire of such offences, shall be as good and effectual in the law, as if the stroke or poisoning had been committed and done in the same county where the party shall die, or where such indictment shall be so found."

Sect. 37. And it seems by the common law, if a fact done in one county prove a nuisance to another, it may be indicted in (b) either county.

(b) F. Bar. 279.

Anizze, 446.
19 Anizze, 6.

(c) Keil. 160.
4 H. 7. 5.
F. Cor. 62.

Sect. 38. Also by the common law, if one guilty of larceny in one county carry the goods stolen into another, he may be indicted in (c) either, as hath been more fully shewn in the first Book, tit. "Larceny." (1)

Sect.

(1) In the cases of goods sent by land or water-carriage, which passed in their journey through several counties when any article was stolen, and the theft not discovered until the end of the journey, it frequently became difficult, if not impossible, to lay a correct venue. So in many cases when the theft was committed on the boundary of two counties, a like difficulty occurred. To obviate these difficulties the following statutes were passed, first.

By stat. 50 Geo. 3. c. 27. after reciting, "That whereas felonies are frequently committed on board vessels employed in carrying and conveying goods, wares, and merchandize in or upon canals, navigable rivers, and inland navigations, in various parts of the united kingdom, as well by breaking open the casks and packages containing such goods, wares, and merchandize, as in various other ways. And whereas such felonies frequently remain undetected until the arrival of such vessels at the places of their destination, and in consequence of such canals and navigations passing through several counties, forming the boundaries of counties on each side of bank, it can seldom be known within what county such felonies may have been actually committed, and offences frequently escape unpunished from defect of proof that the felony with which they are charged was actually committed within the county in which such offenders may be indicted" for remedy thereof it is enacted, "That from and after the passing of this act, in any indictment for any felony committed on board any barge, boat, tow, or other vessel whatever employed or used in carrying or conveying goods, wares, and merchandize, or in

"which any such goods, wares, or merchandize shall be, in or upon any canal, navigable river or inland navigation, in any part of the united kingdom of Great Britain or Ireland, it shall be sufficient to allege, that such felony was committed within any county or city through any part whereof such boat, barge, tow, or other vessel, shall have passed in the course of the voyage or journey during which such felony shall have been committed, and in cases wherein the sides or banks of any navigable river, canal, or inland navigation, or the centre thereof, shall constitute the boundary of any two counties or cities, it shall be sufficient to allege that such felony was committed in either of the said counties or cities through which, or any part thereof, such boat, barge, tow, or other vessel, shall have passed in the course of the voyage or journey during which such felony shall have been committed, and every such felony shall and may be inquired of, tried, and determined in the county or city within which the same felony shall be so alleged to have been committed, and all and every person and persons who shall be convicted of any such felony so to be inquired of, tried, and determined as aforesaid, shall be subject and liable to all such pains of death, and other pains, penalties, and forfeitures, as such person or persons convicted of such felony would have been subject and liable to in case such felony had been inquired of, tried and determined in the county in which the same felony was actually committed, any law, statute, or usage to the contrary in any thing herein contained shall extend, or be construed

Sect. 39. Also if a man marry two wives, the first in a foreign country, and the second in England, it is (a) holden, that he may be indicted and tried for it in England upon the statute of 1 Jac. 1. c. 11. which makes it felony; because the second marriage alone was criminal, and the first had nothing unlawful in it, and was merely of a transitory nature: but where the second marriage is in a foreign country, it hath been holden, that the party is not triable on the statute above-mentioned; but this seems contrary to the purview of it, as hath been more fully shewn in Vol. 1. chap. 32. p. 686.

Sect. 40. Also if a woman be taken with force in one county, and carried into another, and there married, the offender may be indicted and tried in the second county, upon the statute of 3 Hen. 7. c. 2. against forcible marriage, because the continuance of the force in such county amounts to a forcible taking within the statute. But if an offence in stealing, taking away, withdrawing, or avoiding a record, against the purport of 8 Hen. 6. c. 12. be committed partly in one county and partly in another, so as not to amount to a complete offence within the statute in either,

do extend, to affect the jurisdiction of the High Court of Admiralty, or of any commission for the trial of offences under an act passed in the twenty-eighth year of the reign of King Henry the Eighth, intituled, For Pirates."

By stat. 59 Geo. 3. c. 96. after reciting, "That whereas felonies are frequently committed on stage coaches, stage waggon, stage carts, and other such carriages, employed in carrying and conveying goods, wares, and merchandize, travelling on the several highways in various parts of the united kingdom, as well by breaking open the casks and packages containing such goods, wares, and merchandize, as in various other ways: and whereas such felonies frequently remain undetected until the arrival of such carriages at the place of their destination, and in consequence of such highways leading through several counties, it can seldom be known within what county such felonies may have been actually committed, and offenders frequently escape unpunished from defect of proof that the felony with which they are charged was actually committed within the county in which such offenders may be indicted:" for remedy thereof it is enacted, "That from and after the passing of this act, in any indictment for any felony committed on any stage coach, stage waggon, stage cart, or other carriage whatever, employed or used in carrying or conveying goods, wares, and merchandize, or in which any such goods, wares, or merchandize shall be, in or upon any highway in any part of the united kingdom of Great Britain and Ireland, it shall be sufficient to allege that such felony was committed within any county or city through any part whereof such stage coach, stage waggon, stage cart, or other such carriage, shall have passed in the course of the journey during which such felony shall have been committed; and in all cases where any highway shall form the boundary of any two counties, it shall be sufficient to allege, that such felony committed as aforesaid was committed in either of the said counties through which any part whereof such stage coach, stage

stage cart, or other such carriage shall have passed in the course of the journey during which such felony shall have been committed; and every such felon shall and may be inquired of, tried, and determined in the county or city within which the same felony shall be so alleged to have been committed; and all and every person and persons who shall be convicted of any such felony so to be inquired of, tried, and determined as aforesaid, shall be subject and liable to all such pains of death, and other pains, penalties, and forfeitures as such person or persons convicted of such felony would have been subject and liable to, in case such felony had been inquired of, tried, and determined in the county in which the same felony was actually committed."

Sect. 2. "And whereas felonies are sometimes committed on or so close to the boundaries of two or more counties, that the offenders escape unpunished from the defect of proof, that the felony with which they are charged was actually committed within the county in which such offenders may be indicted;" it is therefore enacted, "That from and after the passing of this act, in any indictment for any felony committed on the boundary or boundaries of two or more counties, or within the distance of five hundred yards of any such boundary or boundaries, it shall be sufficient to allege that such felony was committed in either or any of the said counties; and every such felony shall and may be inquired of, tried, and determined in the county within which the same felony shall be so alleged to have been committed; and all and every person and persons who shall be convicted of any such felony so to be inquired of, tried, and determined as aforesaid, shall be subject and liable to all such pains of death, and other pains, penalties, and forfeitures, as such person or persons so convicted of such felony would have been subject and liable to in case such felony had been inquired of, tried, and determined in the county in which the same felony was actually committed."

either, it is said that the party cannot be indicted for a felony in either, but only for a misprision.

Sect. 41. It is enacted by 26 Hen. 8. c. 6. For the punishment and speedy trials, as well of the counterfeiters of any coin current within this realm, washing, clipping, or minishing of the same, as of all and singular felonies, murders, wilful burning of houses, mauslaughters, robberies, burglaries, rapes, and accessories of the same, and other offences feloniously done within any lordship marcher of Wales—"That the justices of the gaol-delivery, and of the peace, and every of them for the time being in the shire or shires of England, where the king's writ runneth (a), next adjoining to the lordship marcher, or other places in Wales, where such counterfeiting, washing, clipping, or minishing of any coin current within this realm, or murder, shall be committed; or where any other felonies or accessories shall be committed; shall have full power at their sessions and gaol-delivery to inquire by verdict of twelve men of the same shire or shires next adjoining, within England, where the king's writ runneth, there to cause all such counterfeiters, washers, clippers of money, felons, murderers, and accessories to the same, to be indicted according to the laws of this land, in like manner and form as if the same petit treasons, murders, felonies, and accessories to the same, had been done within any of the said shires within the said realm: And also to hear, determine and judge the same, according to the laws of the realm."

(a) Vide Rex v. Amery, Trin 26 Gro 3. Term Rep. 363.

See the case of Party v. Roberts, Cases in Cro. Law.

(b) 1 Mod. 64, 68.
2 Keble, 685.
Car. 247. 331.
1 Hale, 157.

Sect. 42. And it seems generally to have been (b) holden, that the power given by this statute to the justices of gaol-delivery, and of the peace, in the adjoining English counties, in relation to the offences therein mentioned, is not repealed by 34 and 35 Hen. 8. c. 26. which impowers the justices of the grand sessions in Wales to take indictments of such offences.

(c) 1 Lev. 110.

But it hath been (c) resolved, that an acquittal on an indictment at the grand sessions is a good bar of an indictment for the same crime in an English county.

Athine's Case, Stra. 535.

† It has also been resolved, that this statute is not confined to the lordship marchers, but that the judges of assize, in the next adjacent English county, have a concurrent jurisdiction throughout all Wales with the justices of the grand sessions, and that a murder committed in Pembrokeshire, which is an ancient Welsh county, but no part of the lordship marchers, may be tried in the county of Hereford.

See this act more fully set forth and expounded Vol. 1. tit. "Piracy."

Sect. 43. By 28 Hen. 8. c. 15. "Treasons, felonies, and robberies, &c. upon the sea, &c. shall be inquired, &c. in such places in the realm as shall be limited in the king's commission, in like manner as if such offences had been committed on the land."

Qu. Moor, 121.

Sect. 44. It hath been resolved, that this statute extends not to offences done in creeks or ports within the body of a county, because such offences were always cognizable by the common law.

Sect.

Sect. 45. Also it hath been (a) resolved, that the force of this statute, in relation to treasons done upon the sea, is not taken away by 35 Hen. 8. c. 2. more fully set forth in the forty-ninth section.

(a) 3 Inst. 11.
112.
4 Inst. 174.

The statute of 28 H. c. 15. extended—to traitors, pirates, robbers, thieves, murderers and confederates upon the sea. But it was held not to extend to give consuance of any felony not a felony at land; nor to any new (1) created felony by statute since the passing of the stat. of H. 8. In order, therefore, to give the court constituted under that statute a larger jurisdiction, the statute of 39 Geo. 3. c. 37. enacted, “That all and every offence which, after the passing of that act, should be committed on the high seas, out of the body of any county of this realm, should be, and were thereby declared offences of the same nature respectively, and liable to the same punishment as if they had been committed upon the shore, and should be inquired of in the same manner as the offences specified in the statute of H. 8.” and it further enacted, “That where any person was tried for murder and found guilty only of manslaughter, he should have the benefit of clergy, the same as if he had been tried for the same offence committed on shore.” Before the passing of this statute, where any person was tried for murder committed at sea, under a commission on shore, pursuant to the statute of H. 8. and the facts of the case amounted only to manslaughter, as the commissioners jurisdiction only extended to cases of murder, not manslaughter, it was usual to direct an acquittal of the prisoner.

By 1 Geo. 4. c. 90. reciting the 43 Geo. 3. c. 58. for cutting, &c. with intent to murder, &c. and reciting that doubts existed whether the offence contained in that statute, if committed at sea, were triable under a commission pursuant to the stat. of H. 8. and whether persons tried for other felonies under such commission, for other felonies besides murder, were entitled to their clergy, enacts, that the offences enumerated in the 43 Geo. 3. if committed at sea, should be triable by a commission under the stat. H. 8. and that all persons found guilty of clergyable felonies should have the benefit of clergy; the same as they would be entitled to if the fact had been committed on land (2).

Sect. 46. It was made a (b) doubt upon the statute of H. 8. whether one who was an accessory at land to a felony at sea, were triable by the admiral, within the purview of it; but this is settled by 11 and 12 Will. 3. c. 7. made perpetual by 6 Geo. 1. c. 19. which enacts, “that accessaries to piracy before or after,” in such manner as is set forth more at large in that statute, “shall be inquired of, tried, and adjudged according to the said statute of 28 Hen. 8. c. 15.”

(b) Yelv. 134.
135.
13 Co. 51, 52.
Noy, 131.
Con.
Sum. 77.
3 Inst. 112.

† And

(1) At an Admiralty Session after Trinity Term, 1702, held under the stat. of H. 8., Snake and Aires were indicted in two indictments for maliciously burning a ship at sea with intent to defraud the insurers. One indictment was for maliciously burning the ship with intent, &c. which the Civilian said was a felony by their law. The other indictment was founded upon the stat. 22, 23. c. 2, which makes the same offence felony, but does not direct how it is to be tried. After some debate and difference of opinion among the judges, it was

agreed that the prisoners could not be tried on either indictment, as the statute only extended to such offences as would be felony if committed on land, and also that the stat. of H. 8. did not extend to offences made felonies since the passing of that act.

(2) The doubt upon the stat. of 45 Geo. 3. arises from the words of the enacting clause, stating that if any person “in England or Ireland,” shall, &c.

† And by statute of 43 Geo. 3. c. 113. s. 5. it is enacted,
 “ That in all cases in which any person shall procure, direct,
 “ counsel, &c. any other person in committing *any felony whatso-*
 “ *ever*, or shall become an accessory before the fact to *any felony*
 “ *whatsoever*, whether such principal felony be committed within
 “ the body of any county within the realm, or upon the high seas,
 “ or whether such procuring, &c. or otherwise becoming acces-
 “ sary before the fact, shall have been committed within any
 “ county within the body of the realm, or upon the high seas;
 “ then in all such cases the offence of procuring, &c. or becoming
 “ accessory before the fact, shall be tried, &c. in case the principal
 “ felony was committed within the realm, by the course of the
 “ common law, either within such county where the principal felony
 “ shall have been committed, or within the county wherein the of-
 “ fence of procuring, &c. or otherwise becoming accessory before
 “ the fact, shall have been committed or done: And in case the
 “ principal felony shall have been committed upon the high seas,
 “ then the offence of procuring, &c. or becoming accessory before
 “ the fact, shall and may be inquired of in and by such courts, and
 “ in such manner and form as in and by the statute of 28 H. 8. is
 “ appointed and directed.” (1)

Vide also 4 Geo.
 1. c. 11.
 18 Geo. 2. c. 30.
 Book the first,
 “ Piracy.”

† And it is enacted by 8 Geo. 1. c. 24. made perpetual by 2
 Geo. 2. c. 28. “ That all persons who are made accessories by 11
 “ and 12 Will. 3. c. 7. shall be deemed and taken to be principal
 “ pirates, felons, and robbers, and shall be proceeded against ac-
 “ cordingly.”

4 Geo. 1. c. 11.
 Vide 8 Geo. 1.
 c. 24.
 18 Geo. 2. c. 30.

Sect. 47. It is further enacted by the said statute of 11 and 12
 Will. 3. c. 7. “ That all piracies and felonies upon the sea, &c.
 “ may be tried at sea, or upon the land, in his majesty’s planta-
 “ tions,” in such manner as hath been more fully set forth in the
 first Book.

(a) 19 E. 4. 6.
 See the preamble
 of 35 H. 8.
 2.

Sect. 48. It seems to have been a great (a) doubt before the
 making of the statute of 35 Hen. 8. c. 2. in what manner and in
 what place high treason done out of the realm was to be tried.
 For some seem to have holden, that it was triable only upon an
 (b) appeal before the constable and marshal; others, that it might
 be tried upon an indictment, laying the offence in (c) any county
 where the king pleased; and others, that it was triable by way of
 indictment in that county (d) only wherein the offender had lands:
 but surely it (e) cannot reasonably be doubted, but that it was triable
 some way or other; for it cannot be imagined than an offence of
 such dangerous consequence, and expressly within the purview of
 25 Edw. 3. should be wholly dispunishable, as it must have been,
 if it were no way triable.

(b) Vide sup. c.
 4. sect. 9. and
 c. 23. s. 29.
 Dyer, 131.
 (c) 1 Inst. 261.
 (d) Sum. 201.
 3 Inst. 11.
 (e) Con. Dyer,
 131. & Co. 63.

1 Ander. 262.
 2 Hale, 104.
 See also the statute,
 35 Hen. 8.
 c. 23.

Sect. 49. But for a plain remedy, order, and declaration of
 this matter, it is enacted by 35 Hen. 8. c. 2. “ That all manner
 “ of offences, being then already made or declared, or after to be
 “ made or declared, by any of the laws and statutes of this realm,
 “ to be treasons, misprisions of treasons, or concealments of trea-
 “ sons, and done, perpetrated, or committed by any person or
 “ persons, out of this realm of England, shall be from thenceforth
 “ inquired

(1) This act passed in consequence of the decision in the case of *Eastby and Mac Farlane*. Vide
 ante, vol. 1. p. 346.

"inquired of, heard and determined before the king's justices of his bench, for pleas to be holden before himself, by good and lawful men of the same shire where the said bench shall sit and be kept, or else before such commissioners and in such shire of the realm as shall be assigned by the king's majesty's commission, and by lawful men of the same shire, in like manner and form to all intents and purposes, as if such treasons, misprisions of treasons, or concealments of treasons, had been done, perpetrated, and committed within the same shire where they shall be so inquired of, heard and determined, as is aforesaid."

In the construction of this statute the following points have been resolved.

Sect. 50. FIRST, That if the court of king's bench, or commissioners appointed in pursuance of the statute, after having taken an indictment of a foreign treason, remove into a different county from that in which the indictment was found, the (a) trial shall be by jurors returned from the first county. And this is most agreeable to the general course of the common law; which (b) requires, that indictments shall be tried by jurors of the same county in which they were found.

(a) Sum. 204.
3 Inst. 34.
(b) S. P. C. 90.
Vide Dyer, 286.

Sect. 51. SECONDLY, That the commissioners, and county for the trial of such treasons, are (c) sufficiently assigned by the king in pursuance of this statute, by his either writing his name to the commission that appoints them, or signing the warrant to the lord keeper for the commission.

(c) Sum. 16.
205.
3 Inst. 11.
The king cannot by his charter give judges a power to try in
Douglas, 796.

one county offences committed in another, Lord Mansfield.

Sect. 52. THIRDLY, That a treason done by an (d) Irishman in Ireland is triable in England according to the purview of this statute; for Ireland being out of the realm of England, a treason committed in it is certainly within the letter of the act; and nothing within the letter of a statute made for enlarging the jurisdiction, and supplying the defects of the common law, shall easily be construed out of the meaning of it. And therefore it seems reasonable, that any offence which by 25 Edw. 3. or any other subsequent statute, either expressly extending to, or (e) received in Ireland, is equally treason in Ireland and England, may be tried here by virtue of this statute.

(d) 3 Inst. 11.
1 And. 262.
263.
Sum. 16. 205.
1 Hale, 155.
11 Coke, 63.
3 Keb. 560, 566.
Warner's Case.
(e) 1 And. 203.
1 Sider. 357.

But if an offence be made treason by an Irish statute which is not treason in England, I see not how it can be tried here; since being neither made nor declared to be treason by any law or statute of this realm, it is not within the description of the offences provided for by 35 Hen. 8. To which may be added, that offences beyond sea, to be tried here by virtue of that statute, are to be inquired of and determined in like manner as if they had been committed in such shire wherein they shall be inquired of and determined; but if an offence, which is treason in Ireland and not in England, had been committed in any English county, it is manifest that it could not be punished as treason.

Also it hath been (f) resolved, that no treason committed in Ireland by an Irish peer, is triable in England, because he is entitled to a trial by his peers, which cannot be had (1).

(f) Dyer, 366.

(1) Resolved by three judges in Dyer, 366. Vide also O'Rourke's Case, 1 Anderson, 262. But in the case of *Ld. Macguire*, 1 St. Tr. 928. 1 Hale, 155, 284. the resolution in Dyer is declared not to

be law, and it was ruled that an Irish peer might be tried by a common jury in England for a treason committed in Ireland. See *quære*.

(a) 11 Coke, 63.
Co. Lit. 261.
1 Hale, 284.
Summary, 205.
3 Inst. 24.
1 And. 262.
S. P. C. 90.
Dyer, 131. 286.
290. 300.
2 Hale, 164.

Sect. 53. FOURTHLY, That this statute is not (a) repealed, by 1 and 2 Philip and Mary, c. 10. which enacts, "That all trials hereafter to be had, awarded or made, for any treason, shall be had and used according to the common laws of the realm, and not otherwise." For it is the manifest purport of this statute to restore the ancient course of the common law as to the trial of treasons, in which great innovations had been made by statutes in the reigns of king Henry the eighth, and Edward the sixth; but it cannot be thought agreeable to the intention of it to abrogate any statute, which in a doubtful case settled and confirmed the jurisdiction of the common law, and gave a method of trial as agreeable as possible to its usual and ordinary manner of proceeding.

Vide Book the
first, "Mur-
ders." See
Rex v. Farrell,
1 Bl. Rep. 459.

In cases of homicide where the stroke and death was one within the kingdom and one without, it is enacted by 2 Geo. 2. c. 21. "That where death shall happen in England from any cause feloniously given out of England; or where the felonious cause shall be given in England and the death ensue in any place out of England, an indictment thereof found by the jurors of the county in which either the death or the cause of the death shall respectively happen, shall be as good and effectual in law, as well against the principals and accessaries, as if the offence had been completed in the same county where such indictment shall be found, &c."

(b) Keil. 67.
Dyer, 38.

Sect. 54. It was a great doubt at the common law, (b) Whether an accessory in one county to a felony in another, were indictable in either. But this is remedied by 2 and 3 Edw. 6. c. 24. by which it is enacted, "That such an accessory may be indicted and tried in the same county, wherein he was accessory."—But intending more fully to treat of this matter in the chapter concerning the Arraignment of the Principal and Accessary, I shall refer the reader thither for the further consideration of it.

By stat. 11 and 12 W. 3. c. 12. in order to bring to condign punishment officers of government who have conducted themselves oppressively in the colonies, it is enacted, "That if any governor, lieutenant-governor, deputy-governor, or commander-in-chief of any plantation or colony within his majesty's dominions beyond the sea, shall be guilty of oppressing any of his majesty's subjects beyond the seas, within their respective governments or commands, or shall be guilty of any other crime or offence contrary to the laws of this realm, or in force within their respective governments or commands, such oppressions, crimes and offences shall be inquired of, heard and determined, in his majesty's court of king's bench here in England, or before such commission and in such county of this realm, as shall be assigned by his majesty's commission, and by good and lawful men of the same county; and that such punishments shall be inflicted on such offenders as are usually inflicted for offences of like nature committed in England."

And by stat. 42 Geo. 3. c. 85. "All persons in the military or civil employment of his majesty out of Great Britain, who shall commit any crime, misdemeanor, or offence, in the execution of or under colour of their office, may be prosecuted in the court
" of

" of king's bench in England, and the venue may be laid in the county of Middlesex."

By stat. 26 Geo. 3. c. 57. East India delinquents may be tried in England according to the provisions of that act (1).

As to the EIGHTH GENERAL POINT, viz. What ought to be the form of the body of an indictment.

I shall endeavour to shew,

I. What ought to be the form of the body of an indictment at common law.

II. What of an indictment upon a statute.

As to the first of these particulars I shall endeavour to shew,

1. How the body of an indictment at common law ought to set forth the substance and manner of the fact.

2. How the persons mentioned or referred to in it.

3. How the thing wherein the offence was committed.

4. How the circumstances of time and place.

5. Where it may be vitiated by false, or improper Latin, or the use of English instead of Latin.

6. Where the offence indicted may be laid jointly and where severally, and where both jointly and severally, and where the offences of several persons may be laid in one indictment.

7. Whether the words *vi et armis* be in any case necessary.

8. Whether it be necessary to lay the offence *contra pacem*.

9. Whether it be necessary to lay it *contra coronam et dignitatem regis*.

10. Whether it be necessary to lay it *in contemptum regis*.

11. Whether it be necessary to lay it *illicitè*.

12. Whether a defect in any of these particulars be amendable.

As to the FIRST POINT, viz. How the body of an indictment at common law ought to set forth the substance and manner of the fact, I shall endeavour to shew,

1. In what manner it ought to set them forth in relation to the offence of the principal.

2. In

(1) There are many other instances in which the rule of the common law, that every offence should be tried by a jury of the visne where it was committed, has been altered by statute; many of which cases have been noticed in the preceding volume under the respective offences. All the offences comprised in the Black Act, 9 Geo. 1. c. 22. vol. 1. p. 179. N. may be tried in any county. By the 1 Geo. 4. c. 90. s. 11. all the offences mentioned in the 43 Geo. 3. c. 58. stabbing and cutting with intent, &c. if committed on the high seas, may be enquired of as murders are directed to be enquired of by stat. 28 H. 8. c. 13. In in-

dictments for assaults upon officers of excise or customs, in execution of their duty, the venue may be alleged in any county, 9 Geo. 2. c. 55. s. 26. In extortion the venue may be laid in any county, 31 Eliz. c. 5. s. 4. For bigamy, the offender may be indicted either where the fact of the second marriage took place or where he was apprehended, 1 Jac. 1. c. 11. s. —. In indictments for plundering ships wrecked, the venue may be tried in the adjoining county, 26 Geo. 2. c. 19. So in many of the revenue acts, the venue may be laid in a different county from that where the fact was committed.

In what manner in relation to the offence of the accessory.

2 Hale, 169.
172. 184. 187.

As to the first of these particulars, viz. in what manner the body of an indictment at common law ought to set forth the substance and manner of the fact in relation to the offence of the principal; I shall observe,

Sect. 55. FIRST, That no periphrasis or circumlocution whatsoever will supply those words of art which the law hath appropriated for the description of the offence, as (a) murdravit, in an indictment of murder; (b) cepit, in an indictment of larceny; (c) mayhemavit, in an indictment of maim; (d) felonice, in an indictment of any felony whatever; (e) burglariter, or burgulariter, or else burgulariter, in an indictment of burglary; (f) proditoriè, in any indictment of treason; (g) contra ligeantiam suam debitum, in an indictment of treason against the king's person (h).

(a) C. 23. s. 77. Dyer, 304. B. Indict. 2. 8. Cro. Eliz. 920. (b) F. Cor. 119. Indict. 2. 8. B. Corone, 76. 12 Assize, 32. 2 Edw. 3. 1. C. 23. sect. 77. (c) C. 23. s. 77. (d) 2 Ed. 3. 1. 3. 2 Ed. 3. 18. 1. F. Indict. 3. C. 23. s. 77. B. Indict. 36. B. Appeal, 48. 18 Ed. 4. 10. C. Eliz. 193. 4 Coke, 41. 5 Coke, 121. An indictment of a scold must be laid *ad commune nocementum*. Strange, 1246. See 9 Coke, 69. (e) Dalison, 22. Con. 4 Co. 39. Summary, 207. 5 Coke, 121. Cro. Eliz. 920. (f) Summary, 11. 3 Inst. 15. F. Corone, 55. S. P. C. 3. 3 H. 7. 10. Carthew, 319. (g) 3 Lev. 396. Calvin's Case, 5, 6. 10 Skinner, 442. Carthew, 319. (h) *Fabricavit* denotes forgery, Strange, 19.

Sect. 56. SECONDLY, That in an indictment, as well as in an (i) C. 23. s. 79. (j) appeal of rape, the fact seems to be sufficiently ascertained by the words felonice rapuit, without adding carnaliter cognovit, or first setting forth the special manner of the terror or violence, and then concluding that the defendant sic felonice rapuit, &c. Also it seems that the like general manner of setting forth the offence, which is sufficient in an (k) appeal of larceny, will also be sufficient in an indictment.

Sect. 57. THIRDLY, That in other cases it is (l) generally a good rule in indictments as well as appeals, that the special manner of the whole fact ought to be set forth with such certainty, that it may judicially appear to the court, that the indictors have not gone upon insufficient premises.

And upon this ground it seems to be agreed, that an indictment finding that a person hath feloniously broken prison without shewing the cause of his imprisonment, &c. by which it may appear that it was of such a nature that the breaking might amount to felony, is (m) insufficient.

Also (n) indictments against persons for refusing to be sworn constables, after they had been *legitimo modo electi*, have been quashed for not shewing the manner of the election, that it might appear to have been such as obliged the defendants to have undertaken the office.

(m) B. Indict. 7. 9 Ed. 4. 26. Strange, 1226. 1268. (n) Aleyn, 78. 79. Strange, 920. 1146. 1 Modern, 84. 5 Modern, 96. 129. Comb. 416. Sup. t. 10. s. 46. Douglas, 534 538. And see *Rev v. Burder*. Trinity Term, 32 Geo. 3. that an indictment that the defendant was appointed "overseer of the poor of the parish of A." and that he afterwards refused "to take the said office of overseer of the parish to which he was so appointed," is good, 4 Term Rep. 778.

(o) C. Eliz. 583. Also it hath been (o) adjudged, that an indictment of burglary is insufficient without the word *noctanter*.

(p) 2 Roll. 345. Palm. 368. 374. Also it seems to be (p) agreed, that an indictment charging a man

man with a nuisance in respect of a fact which is lawful in itself, as the erecting of an inn, &c. and only becomes unlawful from some particular circumstances, is insufficient, unless it set forth some circumstances which make it unlawful. But it is said that this is needless where the thing indicted is unlawful in its own nature, as the keeping of a bawdy-house, &c.

Also it hath been (a) adjudged, that an indictment for traitorously coining alchemy like to the king's money, without shewing what money, is insufficient; of which this seems to be the plainest reason, that it appears not whether it were made like to the king's gold or silver coin, or only like to that in brass or copper, &c. and if it were made like to that of the latter kind only, it (b) seems that the offence could not amount to treason.

(a) F. Indict. 10.
S. P. C. 93.
Summary, 206.
Vide 2 Roll. 12.

(b) B. 1. c. 2.
s. 57.

Also it (c) seems, that an indictment of perjury, not shewing in what manner and in what court the false oath was taken, is insufficient, because for what appears it might have been extrajudicial, &c.

(c) C. 131a. 137.
Rex v. Aylt,
D. and E. 60.

Also it seems clear, that it is necessary, both in indictments and (d) appeals of mayhem and murder, to set forth particularly in what manner the hurt was given, and that an omission thereof is not holpen by a general conclusion, that the defendant *sic felonice mayhemavit* or *murdravit*, &c. But having already shewn in the chapter of Appeals, with what certainty the count in an appeal of death must set forth the special manner of the fact, as by shewing in what (e) part of the body the wound was given, and the (f) length and breadth of such wound, and (g) that the party died of it; and with what (h) weapon it was given; and that the word (i) *percussit* cannot safely be omitted where the truth of the fact will bear it, I shall refer the reader to the said chapter of Appeals, for the learning relating to these points.

(d) Sup. c. 23.
s. 79.
2 Lev. 140, 141.
Salkeld, 377.
Farresly, 16.
Kelyng, 174.
(e) Sup. c. 23.
sect. 80.
(f) Sup. c. 23.
sect. 81.
(g) Sup. c. 23.
sect. 83.
(h) Sup. c. 23.
sect. 82.
(i) 1 Sid. 91.
Vide Rex v.
Roll, Str. 999.
Davy v. Baker,
4 Burrow, 2471.

It hath been adjudged, that an indictment of extortion charging J. S. with the taking of fifty shillings as bailiff of a hundred, *colore officii*, without shewing for what he took it, is good at least after verdict, for perhaps he might claim it generally as being due to him as bailiff, in which case the taking could not be otherwise expressed. But this seems to be a special case (1).

Sect. 58. FOURTHLY, That an indictment charging a man disjunctively is void. As where it finds that A. *murdravit B. vel murdrari causavit*; or that A. *verberavit B. vel verberari causavit*; or that A. (k) *fabricavit talem cartam, vel fabricari causavit*; for here are distinct offences, and it appears not of which of them the indictors have accused the defendant.

(k) 5 Mod. 137,
138.
1 Salkeld, 342.
371.
Rex v. Flint,
B. R. 11. 370.

Sect.

Rex v.
Stoughton,
2 Sess. Cas. 25.

Strange, 900. Barnard, K. B. 347.

(1) An indictment for procuring, &c. must shew the false tokens, Strange, 1127. Vide 21 Hen. 8. c. 1. Also an indictment for words spoken of a justice in the execution of his office, must set out the words, 3 Com. Dig. 506. Also if it be for obstructing him, it must shew by what act it was done, Rex v. How, Strange, 699. So an indictment

that the defendant took a servant without a testimonial must shew a former service, Skinner, 343. So for a contempt in not executing a warrant it ought to shew the nature of the warrant, 1 Ventris, 305. Sed vide Ld. Raym. 1192. So for a forcible entry there ought to be a positive charge of a disseisin, Ld. Raym. 610.

- (a) 1 Lev. 203.
1 Keble, 278.
3 Hale, 189.
Shower, 389.
390.

Sect. 59. FIFTHLY, That (a) regularly every indictment must either charge a man with some particular offence, or else with several of such offences, particularly and certainly expressed, and not with being an offender in general. For no one can well know what defence to make to a charge so uncertain, or to plead it either in bar or abatement of a subsequent prosecution; neither can it appear that the facts given in evidence against a defendant on such a general accusation, are the same of which the indictors have accused him; neither can it judicially appear to the court, what punishment is proper for an offence so loosely expressed.

- (b) 1 Roll. 79.
2 R. Ab. 79.
Rex v. How,
Strange, 699.
3 Com. Dig.
506.

- (c) 2 R. A. 79.
1 Mod. 71.
Rex v. Taylor,
Strange, 849.
Rex v. Cooper,
Strange, 1346.
Barn. K. B.
229.

- (d) 2 R. Ab. 79.
(e) 1 Mod. 71.
288.

- 1 Lev. 299.
Raymond, 205.
1 Ventris, 104.

- (f) 2 R. A. 79.
(g) 6 Mod. 311.
(h) Moor, 302.

- (i) F. Act. sur
le Stat. 26.
29 Assize, 45.
Moor, 302.

- (k) 2 R. Ab. 79. Moor, 302. 22 Assize, 73. (l) 22 Assize, 73. (m) 29 Ass. 45. (n) 29 Ass. 45.

- (o) 22 Ass. 45.
(p) B. Indict.
12.

- (q) 2 R. Ab. 79.

It is holden indeed in a note of Fitzherbert's Abridgment, that an indictment for confederacy in general is good, but this is made a *quare* by the reporter of the (o) Year Book, from which the said note in Fitzherbert is taken, and is denied to be law, both by (p) Brook and (q) Rolle; nor do I any where find the least reason offered to distinguish this from the other cases above-mentioned.

- (r) 3 Inst. 41.

- (s) 3 Inst. 41.
(t) 21 Coke, 29.
Summary, 206.
1 Hale, 371.
2 Hale, 335.

Also it is holden by Sir Edward (r) Coke, that the ancient form of indictments, charging men with having, as heretics and traitors, and infestors of the highways, conspired and confederated, &c. to destroy the catholic faith, and having daily published false and seditious writings, &c. were utterly insufficient, and yet such indictments seem to have been (s) frequent; as were also indictments charging men in general, as *insidiatores viarum, et depopulatores agrorum*, which (t) words took the benefit

(i) Or *quis male et negligenter se gerit* of the office of a constable is too general, Strange, 2; or for deceiving one D. of several lottery orders, viz. *descriptio bonis et cattis* of D. *decipiant et defraudant*, Strange, 2; or of a clerk of a market that

he did cause his agents illegally to receive of several persons several sums, &c. Rex v. Robe, Strange, 999. So in a declaration "that the defendant did receive a gift or reward," without specifying it, is too general, Dary v. Baker, Burr. 5471.

benefit of clergy from the persons indicted, before the statute of 4 Hen. 4. c. 2. by which it is enacted, "That these words shall no more be put into indictments, nor if they be, shall have such effect as to take from the persons indicted the benefit of clergy." (a) And this statute in this respect seems to be in affirmance of the common law, which seems generally to disallow of such uncertain indictments, as appears from the reasons and authorities above set forth.

Yet it hath been adjudged, that a man may be generally indicted as a *common barrator* against the (b) form of the statute, and (c) against the peace, without shewing any of the particular facts in the indictment, by which he appears to have been so; for barratry is an offence (d) of a complicated nature, consisting in the repetition of divers acts in disturbance of the common peace, all of which it would be too prolix to enumerate in the indictment; and therefore (e) experience hath settled it to be sufficient to charge a man generally as a *common barrator* (which is a (f) word of art appropriated to this purpose), and before the trial to give the defendant a (g) note of the particular matters which you intend to prove against him.

Also it is (h) holden, that there is no need to name any particular place where the defendant was a barrator, because he shall be supposed to have been guilty in divers places, and the *venire* is most proper from the body of the county. Also it is said, that there is no need in the conclusion of such an indictment to lay the offence *ad nocumentum omnium ligcorum*, &c. but that (i) *diversorum* is sufficient in such an indictment as well as in an indictment of a common scold, &c. because it appears from the nature of the thing, that it could not but be a common nuisance (l).

Also it seems to be (k) agreed, that an indictment against one as a common scold, is good without setting out the particulars, for the same reasons that such indictment of barratry is good.

Higginson, 2 Burr. 1233. and Lord Hardwicke's observations upon this subject in the case of Clarke v. Periam, 2 Atkins, 340.

Sect. 60. SIXTHLY. That the charge must be laid positively, and (l) not by way of recital, as with a *quod cum*, &c. and that the want of a direct allegation of any thing material in the description of the substance, nature, or manner of the crime, (m) cannot be supplied by any intendment or implication whatsoever (n). And upon this ground it seems to be (o) generally holden, that an indictment of death having the words *felonice murdravit*, &c. cannot amount to an indictment of murder, without the words *ex malitia prægogitatâ*; and yet by the word *murdravit* it expressly charges the party with murder, and it is impossible that there could be a murder, and no malice prepense.

4 Coke, 41.

Also it seems to be generally agreed, that no indictment of death can be good without an express allegation, that the deceased

(a) Vide 3 Inst. 41.

Lamb. b. 4. c. 5. 404.

(b) V. 1. p. 476. s. 10.

(c) C. Jac. 597.

1 R. Abr. 82.

(d) B. 1. tit.

Barratry.

8 Coke, 36, 37.

(e) 2 R. Abr. 79.

C. Jac. 597.

2 Keble, 409.

(f) B. 1. tit.

Barratry, s. 10.

2 Levins, 908.

Strange, 900.

1246.

B. R. II. 370.

(g) B. 1. tit.

Barratry, s. 13.

(h) Vide B. 1.

tit. Barratry,

s. 11.

(i) 2 Keble, 409.

See B. 1. tit.

Nuisance, s. 5.

(k) 6 Mod. 311.

B. 1. tit. Nul-

sance, s. 5.

Strange, 1246.

See also Rex v.

case of Clarke

(l) Salk. 371.

3 Modern, 53.

Ld. Raym. 1363.

1 Burrow, 400.

(m) S. P. C. 96.

C. Jac. 20.

4 Coke, 42.

5 Coke, 120.

(n) 1 Vent. 268.

337.

(o) Dyer, 90.

Summary, 231.

2 Hale, 187.

Vide 2 Lev.

140, 141.

Con. Dyer, 68.

See Lad's Case,

Cases in Crown

Law, 91.

(1) An indictment against a scold must be laid *ad commune nocumentum*. Rex v. Cooper, Strange, 1246.

ceased both received the hurt which is laid as the cause of his death, and also that he died of the hurt so received; and that the want thereof cannot be made good by any implication whatsoever, as hath been more fully shewn c. 23. Sect. 82, 83.

(a) Keil. 87.

Vide sup. c. 18.
s. 12.

Also it hath (a) been adjudged, that an indictment against J. S. for feloniously breaking such a prison, and commanding J. N. who was therein imprisoned for felony, to escape, is not a good indictment for a felonious breaking, without expressly shewing that J. S. did escape, and yet the breaking is expressly laid to be felonious, and it is impossible it could be so unless the party did escape. But it will be needless to enumerate any more instances of this kind, which are so very frequent, that there is scarce any case which mentions exceptions taken to indictments, without having some or other grounded on this rule, "That in an indictment nothing material shall be taken by intendment or implication."

(b) 4 Coke, 41.

Yet the law will not admit of too great a nicety of this kind; for it hath been adjudged, that if in the first part of an indictment of death, the assault be laid with malice prepense, &c. there is no (b) need to repeat it in the following clause, which shews the giving of the wound, being joined with a copulative to the precedent sentence, and laid at the same time and place with the assault.

(c) C. Jac. 473.

Also it hath been (c) adjudged, that where an indictment sets forth, that J. S. was lawfully arrested by virtue of a plaint before such a sheriff, &c. it shall be intended that there was a good warrant.

(d) 9 Coke, 67.

3 Coke, 120.

Vide also

1 Burr. 335.

Also it hath been (d) adjudged, that where a warrant is alleged, authorising the arrest of J. S. within the liberties of London, and the indictment lays the execution of it in such a parish and ward in London, without expressly laying the parish and ward within the liberties of London, yet the indictment is good; for the Court will not admit of such a strained exception, that a parish in London may be out of the liberties of London.

(e) C. Jac. 610.

2 Modern, 128.

Moor, 606.

2 Levinz, 229.

2 Roll. 226.

1st Raym. 378.

1 Keble, 857.

Rex v. Royal,

Burrow, 857.

(f) V. 1. p. 504.

C. Jac. 610.

2 Roll. 226.

2 Levinz, 229.

2 Mod. 129.

Vide Rex v.

Bootic, Burrow,

864.

Rex v. Ham-

mond,

Strange, 44.

Sect. 61. Also it hath been (e) adjudged, that where an indictment finds that J. S. *exists* of such or such a degree or trade, &c. as brings him within the purview of the law whereon the indictment is founded, committed such a fact, it shall be intended that he was of such degree, &c. at the time of the fact, without any express allegation to that purpose, because that is the most natural construction of the participle *exists*, going before the verb to which it is the nominative case. (f) Yet where an indictment of forcible entry finds that A. disseised B. of such land *exists liberum tenementum* of B. it seems agreed, that the indictment is insufficient, because it stands indifferent, according to the common rules of construction, whether the land were the freehold of B. at the time of the *disseisin*, or at the time of the finding of the indictment, the word "*exists*" not being the nominative case to the verb, but applied to the thing which was the subject of the action. But I cannot find any certain general rule, whereby it may be known in what cases an exception of this kind shall be taken

taken to be so over-nice, that the Court will not regard it. All therefore that I shall add on this head is this, that as on the one hand the law will not suffer a man to be condemned of any crime, whereof the jury have not expressly found him guilty, by any argument or implication from what they have so found; so on the other hand it will not suffer a criminal to escape on so trifling an exception, which it would be absurd and ridiculous to take notice of; for *nimia subtilitas in jure reprobatur*. But the judgment hereof cannot but be in a great measure left to the discretion of the judges, who from the circumstances of each particular case, the comparison of precedents, and the plain reason of the thing, seem always to have endeavoured to go within these rules as nearly as possible.

Sect. 62. SEVENTHLY, That it is a certain rule, that where one material part of an indictment is repugnant to another, the whole is void; for the law will not admit of such nonsense and absurdities in legal proceedings, which, if suffered, would soon introduce barbarism and confusion. Also it takes off much from the credit of an indictment that those by whom it is found have contradicted themselves.

And upon this ground it hath been adjudged, that if an indictment (a) charge the defendant with having forged a certain writing by which A. was bound to B. which is impossible, if the writing were forged; or if an indictment of forcible entry set forth, that the defendant disseised J. S. of lands, wherein it appears by the indictment itself that he had no freehold whereof he could be disseised; or that the defendant entered peaceably on J. S. and then and there forcibly disseised him; or that he disseised him of land then being and ever since continuing to be his freehold; (b) every such indictment is void, for its manifest inconsistency and repugnancy. (a) 3 Mod. 104. 2 Show. 460.

And upon the like reason it hath been adjudged, that an indictment of death, laying the stroke at A. and the death at B.: or the stroke on the first of May, and the death on the tenth; and then concluding that the defendant in such manner murdered the party at A. aforesaid, or on the first of May aforesaid, is insufficient for the repugnancy, as hath been more fully shewn in the (c) chapter of Appeals; because it supposes the murder to have been committed at a place in the first case, and on the day in the second, in which it appears, by the indictment itself, that the party was not killed but only wounded. (c) Sup. c. 23. s. 88. and 89. 2 Hale, 188.

Also it hath been (d) adjudged, that an indictment for selling iron with false weights and measures, is void, not only because it is absurd to suppose that iron could be sold by measure, but also because it is repugnant and inconsistent that it should be so sold at the same time when it was sold by weight. (d) 2 R. Ab. 18.

Also if an indictment at a sessions holden the thirteenth of January, in the thirteenth year of Charles the Second, find that the defendant has been absent from church six months from the first of January, in the thirteenth year of Charles the Second, it is (e) agreed, that it is void for the impossibility, for there are but eleven (e) Raym. 414. Par. Case, 3 Keble, 683. Vide 1 Term Rep. 316.

eleven days between the first of January and the holding of the sessions.

Also if an indictment charge a man with having feloniously done a fact, which appears upon the face of the indictment to have been but a trespass, as with feloniously cutting down and carrying away trees, the Court will (a) not arraign him; yet where the sense appears plain, the Court will often dispense with a small impropriety in the expression; as where one is indicted for having mowed *unam acram feni*, which is (b) said to be sufficient, and yet that which was mowed, could not, at the time of the mowing, be, in strictness, called hay, but grass only.

(a) 12 Ass. 39.
F. Corone, 171.
Indictment, 9.
B. Cor. 76. b. 1.
c. 19. a. 34.
(b) 2 R. Abr. 81.
Parallel Cases,
2 R. Abr. 81.
Vide 18 Ass. 15.

As to the second particular, viz. In what manner the body of an indictment at common law must set forth the substance and manner of the fact, in relation to the offence of the accessory; I shall observe,

Sect. 63. FIRST, That a repugnancy in setting forth such offence is equally fatal as in setting forth that of the principal; and therefore if an indictment of death which lays the stroke on one day, and the death on a subsequent one, charge the accessories with having abetted the fact at the time of the felony and murder only, it is insufficient, as hath been more fully shewn in the (c) chapter of Appeals; because it appears by the indictment itself, that the time of the death, and consequently of the murder, was subsequent to that of the stroke, and therefore it is repugnant to allege that the defendant abetted the stroke by being present at the time of the death.

(c) C. 23. a. 88,
89.
Supra, a. 64.

Sect. 64. SECONDLY, That where several are present, and abet a fact, and one only actually does it, an (d) indictment may, in the same manner as an (e) appeal, either lay it generally, as done by them all, or specially, as done only by the one and abetted by the rest. But it hath been resolved, that if an indictment barely charge a man with having been present when a murder was committed, it is (f) void; because a man may be innocently present, and shall not be presumed to have been a party, where no circumstance is found that makes him so.

(d) Sum. 265.
9 Coke, 67.
Howden, 97.
1 Hale, 437.
(e) Sup. c. 23.
a. 76.
(f) 14 H. 7. 31.
B. Indict. 5.
Foster, 351.

Sect. 65. Also it hath been (g) adjudged, that an indictment of J. S. as accessory to four, by these words, "that J. S. *sciens ipsos quatuor homines feloniam predictam fecisse apud D. felonice receptavit*;" is naught for not saying "*eos receptavit*;" for it doth not appear how many of them the indictors have found him to have received, whether all four, or three, or two, or but one.

(g) 30 H. 6. 2.
F. Indict. 13.
S. P. C. 93.
Summary, 206.

Sect. 66. It hath been (h) holden, that an indictment charging a constable with having voluntarily and feloniously suffered a person arrested by him upon suspicion of felony to escape, without shewing what the nature of the felony was, and that it was actually committed, is void for the uncertainty, not only because it appears not but that the offence of which the party was suspected, was never actually committed, in which case the escape could (i) not be criminal; but also because it appears not what the felony was, and unless the arrest were for a felony, the escape could not be felonious.

(h) C. Ellr. 758.
Hedry, 53.
8 Ed. 4. 3.
S. R. C. 95.
F. Indict. 16.
Vide F. Corone,
45. 76.
(i) Sup. c. 18.
a. 16, 17. c. 18.
a. 7. c. 19.
a. 2. 3.
Sur. 1726. 1768.
3 Fler, Wms.
497.

But it is said, that an indictment for knowingly receiving persons outlawed for, or convicted of felony, or for knowingly suffering such persons to escape, (a) may be good without shewing what the felony was, or that it was actually committed, if the record of the outlawry or conviction be set forth with convenient certainty: and the most plausible reason of this opinion seems to be this, that it may be sufficiently made out by such record, of what kind the felony was, and also that it was actually committed, &c. It is holden indeed by Sir William (b) Staundford, that such a general indictment for receiving a person outlawed for felony in the same county wherein he dwells is good, but not if it were in another, because a man is bound at his peril to take consance of an attainder of felony in his own county, but not in another. But I much question the authority of this distinction, since, as the law seems now to be (c) holden, a man is no more bound to take consance of such an attainder in his own county, than in any other.

(a) 2 Ed. 4. 3.
F. Indict. 16.
Qu. Kellw. 194.

(b) S. P. C. 96.
Vide F. Cor.
577.
Dyer, 333.

(c) Sum. 218.
See Id. Hard-
wicke's opinion,
3 Peer. Wms.
493.

Sect. 67. It hath been (d) holden, that an indictment finding that J. S. *scienter recepit* such a one, being a felon, is not good, for this reason among others, because it doth not expressly find, that J. S. knew the person so received by him to have been a felon. But this is contradicted by other (e) authorities, by which it is holden, that the word *scienter* in such a case shall be construed to go through the whole sentence.

(d) 7 H. 6. 42.
B. Indict. 4.
F. Indict. 11.
3 Kellw. 760.
S. P. C. 96.

(e) 2 Lev. 208.
2 Ed. 4. 3.
1 D. An.
Altri. 19.
5 Modern, 129.
Rex v. Bunce,

Strange, 75. Vide Rex v. Lawley, Strange, 904. Barnard, K. B. 263. Fitzgib. 182. Andrews, 162. 1 Barr. 846.

As to the SECOND POINT, viz. In what manner the body of an indictment at common law must describe the persons mentioned in it, I shall endeavour to shew,

1. In what manner it must describe the defendant.
2. How persons mentioned or referred to in the indictment.

As to the first particular, viz. In what manner an indictment must describe the defendant.

Sect. 68. It is said, that an indictment that the king's highway in such a place is in decay through the default of the inhabitants of such a town, is (f) good without naming any person in certain.

(f) 2 Roll. Ab.
79.
Wood, 690.

Also it is said, (g) that no indictor can take any advantage of a mistaken surname in the indictment, either by plea in abatement, or otherwise, notwithstanding such surname hath no manner of affinity with his true one, and he was (h) never known by it. And in this respect, an indictment differs from an appeal, whereof it is (i) certain that a misnomer of a surname may be pleaded in an abatement, as well as any other misnomer whatsoever.

(g) 1 H. 5. 5.
Summary, 243.
S. P. C. 181.
B. Miana. 9.
Vide 3 H. 6.
75. 26.
Thel. b. 11. c.
5. c. 14.
Sed vide B. R.
H. 303.

(h) Q. Kely. 11, 12. 2 Hale, 238. (i) 1 H. 5. 5. Rastal, 50. 54. Summary, 243. 2 Hale, 176. 238. 6 St. Tr. 237. Ante, 185. s. 103.

Sect. 69. But I do not find but that every other misnomer of the defendant, except that of the surname, and also every defective addition, are as fatal in an indictment as in an appeal; for it seems

(a) Thel. b. 11. c. 5. s. 12. 14 H. 4. 41. F. Corone, 88. Mismomer, 18. **It seems generally to be (a) holden, that a mismomer of the defendant's name of baptism may be pleaded in abatement of an indictment:** Summary, 243. Cen. 3 H. 6. 26. B. Mismo. 6.

(b) Cro. Car. p. 371. 1 Jones, 346. **Also it hath been (b) adjudged to be a good plea in abatement of an indictment against one by the name of Sir J. S. Knight, that he is a baronet and no knight.**

(c) 2 Leon. 248, 249. Qu. Cro. Eliz. 542. (d) Vide sup. c. 23. s. 103, 104. Shower, 392, 393. Skinner, 517. 2 Hale, 240. Tremain, 19. Carthew, 299. 3 C. Dig. 502. 2 Inst. 668. (e) Vide c. 23. s. 103. Keilw. 25, 26. Fita. Cor. 88. Qu. Palmer, 195. 3 Bac. Abr. 104. 2 Hale, 175. Cro. Jac. 609. B. R. H. 303. 2 Hale, 238. 6 St. Tr. 230. **Also it hath been (c) holden, that it is a good plea in abatement of an indictment against GARTER, king at arms, that he is not called GARTER in the indictment, because it is a name of dignity, being given him by the words *creamus, coronamus, et nomen imponimus*; and from the reason of this case it seems plainly to follow, that the omission of any other name of (d) dignity may be pleaded in abatement of an indictment: (e) and if so, why should not the omission of the defendant's name of baptism be equally fatal?**

(f) Sup. c. 23. s. 103. (g) B. Add. 50. L. Quin. Ed. 4. 39, 34. Finch, 234. (h) B. Add. 23, 41. 2 Leon. 183. Shower, 392. 9 Edw. 4. 48. Dyer, 46. (i) C. Ellz. 32. 148. C. Jac. 531. **Sect. 70. It seems to be agreed, that notwithstanding an indictment be the suit of the king, yet being within the express letter of the statute of 1 Hen. 5. c. 3. concerning additions, set forth more at large in the chapter of (f) Appeals, it (g) cannot be construed to be out of the meaning of it. From whence it follows, that the want of a sufficient addition, within that statute, is as good an (h) exception to an indictment, if (i) process of outlawry lie on it, as it is to an appeal.**

(k) 2 S. P. C. 68. 2 Hale, 177. 2 Inst. 669. 2 Leon. 183. 30 H. 6. C. Ellz. 383. Vide Dyer, 88. 1 Edw. 4. 1. Sayer, 280. Semple's Case, O. B. Just. sec. 3786. Cases in Crown Law. (l) 30 H. 6. 2 S. P. C. 68. F. Process, 103. 1 Ed. 4. 1. (m) 1 Bulet. 183. Contra, 2 Hale, 177. (n) Vide sup. c. 23. s. 127. F. Count. 18. **Also it hath been adjudged, that it is a (k) fatal fault to apply such addition to the name which comes under the *alias dictus* only, and not to the first name: but it is said not to be material (l) whether any addition be put to the name which comes under the *alias dictus* or not, because what is so expressed is not material. But it is so great a fault to put no addition to the first name, that where several are indicted, such an omission in respect of one of them makes the indictment (m) vicious as to all. And it may be probably argued, that there is the same reason for the like fault in an appeal against divers, to abate it also as to all; but I do not find this point (n) expressly agreed. But it seems clear, that generally the law is the same in relation to additions in indictments and appeals.**

(o) Sup. c. 23. s. 106. (p) Sup. c. 23. s. 106. (q) Sup. c. 23. s. 106. (r) Sup. c. 23. s. 107 to 113. (s) Sup. c. 23. s. 113 to 118. (t) Sup. c. 23. s. 118 to 124. (u) Sup. c. 23. s. 124. **Having therefore already treated in the chapter of Appeals of the general learning relating to this subject, and shewn that an addition in (o) English is as good as in Latin; and that where several defendants have the same addition, it is (p) safest to repeat it after each of their names; and that the son being of the same name and addition with the father, ought to be distinguished with some (q) farther description; and having also shewn what is a sufficient addition of the (r) estate, or degree, or (s) mystery, and also of the (t) town, hamlet, place and county of the defendant; and also how the defect of an addition may be (u) saved by the**

the appearance and plea of the defendant, I shall refer the reader for all these particulars to the chapter of Appeals.

As to the second particular, viz. In what manner the body of an indictment at common law must describe the other persons besides the defendant mentioned or referred to in it.

Sect. 71. It is certainly safest to describe them with convenient certainty, which will hardly be dispensed with except in special cases, and for special reasons. For those general indictments which (a) anciently seem to have been allowed for suffering divers bakers to bake, &c. against the assize, &c. or for distraining divers persons without cause, &c. have by the later (b) authorities been holden insufficient for their uncertainty in not naming some persons in particular who were so suffered to bake, or distrained, without which the Court cannot so well know what fine will be proper; nor can the defendant be so well enabled to make his defence, nor to plead the indictment to a subsequent prosecution. And for the same reason among others, an (c) indictment for taking divers sums of divers persons for such a toll at such a rate, without naming any persons in particular, hath been adjudged naught.

(a) 38 Assize, 11. 22.
B. Precum. 27.
(b) B. Indict. 21.
2 R. Abr. 60.

(c) Shower, 389, 390.

Yet where in common presumption it may be very difficult, if not impossible, to know the names of the persons referred to in an indictment, it (d) may be good without naming any of them; (e) as where one is indicted for having knowingly received and harboured divers thieves, to the jurors unknown. In which case, such a general charge is maintainable from the necessity of the thing; for otherwise a notorious offender of this kind might be wholly dispensable for want of the jurors knowing the names of the persons so received, and yet might be publicly known to carry on such a practice, to the common nuisance of the country; in which respect it cannot but be reasonable in such a case to punish him, though not as an accessory to the thieves, without shewing that he had received some of them in particular.

(d) Flow. 85.
129.
(e) 2 Lev. 408.

And for the like reason, if a (f) stranger unknown to the country, be found slain, or if the dead body of a person who was well known, be disfigured in such a manner by its wounds, that no one can discover whose it was, it is certain that an indictment against the offender, for having killed *quendam ignotum*, will be good.

(f) 1 Ed. 2. 20.
1 Assize, 7.
F. Cor. 159.
23 Assize, 94.
F. Indict. 10.
S. P. C. 95.
2 Hale, 181.
Flowden, 85.
129. 9 H. 6. 45. b. Dyer, 99. 285. Vide F. Cor. 146. 183. Noy, 85. Sup. c. 23. s. 78.

(g) And upon the same ground, if a stranger unknown to the country be robbed, and will not come in to prosecute, nor discover his name, it seems clear, that an indictment against the offender for having robbed *quendam ignotum* is good. And if goods be found upon one notoriously suspected of felony, of which he can give no manner of account, as where a highwayman is apprehended with his pockets full of watches and rings, it seems, that he may either be indicted for stealing such watches and rings, being the goods of *quorundam ignotorum*; or, as some (h) say, for stealing them generally. Also in the indictment of the regicides for the murder of King Charles the First, it was (i) agreed,

(g) F. Indict. 14. 17.
2 Ed. 4.
S. P. C. 95.
2 Hale, 181.
Dyer, 99.
Kellw. 25.
Sup. c. 23. s. 78.
B. Indict. 11.
Flowden, 84.
129.
18 Assize, c. 15.
second country.
(h) F. Indict. 2. 26.
(i) Kelynge, 10.

agreed, that the fact was well laid, as done *per quendam ignotum* with a vizer on his face. And if one steal the goods of an abbey, &c. during a vacancy, he may be indicted for stealing (a) *bona ecclesie*, and yet the church can have no property. But these seem to be special and extraordinary cases, depending on particular reasons, and grounded on manifest necessity, without which it seems that such indictments cannot be maintained.

(a) 7 Ed. 4. 14. F. Indict. 15. S. P. C. 95. It seems to be taken as a ground in (b) many books, that regularly the persons offended, as well as the defendant, ought to be certainly described in every indictment. And agreeably hereto it hath been (c) adjudged, that an indictment for stealing *quandam peciam panni linei cujusdam J. S.* without adding *de bonis et catallis cujusdam J. S.* is insufficient, because it doth not expressly appear to whom the goods stolen did belong. Also it was anciently (d) holden, that where one is indicted for the death of a person unknown, the inquest ought to tell his name to the Court; but surely this must be intended where they have some means to know it. However, from the whole, thus much seems plainly to follow, that wherever the person injured is known to the jurors, his name ought to be put into the indictment. And therefore, as I take it, those (e) books which seem generally to allow of indictments of killing, or robbing persons unknown, are to be understood with this limitation, that such indictments are then good when the party is in truth unknown to the jurors. And agreeably hereto, others (f) who speak more fully of the matter seem plainly to go upon the necessity of the several cases; and the want of such necessity seems probably to have been the best reason why indictments not shewing to whom the wrong was done, were disallowed in some of the old (g) books. However it is certain, that an appeal for the death or the robbery of a person unknown, is in no case good, as hath been more fully shewn in the (h) chapter of Appeals.

(i) Keilw. 25. Dyer, 285. Sect. 72. It hath been (i) adjudged that an indictment for an assault on John, parish priest of D. in the county of C. is good without mentioning his surname; for if a wrongful surname of the defendant himself will not vitiate an indictment, as hath been more fully shewn Sect. 69. surely *à fortiori*, the omission of the surname of any other person will not vitiate it; especially where such person is otherwise described with such certainty that it is impossible to mistake him for any other. But if an indictment for a wrong done to a person well known describe him only by his name of baptism, without some addition to distinguish him from others of the same name, it seems (k) questionable, whether it be not insufficient for the reasons given in the foregoing section. It is (l) said indeed, in a short note of a case in Moor's Reports, that an indictment against one Cole, *quod burglariter domum cujusdam Ricardi fregit*, was adjudged good without the surname; and it not being there mentioned that there was any other description of the party but by his name of baptism, it may be argued that that alone is sufficient. But to this it may be answered, that the only point taken notice of as adjudged, is that the surname is not necessary, and perhaps in the record at large there might be some addition. But granting that there was none, yet the authority of this case is the less to be regarded, because

of the books cited to support it, (a) two seem to be directly against it, and the (b) third, which is most to the purpose, only proves that an indictment for stealing the goods *cujusdam ignoti* is good, which seems by no means to come up to the point in question, as hath been more fully shewn in the precedent section.

Yet, however the law may stand in relation to such an uncertainty, it seems to be (c) agreed, that a repugnancy or absurdity in the description of the person injured will vitiate an indictment; as where one is indicted for stealing *bona predict'* J. S. where no J. S. was mentioned before (1); for though in civil actions the word *predictus* hath been sometimes (d) rejected, as surplus and void, where it could be referred to (e) no certain antecedent, yet this may perhaps chiefly depend on the statutes of Jeofailes, which in many cases help defects in form in civil actions, but extend not to criminal cases, wherein the greatest exactness is required; and if an award may be defeated by appointing a (f) payment on a certain day before-mentioned, where no such day was mentioned before, it cannot well be imagined that the like inconsistency will be less fatal in a criminal proceeding.

Sect. 73. It hath been (g) adjudged not to be necessary in an indictment of death to allege that the person killed was in *the peace of God, and of our lord the king, &c.* though such words are commonly put into indictments, as they are not of substance, and perhaps the truth might be that a party was at the time actually breaking the peace.

As to the THIRD POINT, viz. In what manner the body of an indictment at common law must describe the thing wherein the offence was committed.

Sect. 74. It seems clear that no indictment can be good which wants a convenient certainty of this kind. And therefore it is (h) said, that an indictment for forging a lease of certain lands, without naming some one certain parcel, is insufficient. Also it seems to be agreed, that an (i) indictment for stealing *bona et catalla* J. S. without any farther description of them, is void for its uncertainty, for the like reasons for which indictments charging a man with being an offender in general are void, as hath been (k) more fully set forth in the fifty-ninth section. And upon the like ground it hath been adjudged, that an indictment for a trespass in two closes of meadow or pasture; or for diverting *quandam* (l) *partem aquæ* running from such a place to such a place, without any farther description; or for ingrossing (m) *magnam quantitatem straminis, et feni*, or (n) *diversos cumulos tritici* without shewing how much of each; or for carrying away *duas* (o) *cent-*

(1) Francis Morris was indicted as a receiver. The indictment stated "he the said Thomas Morris well knowing, &c." But the indictment was held good, and the words "the said Thomas Morris," rejected as surplusage. Morris's Case, Cases in Crown Law, 103. But where an indictment contained two counts, one for stealing a bank note, and the other for stealing a pocket-book, and the same indictment charged Mary Graham with know-

ingly receiving them, and the stealers were found guilty on the last count only, and Mary Graham was found guilty of the offence aforesaid; this was held bad, for it is uncertain to which offence this finding refers. Graham's Case, Cases Crown Law, 82. So also on an information charging two distinct offences, if the offender is convicted of the said offence, it is insufficient. Rex v. Salamans, 1 Term Rep. 149.

(a) 2 R. Abr. 80. *centenas casei*, without adding the words *libras* or *uncias*, or some other substantive to *centenas*; or for erecting several (a) cottages *contra formam statuti*, without shewing how many, &c. are insufficient for their uncertainty.

(n) 2 Keble, 178. As to the case of the King v. Wetwang(n), wherein the court disallowed an exception to the generality of an indictment for taking *quosdam pisces*, without shewing how many, it may be answered, that this was contrary to the opinion of Mr. Justice Twisden, and was only the sudden opinion of two of the other judges; neither does it appear that the indictment was adjudged good, but only that the court refused to quash it, and ordered the defendant to plead to it. However, it seems clear from constant experience, (o) that if an indictment be uncertain as to some particulars only, and certain as to the rest, it is void only as to those which are uncertainly expressed, and good for the residue.

1 Levinz, 203.
Skinner, 343.
Ld. Raym. 1363.
B. R. H. 370.
Andrews, 162.
Vide Burr. 336.
1232, 1233.
832. 864.
Strange, 228.
849. 497. 900.
552. 788. 699.
1227. 1127.
6 Com. Dig. 355. 3 P. Will. 419. (o) Vide Poph. 208.

Sect. 75. If the indictment be for a larceny or trespass on a living thing, as an ox, sheep, or horse, &c. it seems to be holden by (p) Lambard and (q) Dalton, at it it is most proper to express to whom the property of it belonks by calling it respectively the ox, sheep, or horse of the paror robbed, without using the words *bona* or *catalla*; but that it is improper to use these words, where the thing taken was not a living creature.

(p) Lamb. B. 4. c. 5. f. 496.
(q) Dalt. c. 151.

Also it is holden by (r) Lambard, that it is proper to shew the worth of all living things, and also of such dead things as are sold by weight or measure, by expressing that they are of such a price; and the worth of other dead things, by expressing that they are of such a value; y^{an} instance is produced where any indictment has been disallowed in either case for a variance from these rules.

(r) Lamb. B. 4. c. 5. f. 497, 498.
2 Hale, 187.
Vide Cro. Ja. 130.

And as to the first of them it is farther observable, that the (s) precedents in Crompton of indictments for stealing of horses and oxen, expressly allege the horse and ox stolen *de bonis et catallis cujusdam*, &c. Also an appeal of stealing sheep in (t) Rastal's Entries expressly alleged them *de bonis et catallis* of the appellant.

(s) Crompt. 247, 248.
(t) Rast. Ent. 55.

And as to the second of the rules above-mentioned, it is observable that the directions in the (u) Register concerning this matter, which seem to be the chief foundation of the same rule, are thus expressed, "That in a writ of trespass of immoveable chattels, the writ shall say, *tants de chatteux ad valentiam X. S.* But if it be brought of a moveable chattel, it shall say, *pretii X. S. and non ad valentiam.*" Yet it appears by the Register itself that even in writs of trespass concerning which these directions are given, the worth of the things taken away is sometimes omitted for the (x) whole, and sometimes for (y) part. And it is

(u) Register, 95.
(x) Vide Register, 93. in the writ *de warrena fugata*, &c. and that *de parco fracto*, and 94. a. in the writ *de equo et catallis arrestatis*, 94. b. in the writ *de averiis imparcatis*, &c. and in that *de transgressionem facta*, &c. and 96. b. in that *de equo percusso*, and 97. a. in that *de ovibus fugatis*, &c.
(y) Register, 93. b. in the writ *de clauso fracto arboribus succisis*, 94. b. in the writ *de domo fracta*, &c. and in the writ *de jumento*, &c. *fugatis*, and in that *de equis imparcatis*, and 95. b. in that *de palis*, &c. and in that *de piscaria piscata*, &c. and in that *de domo fracta*, &c. and 96. a. in that *de ovibus tonsis*, &c. and 96. b. in that *de warrenis fugata*, &c. and 97. a. in *de porcis fugatis*, &c.

is said to have been (z) adjudged, that such writs are good notwithstanding such omissions. Also where things moveable and immoveable are mentioned together in the same writ, the worth of all of them together is sometimes (a) expressed under the words *ad valentiam*, &c. And sometimes the worth of moveable chattels, as that of (b) corn in a granary, &c. of (c) wine in a vessel, and of (d) wool, is expressed under the words *ad valentiam*. (e) Register, 97. Vide Cro. Jac. 130. 1 Sid. 39. 150. (a) Register, 94. a. in the writ *de piscaria piscata*, &c. and 95 b. in that *de piscu' piscata*, &c. and in that *de domo fracta*, &c. and 96. *de exclusis stagni*. (b) Reg. 95. b. in the writ *de bladis mundatis*, &c. and 96. a. in that *de clauso fracto*, &c. (c) Register, 95. b. in the writ *de vino*, &c. (d) Register, 16. and in the writ *de ovibus tonis*, &c.

From all which it seems to (e) appear, that the said directions are not necessary to be observed even in writs of trespass, concerning the form whereof they are expressly given, and that it is not material whether the words *ad valentiam* or *pretii* are used, or whether any value be set on the things taken away or not. And if so, why should it be a greater fault not to observe the said directions in indictments, which are (f) not tied to the strict forms of writs? Therefore from the whole it seems (g) questionable, whether it be needful to set forth the value of the goods in an indictment of trespass for any other purpose than to aggravate the fine, and whether it be necessary in an indictment of larceny for any other purpose than to shew that the crime amounts to grand larceny, and to ascertain the goods, thereby the better to entitle the prosecutor to a (h) restitution (1).

As to THE FOURTH POINT, viz. In what manner the body of an indictment at common law must set forth the circumstances of time and place, I shall endeavour to shew,

1. How it ought to set forth the circumstance of time ;

2. How

(1) As great inconvenience was found to prevail from the rule of law, that in larcenies the stolen property must be laid to be in *all* the persons who were interested in it, and particularly in cases of large commercial and mining concerns, to obviate the difficulty, as to mining companies :—

The statute 56 Geo. 3. c. 73. intituled, "An act for removing difficulties in the conviction of offenders stealing property from mines," recites that "the minerals, and the timber, iron, and other materials used in or for the working of mines, are much exposed to depredation ;" and that "great difficulties have been experienced in prosecuting to conviction and bringing to justice persons who have stolen such property, by reason of the rule of law which at present prevails throughout that part of Great Britain called England, for setting forth in indictments for larceny the names of all the persons who may be the owners of or are interested in the property stolen ;" and that "the identity of such property may be ascertained and described as effectually by averring the same in such indictment to be the property of some one or more of the partners in such mining concerns, and others his or their partners or co-adventurers, without naming such other partners or co-adventurers ;" and then enacts, "that from and after the passing of this act, it shall and may be lawful, and shall be deemed sufficient to all intents and purposes whatsoever, for the conviction of any offender or

offenders charged in any indictment with grand or petty larceny for or on account of stealing any minerals, or any timber, iron, or other materials used in or for the working of mines, being the personal property of any company or adventurers carrying on the same, to allege and aver that the minerals, timber, iron, or other materials so stolen, are the property of some one or more of the partners or adventurers in such mining concern, and others his or their partners or co-adventurers, without naming such other partners or co-adventurers ; and that such form of describing the property stolen from such company or adventurers shall be to all intents and purposes whatsoever as valid and effectual in law as if the same were averred to be the property of all the owners thereof, and as if the names of all such owners were particularly and distinctly set forth in such indictment ; any law, custom, or usage to the contrary thereof in anywise notwithstanding." By st. 1 and 2 Geo. 4. c. 102, the enactments of the above statute are generally extended to indictments for "burglary, felony, grand or petit larceny, or criminal breach of trust, committed on the goods, chattels, or personal property of what nature soever, of any partners whatsoever." It is therefore now sufficient, where the property is in many persons, to allege it to be the property of "A. B. and others his partners."

2. How that of place.

AND FIRST as to the circumstance of time.

Sect. 76. I find it no where holden, that it is necessary to mention the hour in an indictment. But on the contrary, it is said, (i) that if there be any necessity for it in an appeal, which yet is (k) questionable, it is from the statute of Gloucester, and not from the common law, and therefore I shall take it for granted, that it is not necessarily required in an indictment; since it is certain, that there is no statute that makes it so, and the common law seems to have required no greater certainty in an indictment than in an appeal.

(i) S. P. C. 80.
(k) Sup. c. 23.
s. 87.
1 Bulstode,
203.

(l) S. P. C. 95.
Lamb. b. 4. c. 5.
Dalton, c. 131.
F. Indict. 28.
Dyer, 164.
Summary, 206.
2 Hale, 177. 179.
8 H. 5. 8.
(m) F. Cor. 45.
F. Attach. 1.
B. Return de
Brief. 97.
3 H. 7. 11.
(n) Dyer, 164.
Vide F. Return
de Visc. 32.
Dyer, 69.
10 Edw. 4. 15.
Qu. 5 H. 7. 17,
18.
(o) Yet the con-
trary is ad-
judged 2 Bul-
stode, 208.
C. Jac. 345.
(p) Dyer, 164.
See also
3 Peer. Wms. 484. 497. 4 Bac. Abr. 400.

Sect. 77. But it is laid down as an undoubted principle in all the books (l) that treat of this matter, that no indictment whatsoever can be good without precisely shewing a certain year and day of the material facts alleged in it. Also it hath been (m) adjudged, that the sheriff's return of a rescous without shewing the year and day is insufficient, because such a return is in lieu of an indictment. Also it is taken for granted in (n) Dyer, that an indictment of rescous is not good without expressly shewing the day and year both of the arrest and also of the rescous, and that the time of the latter is not sufficiently shewn by (o) shewing that of the former. And where an indictment of rescous set forth, that J. S. committed such a felony such a day, and year, and place, *per quod A. B. predictum J. S. cepit et arrestavit, et in salva custodia sua adtunc et ibidem eundem J. S. habuit et custodivit*, it is made a (p) *quære*, whether the indictment be not insufficient, because no time of the arrest is alleged in the same sentence with it; and it is doubtful whether the time of the custody, which is alleged in the next sentence by force of the copulative, be applied also to the arrest or not, and Dyer seems rather to incline to the contrary opinion.

(q) Sup. c. 23.
s. 88.
Moor, 555.
Rex v. Fearnley,
Term Rep. 316.
(r) Rast. 263.
(s) 2 H. 7. 7.
(t) Sup. s. 64.
and c. 23. s. 88,
89.
(u) 1 R. Abr.
781.
(x) Sup. c. 23.
s. 88.
Hetley, 35. 119,
120.
5 H. 7. 17, 18.
1 Bulst. 203,
204.
(y) Sup. c. 23.
s. 90.

However, it is certain, that if an indictment lay the offence on an (q) uncertain or impossible day, as where it lays it on a (r) future day, or lays one and the same offence at (s) different days, or lays it on such a day which makes the indictment (t) repugnant to itself, it is void. Also it hath been adjudged, that no (u) defect of this kind can be helped by the verdict. Also it is said, that an indictment of death laying an assault at a certain time and place, is (x) not sufficient without repeating the time and place in the clause of the stroke: and the like rule seems also to hold as to indictments of other felonies, in which respect such indictments differ from indictments of trespass. Also it is (y) certain, that an indictment of death ought as well to set forth the year and day of the death as of the stroke, that it may appear that the party died within the year and day. But these matters having been more fully considered in the chapter of Appeals, I shall refer the reader thither for the better understanding of them.

(s) Dyer, 28.
2 Hale, 178.
Keilway, 100.
Sup. c. 23. s. 88. 4 Coke, 41. Qu. Dyer. 164.

Sect. 78. It seems to be (z) generally agreed, that the words
“*adtunc*”

“*adtunc et ibidem*” (1) in the subsequent clauses of an indictment, are of the same effect as if the year and day mentioned in the former part of it had been expressly repeated. Also it hath been (a) adjudged, that an indictment laying the offence on the Thursday after the day of Pentecost in such a year is good. And from the like ground it seems to follow, that an indictment laying it on the (b) *utras* of Easter, &c. which shall be taken for the very eighth day after the feast, or on the tenth of March (b) last (if it may be ascertained by the style of the sessions before which the indictment was taken), is as good as if it had shewn the day and year by expressly naming such a day of such a month, &c.

(a) 7 H. 6. 59.
F. Error, 17.
Plowden, 122.

(b) Lamb. b. 4.
c. 5. f. 491.

Sect. 79. And where an indictment charges a man with a bare omission, as the not scouring such a ditch, &c. it is (c) said, that it need not shew any time.

(c) Lamb. b. 4.
c. 5. f. 492.

Sect. 80. It is most (d) regular to set forth the year by shewing the year of the king, yet this may be dispensed with for special reasons, if the very year be otherwise sufficiently expressed, for that only is material. And therefore in the (e) case of the Regicides, no year of any king was laid for the king's murder, but the compassing of his death was laid in the twenty-fourth year of King Charles the First, and the murder was laid on the thirtieth day *ejusdem mensis Januarii*, because if the reign of either king had been expressed, it might have caused a dispute whether that or the other would have been more proper.

(d) Sup. c. 43.
s. 90.
1 Levinz, 113.
1 Salkeld, 195.
(e) Kelyng, 11.
Burrows, 1901.

Sect. 81. It is (f) agreed, that a mistake in not laying an offence on the very same day on which it is afterwards proved upon the trial, is not material upon evidence.

(f) Sup. c. 23.
s. 87, 88. 91.
3 Inst. 230.
2 Hale, 179.

Sect. 82. If an indictment charge a man with having done such a nuisance such a day and year, &c. and on divers other days, it is void (g) only as to the facts on those days which are uncertainly alleged, and effectual for the nuisance on the day specified. But if it charge a man generally with several offences at several times, without laying any one of them on a certain day, (h) as with extorting divers sums of divers subjects for a passage over such a ferry, &c. between such a day and such a day, it hath been adjudged, that it is wholly void (2). Yet it hath been solemnly resolved, that a conviction of (i) deer-stealing, setting forth the offence between the eighth and the twelfth of July, &c. is sufficient.

(g) 10 Mod.
336.
Vid. sup. s. 74.

(h) Shower, 389.
Carthew, 226.

(i) Reg. v.
Simpson, ad
Triu. 13 Annæ,
10 Mod. 248.
341.

As to the second particular, *viz.* How an indictment at common law must shew the place where the offence was done.

Sect. 83. It seems agreed by all the (k) books, that no indictment can be good without expressly shewing some place wherein the offence was committed; which must (l) appear to have been within the jurisdiction of the court in which the indictment

(k) 25 Edw. 3.
43.
F. Indict.
1 Suggestion, 7.
4 H. 7. 8.
2 Hale, 180.
is Keilwood, 98.

1 Bulst. 124. See the books cited s. 70. B. R. II. 105. (l) Vide Keil. 33. 89. C. Eliz. 448.

(1) If omitted, judgment may be arrested, Strange, 901.

(2) Because every extortion is a separate and distinct offence, requiring a separate and distinct punishment in proportion to the enormity of it;

and if accumulated under a general charge, instead of being singly and certainly laid, it is impossible for the court to adapt the punishment to the measure of the crime. 4 Mod. 103. Sed vide Cro. Jac. 611. 1 Keble, 357.

(m) Sup. s. 62. 77. and c. 23. s. 88, 89, 91.
 (n) 2 H. 7. 7.
 (o) Cro. Car. 465. Ante, Sect. 74. and see Rex v. Matthews, 5 Term Rep. 162.
 (p) Sec c. 23. s. 88, 89, 91.
 (q) Sup. c. 23. s. 92.
 Hetley, 35. 118, 119.
 Dyer, 68.
 (r) Sup. c. 23. s. 92, 93.
 (s) 9 Coke, 66. Con. C. Eliz. 732.
 Sup. c. 23. s. 92.
 (t) 7 H. 6. 36. Vide Rex v. White, Burrow, 333. (u) C. 23. s. 88, 89, 91, 92, and 93. (x) Sup. 2. 76, 77, 78.

is taken, and must also be alleged in such a manner as is perfectly free from all (m) repugnance and inconsistency. For if one and the same offence be laid at two (n) different places; or "at the town of B. (o) aforesaid," where no such town was mentioned before; or if, in an indictment of murder, the stroke be laid at A. and the death at B., and then it is (p) concluded that the defendant *sic felonice murderavit* the person deceased at A. the indictment is void. And so it is also, if it do (q) not lay a place both of the stroke and the death; or if the place or places so alleged be not such from whence a (r) *visne* may come. Yet it hath been adjudged, that a fact laid in a parish of London with some other addition, as in the parish of St. (e) Michael in Woodstreet, London, or in the parish of St. (t) Lawrence Jury, is good without shewing the ward in which the parish lies (1). But these matters having been more fully treated of in the (u) chapter of Appeals, and also in the foregoing part of this (x) chapter, relating to the certainty of the time of the offence, I shall refer the reader thither, for the fuller consideration of them (2).

Sect. 84. It seems, that there is no need in an indictment on a statute setting forth the description which brings the defendant within the purview of it, to set forth any place where those things happened which brought him within such description; and therefore where a statute makes it high treason for a person born within the realm, and in popish orders, to come into, or remain in the kingdom, &c. there is no need, in an (y) indictment on such statute, to shew in what place the defendant was born or ordained. Also it seems to be (z) agreed, that a mistake of the place in which an offence is laid, will not be material upon the evidence on "not guilty" pleaded, if the fact be proved at some other place in the same county.

But if there be no such place in a county as that wherein an offence is laid in an appeal or indictment, all process on such indictment or appeal is made void by the statute of 7 Hen. 5. and 9 Hen.

(1) If there be two vills in a parish, the indictment need not shew in which of them the defendant lives Sayer, 119. Vide also Burrow, 337.

(2) In cases where the offence consists of a single fact, there is no difficulty in stating where it happened. But in cases under the act of 39 Geo. 3. c. 85. to protect masters from embezzlement by servants of money, &c. which they receive in the course of their employ, there is some little doubt which is the proper county to indict in, whether where the money was received, or where the receipt was denied, or false account rendered, when these facts happen in different counties? In the case of *The King v. Hobson*, the prisoner received the money he was charged with embezzling at Shrewsbury, in the county of Salop, and denied the receipt of it to his master, for whose use he was entrusted to receive it at Litchfield, in the county of Stafford. It was objected in this case that the venue was wrong laid, as the receipt of the money was lawful in the county of Salop, and that there was no embezzlement until he denied the receipt

of it in the county of Salop. Upon a case reserved, it is said most of the judges thought, that the conduct of the prisoner in not accounting with his master, but denying the receipt of the money, was evidence to shew that the original taking was with intent to embezzle, and so to steal; and some thought the offence triable in either county.—(1 E. P. C. Add. xxiv.) But in a subsequent case of *The King v. Taylor*, where the prisoner was sent to receive money over Blackfriars' Bridge in the county of Surrey, where he received it, but on his return to his master's house in the county of Middlesex, he there denied the receipt of it, it was objected, that he was improperly tried in Middlesex, but ought to have been tried in Surrey, where he received the money. The judges there held, that the receipt of the money being a lawful act, there was no embezzlement until he gave the false account in Middlesex, and therefore that he was properly tried in Middlesex. (3 Bos. and Puller, 396.)

9 Hen. 5. c. 1. and 18 Hen. 6. c. 12; by the last of which statutes it is recited, "That in the parliament holden in the ninth year of Henry the Fifth it was ordained, for that many people of malice cause often the king's liege people to be appealed or indicted in divers counties of treasons or of felonies, supposing by the said indictments or appeals, that the said treasons or felonies were done in a certain place in such a county, &c. where no such place is in the same county, that the process of the same shall be void; and that the indictors, procurators, and conspirators shall be punished by fine, &c. by the discretion of the justices, and also liable to writs of conspiracy: and by the present statute the above-recited statute is made perpetual."

Sect. 85. It is observable, that the statute made in the ninth year of Henry the Fifth, herein referred to, seems to be wholly omitted by Keble and Pulton, who have no other statute concerning this matter made in the ninth year of Henry the Fifth, excepting the first, which only confirms a statute made in the seventh year of the same king concerning appeals and indictments; and there is no other statute whatsoever in the seventh (a) year of that king mentioned in Keble or Pulton, but only one which requires the justices before the award of any *exigent* to inquire by inquest of office, whether there be any such place in the county as that wherein an offence is laid in an appeal or indictment. But this statute seems only to extend to the county of Lancaster, for it is directed to the chancellor of that county, and recites, "That persons had been indicted and appealed in places falsely alleged in the said county;" and in the enacting part speaks only of "justices who had power to determine felonies in the said county;" and in the latter, expressly commands the said chancellor to "cause it to be proclaimed in the same county," but mentions no other. From all which I see not how it can extend to any other county; and yet Wingate in his (b) Abridgment makes it equally extend to all counties. However, (c) Rastal in his collection of statutes seems to have set down the very statute which is referred to by the above recited statute of 18 Hen. 6. c. 12. and this is certainly (d) still in force.

(a) Qu. Vide 9 Hen. 5. c. 2. Ruffhead's Statutes.

(b) Wingate's Abridgment of the Statutes, under the title of "Conspiracy," s. 3.

(c) Rast. Statutes, Conspiracy, 3. so also Ruffhead Stat. p. 512.

(d) Lamb. b. 4. c. 5. f. 493. F. N. B. 115.

As to the FIFTH POINT, viz. Where the body of an indictment may be vitiated by false or improper Latin, or the use of English instead of Latin, I shall endeavour to shew,

All law proceedings are now to be in the English tongue. Vide infra, s. 88.

1. Where false Latin will vitiate an indictment.

2. Where a word which is not Latin.

3. Where such faults are holpen by an *Anglicè*.

As to the first of these particulars, viz. Where false Latin will vitiate an indictment.

Sect. 86. It seems to be holden generally in some (e) books, that no false Latin will vitiate an indictment. And it seems to be holden by my Lord (f) Coke, that an indictment shall not be quashed for any false concord between the substantive and the adjective, as *præfata regi*, or *præfata reginæ*, because though the expressions

(e) 5 Coke, 121. Cro. Car. 465.

(f) 5 Coke, 121. Vide Cro. El. 108.

2 Hale, 169.

expressions be incongruous, yet they are Latin and significant. Neither do I find this opinion denied by any other authority, and therefore I leave it to be considered, whether it may not still be maintained, especially (g) considering that the sense appears as fully, clearly, and expressly from such Latin as if it had been never so properly expressed. And it seems also, that the like reason may be given for the case in (h) Yelverton, wherein an indictment of forcible entry, finding that the defendant *unum messuagium ingressum fecit*, without adding the word *in* before *messuagium*, was adjudged good; but it is said in the book, that this is not false, though it be not fine Latin; by which it seems to be implied, that if it had been false Latin, it might have vitiated the indictment.

However, it seems to be settled at this day, that an indictment against two or more, laying the fact charged against them in the singular number, is insufficient; as where it finds, that A. and B. *insultum (i) fecit*; the reason whereof perhaps may be this, that it appears somewhat doubtful upon the face of the indictment whether the jurors intended to charge more than one, because the fact is laid in the singular number, which it seems absurd to apply to more than one, and therefore the indictment is insufficient for its uncertainty. As to (k) Fulwood's case, wherein Croke reports the contrary to have been resolved, it is certain, that the verb in the record is in the plural number. And as to the (l) cases, wherein faults of this kind have been amended in original writs, as *teneat conventionem* for *teneant*, and such like, it may be answered, that those emendations were made by virtue of the statutes of (m) Amendments, which extend not to criminal proceedings. And as to the case in (n) Bulstrode's Reports, wherein it is said to have been resolved, that an indictment of felony against more than one in the singular number was amended, and thereupon the defendants were adjudged to be hanged, it may be answered, that it doth not appear in what part of the indictment the singular number was put for the plural; neither is the said resolution, in whatsoever sense it be taken, reconcilable with the later authorities, as shall be more fully shewn under the twelfth point.

But it is said (o), that a fault of this kind is made good by the grand jury's finding the indictment *billa vera* against one of the defendants only; the reason whereof perhaps may be this, that the uncertainty of the indictment is supplied by such an indorsement. But this seems contrary to the authorities, relating to this matter, cited in the second section. Also it hath been adjudged (p), that where a bill of indictment lays the fact in the plural number against two, and it is found *billa vera* as to one of them only, it is good; and yet the verb in the plural number in the record must, after such a finding, be applied only to one person: but to this it may be answered, that there is no uncertainty either in the bill or the indorsement. Also it hath been adjudged (q), that the word *solvet*, instead of *solvat* is not fatal in a judgment, but that a new one shall be given.

As to the second particular, *viz.* Where the use of a word which is not Latin, will vitiate an indictment.

Sect.

(g) Vide Cro.
El. 108.

(h) Yelv. 27, 28.

(i) Rex v. Dobson, Hil. 3 Geo. 1.

2 Keble, 51.
Vide Cro. Car. 465. 573.

Cro. El. 754.

(k) Cro. Car. 489.

(l) 2 Vent. 173.

Yelv. 224, 225.

2 Saunders, 38.

C. Jac. 306.

369.

(m) Salk. 51,

32.

6 Modern, 268.

(n) 2 Bulst. 35.

(o) 2 Keb. 51.

(p) C. Car. 464, 465.

See also Rex v.

Fieldhouse,

Cowper, 325.

where *billa vera*

was indorsed as

to one distinct

count of an in-

dictment, and

ignoramus as to

the rest, and

held good.

(q) 1 Sid. 219.

2 Hale, 169,

170.

2 Sta. 870.

Bar. K. B. 24.

Sect. 87. It seems generally agreed (r), that an indictment wholly in English is void. This seems to depend upon the statute of 36 Edw. 3. c. 15. by which it is enacted, "That all pleas which be pleaded in any of the king's courts shall be entered and enrolled in Latin." And from hence it seems clearly to follow, that if any material part either of the body or caption of an indictment be expressed in a word which is not Latin, as by the word (s) *erectaverunt*, instead of *erexerunt*, or (t) *brachia sua dextra*, instead of *brachio*, or (u) *præsentant. existit* instead of *præsentat*. the indictment is insufficient (except in some special cases hereinafter set forth); for no one can say, that the bare giving a Latin termination to a word unknown in that language can make it become Latin; and if the want of one material word may be supplied, why not the want of two, and so on? It hath indeed been (x) holden, that a fault of this kind, as "*imaginavit*" for "*imaginatus est*," "*avæ*" for "*aviæ*," is amendable in an original writ, which yet is denied by others, if it be in a substantial (y) part. However, it seems certain, that such amendment must depend upon the statute of Amendments, which extend (z) not to criminal proceedings.

Also it seems, that it is no less a fault to make use of a word which is proper Latin in another sense, whether entirely different, or of a much larger extent, than that in which it is used, as of the word (a) *collis* for *colli*, or (b) *mula ars* for *veneficium*. Also it seems agreed, that an abbreviation not justified by legal usage, as (c) *dno.* without a dash, for *domino*, (d) *R. Rs.* for *regni regis*; or the expression of a number of figures that are not (e) Roman, is equally fatal as it would have been wholly to have omitted what you endeavour in such manner to express. Also it hath been (f) adjudged, that an inquisition finding that *J. S. seipsum emersit*, &c. is insufficient; because *emerge* doth not signify to put into, but to rise out of the water. (g) Also it is said, that an indictment has been quashed for the words *pace regia* instead of *pace regis*: but it appears not what was the nature of the indictment, nor in what part of it these words are used, and therefore I would suppose it to have been in such part of some indictment wherein those expressions are so material that they cannot be rejected as surplus and immaterial; for it seems to be a settled rule, that nothing which may be so rejected shall vitiate an indictment; as where the year of the Lord is written in common (h) figures, but the year of the king is well expressed; or where an indictment is said to be taken before J. S. and J. N. (i) *duo justiciarii*, &c. Also it seems, that the use of a word which is not proper Latin, as (k) *contrafacere*, for counterfeiting, may be made good by precedents. And there can be no doubt but that (l) terms of art, which are necessary in all indictments, as *felonia*, *murdrum*, *burglaria*, and such like, are good, though they be not good classical Latin; for they are of such a complex and peculiar signification as no proper Latin word will come up to. Also it hath been (m) adjudged that a literal translation of a statute into Latin is sufficient, if intelligible, let it be never so inelegant; as where it sets forth that the defendant *super caput suum*

(r) C. Eliz. 85. Qu. 3 Keb. 637.

(s) C. Eliz. 231. Hutt. 56. Sed vide Cowper, 229.

(t) C. Eliz. 137. (u) 1 Sid. 175. Salkeld, 370.

Sed vide 2 Salk. 660.

Doug. 194.

(x) 8 Co. 159.

2 Bulst. 35.

Moor, 5.

N. Bend. 35.

1 And. 24.

(y) 1 Lev. 1, 2.

5 Coke, 45.

C. Eliz. 462.

(z) 1 Salk. 51, 52.

6 Mod. 268.

Vide sup. s. 86.

(a) 1 Bulst. 109.

(b) Noy, 85.

1 Jones, 144.

Litch. 156.

(c) 5 Sid. 175.

(d) 1 Salk. 140.

(e) Salk. 195.

1 Sid. 40.

3 Keble, 301.

2 Lev. 102.

1 Mod. 78.

(f) 2 Lev. 140.

3 Mod. 100.

B. 1. c. 27. s.

15.

(g) 1 Sid. 140.

(h) 1 Salk. 195.

1 Mod. 78.

(i) C. Eliz. 108.

(k) 2 Jon. 59,

60.

(l) Dalt. c. 141.

10 Coke, 133.

(m) 2 Lev. 221.

suum proprium did forge, meaning that he did it of his own head. (1)

As to the third particular, *viz.* What faults of this kind are holpen by an *Anglicè*.

2 Hale, 169.

(n) Cro. Eliz.

231.

(o) Keilw. 100.

3 Bulst. 178.

seems contrary.

(p) 1 Sid. 318.

(q) Cro. Jac. 129.

(r) 1 Lev. 99.

129. 204.

1 Sid. 98. 318.

Raymond, 5.

3 Lev. 336.

10 Co. 130 133.

(s) Keble, 779.

(t) Noy, 85.

Latch. 156.

March, 16. 60.

1 Jones, 144.

10 Coke, 133.

Vide 1 Lev. 204.

1 Sid. 318.

Yelv. 68.

(u) Co. 131.

Noy, 85.

Latch. 156.

March, 16.

1 Sid. 81.

1 Jones, 144.

(v) Noy, 85.

1 Sid. 60. 81.

(x) Cro. Jac.

664, 665.

(y) Noy, 85.

Latch. 156.

1 Jones, 144.

(z) Cro. Jac.

664, 665.

2 Roll. 254, 255.

(a) 10 Coke,

130. 132, 133.

(b) Cro. Jac. 665, 664. 2 Roll. 254, 255. 10 Coke, 130. 132, 133.

Vide observations upon these statutes, 3 Com. 322 Barnardiston, K.B. 177. 261 268 298. 271. 331. 336.

The use of the Latin language in law proceedings is now abolished; for it is recited by 4 Geo. 2. c. 26. that many and great mischiefs do frequently happen to the subjects of this kingdom from the proceedings in courts of justice being in an unknown language, &c. &c. and it is therefore enacted, "That all proceedings whatsoever in any courts of justice in England, and in the court of exchequer in Scotland, and by 6 Geo. 2. c. 14. s. 5. in Wales, and Berwick upon Tweed, which concern the law and administration of justice, shall be in the English tongue" and

(1) The word *indictari* instead of *indictari*, and *destructionem* instead of *destructionem*, have been thought fatal, *Parker's Case*, Hutton, 56. So also *australia*, as a description of the South Sea Company, instead of *australia*, has been adjudged fatal, *Strange*, 787. *Ld. Raym.* 1615. But in the case of the King v. Beach, Lord Mansfield said, that

the court had looked into all the cases upon the subject, and that the true distinction is, even in the case of a variance, that where the omission or addition of a letter does not change the word so as to make it another word, it is not material. *Cowp.* 230. *Douglas*, 194.

"and language only, and not in Latin or French, or any other tongue or language whatsoever, and shall be written in such a common legible hand and character as the acts of parliament are usually ingrossed in, &c. and in words at length, and not abbreviated, and all persons offending against this act shall forfeit fifty pounds to any person who shall sue for the same.

But by 6 Geo. 2. c. 14. s. 5. "Law proceedings may be written or printed in the like way of expressing numbers by figures, as have been commonly used, and with such abbreviations as are now commonly used in the English language. Nor shall the penalty aforesaid be extended to the expressing the proper or known names of writs or other process or technical words in the same language as hath been commonly used. Nor shall this act extend to the certifying proceedings in the court of admiralty; nor by 6 Geo. 2. c. 6. to the court of receipt of exchequer in Scotland."

As to the SIXTH POINT, viz. Where the offence indicted may be laid jointly, and where severally; and where both jointly and severally; and where the offences of several persons may be laid in one indictment.

Sect. 89. It seems certain at this day, that notwithstanding the offence of several persons cannot but in all cases be several, because the offence of one man cannot be the offence of another, but every one must answer severally for his own crime, yet if it wholly arise from any such joint act which in itself is criminal, without any regard to any particular personal default of the defendant, as the joint (c) keeping of a gaming-house, or the (d) unlawful hunting and carrying away of a deer, or (e) maintenance, or (f) extortion, &c. the indictment or information may either charge the defendants jointly and severally; as thus, "*quod (g) custodiverunt, et uterq. eorum custodivit*;" or "*quod (h) asportaverunt, et eorum uterq. asportavit*;" or may charge them jointly only, without charging them (i) severally, because it sufficiently appears, from the construction of law, that if they joined in such act, they could but be each of them guilty; and from hence it follows, that on such indictment or information (k) some of the defendants may be acquitted, and others convicted; for the law looks on the charge as several against each, though the words of it purport only a joint charge against all.

M. 3 Geo. 1. (i) Rex v. Williams, adj. M. 10 Annæ. Bear v. White, 4 Will. 3. C. Car. 380, 381. 2 R. Abr. 707. 48. 708. Con. 2 Holl. 345. Palm. 367, 368. (k) 2 R. Abr. 707. 48. 708. Bear v. White, 4 Will. 3. 10 Mod. 65. Foster, 329.

But where the offence indicted doth not wholly arise from the joint act of all the defendants, but from such act joined with some personal and particular defect or omission of each defendant, without which it would be no offence, as the following a joint trade without having served a seven years apprenticeship required by the statute, in which case it must be the particular defect of each trader which must make him guilty, and one of them may offend against the statute, and the others not, the indictment or information (l) must charge them severally and not jointly; for it is absurd to charge them jointly, because the offence of each defendant arises from a defect peculiar to himself.

(c) Rex v. Dixon & ux. adj. Trin. 2. Geo. 1. 10 Mod. 335. 2 Hale, 174. (d) Rex v. Hawkins, adj. M. 3 Geo. 1. (e) 1 Vent. 302. (f) Salk. 382. (g) Rex v. Dixon et uxorem, adj. Tr. 2 Geo. 1. 10 Mod. 335. (h) Rex v. Hawkins, adj. 2 R. Ab. 81. 5 Mod. 180. 2 Hale, 174. Confirmed Strange, 623. 2 Sess. Cas. 221. 4 Burr. 2046. Barnard. K. B. 96. See also Burr. 980. Ld. Raym. 1572. But this last case is said not to be law.

(m) 2 R. Abr.
Burr. 984. 81.

himself. And for the like reason a joint indictment against several, for not (m) repairing the street before their houses, hath been quashed (l).

(n) 1 Leon. 241.
(o) 2 R. Ab. 81.

Salkeld, 382.

2 Burr. 984.

1 Vent. 302.

(p) 2 R. Abr.

81.

(q) Style, 245.

(r) Style, 312.

(s) C. Jac. 647.

1 R. Abr. 781.

Palmer, 313. 2

1 Bulst. 15.

2 Burr. 984.

(t) 2 Roll. 164.

(u) 6 Mod 210.

Strange, 623.

870. 921.

2 Ld. Raym.

1572.

2 Sess. Cas. 28.

154.

2 Bar. K. B.

80. 337.

Sed vide Burr.

985.

(x) B. Join. in

Action, 5. 47.

100. 108.

F. N. B. 171.

F. Dec. tant. 1.

4. 6. 8, 9.

(y) Qu. Dyer, 159. (z) B. Maint. 26. 52.

But I do not find it settled in what cases several offences of several persons may be joined in one indictment; for in some (n) books indictments against several for offences, as for recusancy, (o) following a trade without having served an apprenticeship, not (p) repairing the streets, &c. are mentioned without any exception on this account. And it is holden, that one indictment against two justices for not (q) inquiring of a riot, and an indictment against two persons for speaking of the same (r) words, may be maintained; and yet it is (s) agreed that one action lies not against several for the same words. Also in (t) Roll's Reports an indictment against several for having inmates in their houses is said to have been quashed because it was but one joint indictment against them all, whereas there ought to have been several indictments against them. Also in the sixth (u) Modern Reports, an indictment against several for the neglect of a day of fasting appointed by proclamation, is said to have been quashed for the like reason. And this is certainly the most agreeable to the rule of bringing actions upon penal statutes, wherein several offences shall not be joined, except it be in respect of some one thing to which all of them have a relation; as where several (x) join in a suit in the (y) admiralty for a contract on land, or in procuring or giving an untrue verdict, or are privy to one another (z) in maintenance of the same cause.

As to the SEVENTH POINT, viz. Whether the words *vi et armis* be in any case necessary in the body of an indictment at common law.

(a) C. Jac. 473.

Skinner, 426.

2 Hale, 187.

2 Lev. 221.

See the books

cited in the next

sect. qu. sup. c.

23. sect. 85.

(b) Yet see prea.

37 H. 8. 8

(c) 1 Lev. 125,

126.

Dalt. c. 311.

(d) 1 Keb. 562.

Dalt. c. 131.

(e) Popham, 206.

Cro. Car. 377.

Sect. 90. It is taken for granted in some (a) books, that they were necessary at common law in all indictments for offences which amount to an actual disturbance of the peace, as rescoues, and assaults, and such like; yet I do (b) find it agreed, that they were ever necessary in such indictments wherein it would seem absurd to put them in, as in indictments for (c) conspiracies, (d) cheats, slanders, escapes, and such like, or (e) nuisances committed in a man's own ground.

However, there can be no doubt but that the omission of them in indictments of this kind is made good by the statute of 37 Hen. 8. c. 8. by which it is recited "That in all indictments of felony and trespass, and divers others, it was common to use
" the

(1) Several defendants cannot be joined in one indictment for perjury; for perjury is a separate act in each; and one may be desirous to have a *certiorari*, and the other not; and the jury on the trial of all may apply evidence to all that is but evidence against one, Strange, 921. So also in Rex v. Clendon, and others, where two were joined in the same indictment for an assault, the court held they were distinct offences, Strange, 870. Ld. Raymond, 1572. Bar. K. B. 337. 2 Sess.

Cas. 24. But in the case Rex v. Benfield and Saunders, E. 33 Geo. 2. on an information against both for the same libel, it was held good; and the case of the King v. Clendon, held not to be law, Burrow, 980. And where goods are obtained under false pretences, if the false pretence is conveyed by words spoken by one defendant in the presence of others, who are acting in concert together, they may be all indicted jointly, Rex v. Young and others, 3 Term Rep. 96.

“ the words *vi et armis*, and in divers of them to declare the manner of the force and arms, that is to say, *vi et armis, videlicet, baculis, cultellis, arcubus et sagittis*, or other such like words, where in truth the parties indicted had no such weapons at the time of the offence, yet for lack of such words the said indictments were taken as void, and had been avoided by writ of error or plea, &c.” and thereupon it is enacted, “ that these words *vi et armis, videlicet, cum baculis, cultellis, arcubus et sagittis*, or other such like, shall not of necessity be put in any indictment or inquisition; nor shall the parties indicted have any advantage by writ of error or plea or otherwise, to avoid any such indictment or inquisition for the want of these or the like words; but that the same inquisitions and indictments, and every of them, lacking the said words, or any of them, shall be adjudged as effectual to all intents, constructions, and purposes, as the same inquisitions and indictments having the same words in them.”

Sect. 91. But notwithstanding this statute seems to be so express as to all indictments, yet it is (f) holden in many books, that indictments for trespass, and such like, are still insufficient without the words *vi et armis* (1); and many indictments have accordingly been quashed for want of them, where they are not implied in some others, as (g) *rescussit*, or (h) *manu forti*, &c. But it seems difficult to assign any reason for these opinions, unless it be, that because the enacting part of the statute says, that the words “ *vi et armis, videlicet, cum baculis, cultellis, &c.*” are not necessary, &c. the meaning was only to take away the necessity of those superfluous words *baculis et cultellis, &c.* but not of the words *vi et armis*, where they are proper and pertinent. But to this it may be answered, that the preamble seems to complain of the opinion that the words *vi et armis*, whether put by themselves, or used with those other words, were in any case thought necessary in indictments; and it is most natural so to explain the enacting part of a statute as to make it extend to all the mischiefs complained of in the preamble; besides, the enacting part of the statute is express, “ that indictments without these words, *vi et armis, videlicet, baculis, cultellis, arcubus et sagittis*, or any of them, shall be as effectual as if they had been comprised in them;” and surely the words *vi et armis* cannot but be comprehended under these words, “ or any of them.”

It is said (i) indeed in Levinz's Second Reports, that the words *vi et armis* are still necessary, because without them there can be no *capiatur* entered, nor fine to the king; but this is in effect to contradict the statute, which says, “ that an indictment without those words shall be as effectual to all intents, constructions, and purposes, as an indictment with them.” Besides, will any one say, that there can be no *capiatur* nor fine to the king upon indictments of cheats, conspiracies, and such like? wherein yet it seems to be agreed, that those words are not necessary. And agreeably hereto, the court of king's bench has (k) often refused to

(1) In an indictment for a riot the words *vi et armis* are implied in the words *riose cesserunt, fregerunt, et prostraverunt*. Strange, 834. Bar. K.

B. 138. 2 Sess. Cas. 13. Cro. Car. 345. 472. Styles, 12. 3 Peer. Will. 464.

(f) S. P. C. 94.
2 Lev. 221.
1 Sid. 140.
1 Bulst. 205.
1 Levinz, 126.
1 Keble, 101.
2 Keble, 154.
Vide Poph. 206.
C. Ca. 377, 378.
(g) C. Jac. 345.
2 Bulst. 208.
2 Hale, 117.
(h) Dalt. c. 131.

(i) Rex v. Marriott, 2 Lev. 221.
Sed qu.

(k) C. Jac. 472, 473.
Vide C. Jac. 345.
2 Bulst. 208.
Dalt. c. 131.
Lamb. B. 4. c. 5. s. 502, 503.

(l) See Lord Hardwicke's opinion upon this subject, in the case of *Rex v. Burridge*, 3 Peer. Wms. 493.

to quash indictments of trespass for want of those words. However, it is certainly safe and advisable to make use of them where they are proper and pertinent, if it be to no other purpose than to aggravate the offence (l).

As to the EIGHTH POINT, viz. Whether it be necessary in the body of an indictment at common law to lay the offence *contra pacem*.

(m) 3 Keb. 490.
1 Keb. 490.
2 B. 1st. 258.
2 Hale, 188.
See the cases cited in the following part of this section, and *Cro. Eliz.* 186.
6 Modern, 128.

Sect. 92. Inasmuch as all offences whatsoever which are subject to a public prosecution seem in general to be so, as they are breaches of the law, and in that respect tend to the disturbance of the quiet and peaceable government of the king over his people, it seems to be a good general (m) rule, that no indictment or information for an offence, capital or not capital, against the common law or statute, can be good, except it expressly suppose such offence to have been done against the peace of the king or kings in whose reign (1) or reigns it was committed.

(n) Co. Ent. 360, 361.
(o) Co. Ent. 351, 352, 355, 356, 358, 359.
(p) Co. Ent. 352, 353, 361, 362.
(q) Co. Ent. 358. See *Rastal*, 263.
(r) 2 R. Abr. 82, 83.
Con. Cro. Car. 584.

And accordingly I find, that every precedent of an indictment in Coke's Entries, whether for (n) treason, or (o) felony, or (p) inferior offences, expressly lays the offence against the peace of the king, except only in four instances: the FIRST whereof is of an indictment for a (q) nuisance for not repairing the highway; which if it may be maintained, seems to depend chiefly on this reason, that the offence is of such a nature that a man may be as well guilty of it in his own ground as in that of another; and therefore it hath been (r) holden, that it needs not be laid against the peace, because the laying it in such manner may seem to imply somewhat of force or trespass against the person or possession of another: but it seems difficult to reconcile this opinion with those many resolutions taken notice of in the following part of this section, by which indictments, for want of these words *contra pacem*, have been adjudged insufficient, where the offences could on no other account be said to be against the peace than as they

(s) Co. Ent. 253.

(t) Co. Ent. 254.

(u) Co. Ent. 363.

(x) *Rastal*, 263.

(y) 2 R. Ab. 82.

(z) 2 R. Abr. 82.

(a) 1 Mod. 8.

were breaches of the law, as all nuisances certainly are. The (s) SECOND of the said instances in Coke's Entries is, of an indictment of homicide by misadventure; and the THIRD (t) of an indictment of homicide in self-defence; but these precedents, if they may be maintained, seem to depend chiefly on this reason, that such offences are supposed to be owing rather to the misfortune than to the fault of the party. And the (u) FOURTH of the said instances is, of an indictment of perjury on the statute which concludes in *contemptum reginae, &c. et contra formam statuti*, without adding *contra pacem*. But (x) *Rastal's* Precedents, both of indictments of felony and of inferior offences, do as often omit the words *contra pacem* as make use of them. However, certainly the much greater number of precedents expressly conclude *contra pacem*; and the authority of these is much strengthened by those many cases in the Reports wherein indictments and informations appear to have been quashed for want of the words *contra pacem*; as indictments and informations for (y) barratry, (z) forgery, (a) retaining

retaining a servant without a testimonial from his last master, (b) following a trade without having served an apprenticeship, (c) erecting a cottage, (d) assault and battery, &c.

(b) 3 Keb. 790.
1 Keb. 501. 848.
6 Modern, 128.
(c) 1 Keb. 474.
Yelverton, 66.
(d) 2 Keb. 36. 779.

But it seems clear from all the precedents, that neither an information (e) *qui tam* on a penal statute, nor an information by the king for an (f) intrusion, or other (g) wrong of a civil nature done to his lands, goods, or revenues, need the words *contra pacem*.

(e) Rastal, 409.
1 Kible, 360.
Co. Ent. 361.
to 372. 393.
(f) Rastal, 412.
Co. Ent. 372.
390.
(g) Rastal, 410. Co. Ent. 390.

Sect. 93. If the offence indicted be expressly laid, partly in the reign of one king, and partly in the reign of another, as where J. S. is indicted for having erected a weir in the time of queen Elizabeth, and continued it in the time of king James, and thereupon the indictors conclude, that so the weir was erected and continued *contra pacem regis*, &c. without adding, *contra pacem nuper reginae*, the indictment is (h) insufficient; because it appears, that the commencement of the wrong, which is as much indicted as the continuance, was in the reign of queen Elizabeth, and consequently, if a crime, must have been against the peace of her reign. But if the indictors had concluded only, that J. S. so continued the weir *contra pacem domini regis*, &c. and had laid the erection of it by way of recital or inducement only, it is (i) said, that the indictment had been good, because it should be taken as an indictment for the continuance only.

(h) Yelver. 66.
Vide 4 H. 6. 4.
2 Hale, 188, 189.
F. Brief, 25.

(i) Yelv. 66.
4 H. 6. 4.
F. Brief, 25.

As to the NINTH POINT, viz. Whether it be necessary in the body of an indictment at common law to lay the offence *contra coronam et dignitatem regis*.

Sect. 94. It is observable, that all the precedents of indictments in Coke's Entries, cited in the ninety-fourth section, which lay the offence *contra pacem*, lay it also *contra coronam et dignitatem* &c. Yet not one of (k) Rastal's Precedents doth so. Neither do I find any one case wherein an indictment against which no other exception could be taken, has been adjudged (l) insufficient for the want of these words. But, on the contrary, I find it expressly resolved in (m) Holbrook's Case, that an indictment of a riot is good without them.

(k) Rastal, 263.
(l) 2 Bulst. 258.
Aley, 49, 50.
(m) 2 R. Abr. 82.
2 Hale, 188.
N.B. Most of the precedents in Treman's Ent. agree with the precedents in Coke.

As to the TENTH POINT, viz. Whether it be necessary in the body of an indictment at common law to lay the offence *in contemptum regis*.

Sect. 95. It is so laid in some indictments of inferior crimes in (n) Coke and Rastal, and in others (o) not. Also it is so laid, with the addition of the clause *contra leges suas*, in every information of intrusion upon the king's lands in (p) Coke and (q) Rastal, and also in an information in (r) Coke for a trover and conversion of the king's goods. But in (s) two informations for mines claimed by the king, which are the only precedents I find of this kind, the supposed injury is laid only *ad damnum regis* without either of the said clauses. Neither do I find either of them in any indictment of treason or felony, nor in any information *qui tam* in Coke or Rastal. And though it seems to be admitted in the Year-Book

(n) Co. Ent.
353. 363.
Rastal, 263.
(o) Co. Ent. 362.
Rastal, 263.
(p) Co. Ent.
372. 376. 379.
381. 385. 387.
1 Coke, 16. 26.
(q) Rastal, 412.
(r) Co. Ent. 390.
(s) Rastal, 400.
Plowden, 310.

(t) 4 H. 6. 4.
F. Brief, 25.
(u) Lutw. 132,
133, 134, 135,
139. 165. 167.

Book of (t) the fourth year of Henry the Sixth, that in an action on a statute it is necessary to conclude, *in contemptum domini regis*, yet in (u) Lutwych's Entries it is oftener omitted than used, and no exception appears to have been taken for the omission.

As to the ELEVENTH POINT, viz. Whether it be necessary in an indictment at common law to lay the offence *illicite*.

(x) See 1 Keb.
859.
2 Keble, 715.
(y) 2 R. Abr. 82.
See Cox's Case,
Cases in Crown
Law, 65.

Sect. 96. I cannot find this word used in any one of Coke's or Rastal's precedents of indictments; neither do I find any clear and express (x) authority, that it is in any case necessary in an indictment at common law; but on the contrary I find it expressly (y) adjudged, that it is not necessary in an indictment of a riot, because the act itself contained in the indictment so plainly appears to be unlawful. But where a statute uses the word unlawfully in the description of an offence, it is certain than an indictment grounded on it must use the word *illicite*, or some other tantamount.

As to the TWELFTH POINT, viz. Whether a defect in any of the particulars above-mentioned be amendable.

For the rise and
history of
amendments,
vide 3 Com. 307.
(z) 1 Jon. 421.
1 Salk. 51, 52.
6 Mod. 268, &c.
Vide sup. c. 23. sect. 129. 1 Sid. 66.

Sect. 97. I take it to be (z) settled, that no criminal prosecution is within the benefit of any of the statutes of Amendments (1); from whence it follows, that no amendment can be admitted in any such prosecution but such only as is allowed by the common law.

(a) 1 Keb. 252.
2 Keble, 580.
1 Sid. 155.
Vide 1 Keb. 45.
2 Keble, 141,
142. Con.
2 Bulstrode, 35.
(b) 1 Keb. 252.
1 Sid. 155. 229,
230.
Vide Hob. 135.
(c) The custom
extends to Mid-
dlesex as well as
London.
1 Keble, 571.
(d) See B. 1. c.
27. sect. 16.

And agreeably hereto I find it laid down as a (a) principle in some books, that the body of an indictment removed into the king's bench from any inferior court whatsoever, except only those of London, can in no case be amended. But it is (b) said, that the body of an indictment from London may be amended, because by the City charter a tenor of the record only can be removed from thence (c) (d). And it seems, that by the course of the king's bench, a rule may be made on any coroner to amend even the body of his inquest by his notes in a mere matter of form. But I do not find it any where holden, that this can be done after it is filed, by which it becomes a record of the court; and then the same objection seems to lie against the amendment of it, as of an indictment.

(e) 1 Saund. 249.
1 Sid. 175.
1 Keble, 656.
3 Mod. 167.
(f) C. Jac.
276, 277.
1 Sid. 155.
(g) 1 Sid. 155.
Rex v. Atkinson,
Trin. 25 Geo. 3.
1 Keb. 45. 656.
1 Sid. 175.
12 H. 7. 25.
10 Ed. 4. 15.

But it seems to be (e) agreed, that the caption of the indictment from any place may, upon motion, be amended by the clerk of the assizes or of the peace, so as to (f) make it agree with the original record at any time during the same Term in which it came in, (g) but not in a subsequent Term. But I have known it holden, that the caption of an inquisition cannot be amended at any time after it is filed any more than the body; the reason whereof perhaps may be this, that the caption being part of, and drawn at the same time with the inquisition, greater exactness is required in it than in that of an indictment, which is left as a thing of

(1) Confirmed by Ld. Mansfield, Burr. 2527. Sed vide Douglas, 115. with respect to penal ac-

tions, and Rex v. Holland, 4 Term Rep. 457. as to informations *ex officio*.

of course to be drawn up by the clerk of the court, when occasion shall require.

Also by the opinion of two judges against that of two, the want of continuances in the record of an attainder of felony (*h*) cannot be amended by the certificate of the clerk of the assizes, especially if the king signify his pleasure that he doth not desire any amendment. And it seems to be (*i*) settled at this day, that no discontinuance is amendable in any criminal prosecution, (*k*) without consent.

(*h*) 1 R. Abr. 196. 1 Jones, 120. (*i*) Salk. 51, 52. 6 Mod. 268. B. Amend. 10. 17. 66. 92. F. Amend. 59. 20. 32. Dis. de Process, 47. (*k*) 21 H. 7. 40. F. Amend. 78. See the case of *Rex v. Tutchin*, 6 Mod. 268. 2 Ld. Ray. 1061. 5 St. Tri. 532.

But it hath been (*l*) adjudged, that a mere misprision in the joining of an issue in a criminal prosecution, as where the word *similiter* is omitted, may be amended at any time. Also it hath been (*m*) adjudged, that the direction of a *venire vicecomitibus* of such a place, which is returned by J. S. *vicecomite*, may be amended on the oath of J. S. that there is but one sheriff of the place, which is himself. Also it is every day's practice to amend (*n*) criminal informations (*o*) and the pleadings thereon by the rule of court, while all is in paper. And (*p*) *quare* if the record may not be so amended by the Paper-book at any time before judgment.

ments underwent a very critical investigation. (*p*) Salkeld, 47. Salkeld, 50. Vide 1 Keb. 144. 1 Levinz, 189. 3 Levinz, 430. 2 Burrow, 758.

Sect. 98. It seems to have been anciently the common practice, where an indictment appeared to be insufficient, either for its uncertainty, or the want of proper legal words, not to put the defendant to answer it; but if it were found in the same county in which the Court sat, to award process against the grand jury, to come into court and (*q*) amend it. And it seems to be the common practice at (*r*) this day, while the grand jury who found a bill is before the Court, to amend it by their consent in a matter of form, as the name or addition of the party, &c.

that that court shall alter matter of form, altering no matter of substance.

And now I am in the SECOND PLACE to shew what ought to be the form of the body of an indictment upon a statute.

Sect. 99. For the better understanding whereof, having premised, that the same rules which have been already laid down concerning indictments at common law, are generally applicable to indictments on statutes, I shall in this place consider such matters only as more peculiarly belong to the form of the body of an indictment upon a statute, under the following particulars :

1. Whether it be necessary that such indictment recite the statute whereon it is grounded.

2. What mis-recitals of such statutes are fatal.

3. How far it is necessary to bring the offence indicted within the very words of the statute.

4. Whether an indictment grounded on a statute, which will

not maintain it, may be made good, as an indictment at common law.

5. How far it is necessary to conclude *contra formam statuti*.

As to the FIRST POINT, viz. Whether it be necessary that such indictment recite the statute whereon it is grounded.

(s) 5 H. 7. 17.
F. Act. sur le
Stat. 7. 20.
2 R. Abr. 79.
Plowden, 1. 79,
&c.
1 H. 6. 1.
4 Co. 48.
C. Eliz. 236.
C. Car. 229.
Dyer, 155. 346.
B. Act. sur le
Stat. 4. Parl. 15.

Sect. 100. I take it to be (s) settled, that there is no necessity in any indictment or information on a (t) public statute, to recite such statute, whether the offence be such only because prohibited, or be an evil in its own nature, and whether it be prohibited by more than one statute, or by one only. For the judges are bound *ex officio* to take notice of all public statutes (u); and where there are more than one by which an indictment or information may be maintained, they will go upon that which is most for the king's advantage.

but C. Eliz. 187. 47 E. 3. 10 Dyer, 159. B. Parl. 75. B. Champ. 1. Shower, 337. F. N. B. 55. cont. Qu. 6 Modern, 140, 141. (t) Moor, 468. 699. 4 Co. 13. 76. B. Avow. 5. B. Parl. 15. 32. 2 Hale, 172. 192. (u) Dyer, 155. 346. 5 H. 7. 17. 6 Mod. 140. Cro. Eliz. 187.

As to the SECOND POINT, viz. What mis-recitals of such statutes are fatal, I shall endeavour to shew:—

1. Whether all mis-recitals of the substantial part of the statute are fatal.

2. What mis-recitals of the place or time at which the parliament was holden.

3. Whether a mis-recital of the title of a statute.

4. What other mis-recitals are fatal.

As to the first of these particulars, viz. Whether all mis-recitals of the substantial part of the statute are fatal.

(v) Plow. 79.
83, 84.
Cro. Eliz. 236.
245.
Palmer, 565.
4 Coke, 48.
See the three
next sections.
1 Roll. 50.
C. Car. 135, 136.
2 Hale, 172.
1 Jones, 194.
(w) Vide 2
Hale, 173.
(x) C. Eliz. 93.
2 Bulst. 258.
(y) 4 Co. 12, 13.
C. Car. 135.
(z) 2 Jon. 49, 50.
3 Keble, 661.
(*) C. Eliz. 236.
(a) C. Jac. 362.
See sect. 108.

Sect. 101. It seems to be settled, that notwithstanding there be no necessity to recite a public statute, yet if the prosecutor take upon him to do it, (v) and materially vary from a substantial part of the purview of the statute, and conclude *contra formam statuti prædicti*, he vitiates the indictment (w); because it judicially appears to the Court, that there is no such foundation for the prosecution, as that whereon it is expressly grounded; as where in an (x) indictment with such a conclusion, on the statutes which prohibit entries with strong hand, the word *vi* is put for *manu forti*; or where the word (y) *nuncia* is put for *mendacia* in such an indictment on the statutes against the tellers of lies of great men; (z) or where the verb in a statute which expresses the principal act wherein the offence consists, is expressed in such an indictment on such a statute by a word which is neither classical nor legal Latin; (*) or where a statute, in describing courts wherein it prohibits persons to bring actions in other names without their privacy, call them courts wherein pleas are holden in actions personal, &c. and you, in reciting it in such an indictment, (a) call them courts wherein pleas are holden in any actions.

Sect. 102. Yet it seems that the following mis-recitals of the substantial part of the purview of a statute in any indictment are not

not fatal; as the omission of a synonymous word, having no other meaning than what is fully expressed in the words which are recited; or the joining of words which are either wholly synonymous, or much of the same sense, as signifying such things as generally include one another, as (b) the words *malitiosè et contemptuosè*, &c. with a copulative, where the statutes use a disjunctive; or the using the singular number for the plural, or the plural for the singular, where the sense is the same; as where in (c) reciting a statute speaking of suits in any courts, you use the words *in aliquâ curiâ*; or where, in reciting the statute against disturbing persons in their open preaching, you use the (d) words *in apertis prædicationibus*.

Sect. 103. Also it (e) seems, that no advantage can be taken of a variance from any part of a private statute, without shewing it to the court in a proper manner, because otherwise such a statute shall be taken to be as it is recited.

As to the second of the particulars above-mentioned, viz. What mis-recitals of the place or time at which the parliament was holden, are fatal.

Sect. 104. It (f) seems to be generally agreed, that a mis-recital of the place or the day at which the parliament was holden, vitiates an indictment. As (g) if a parliament was first holden on the twenty-eighth of April in the thirty-second year of Henry the Eighth, and afterwards holden by prorogation on the twelfth of April the next year, and a statute then made be recited, as made at a parliament holden on the twenty-eighth of April in the thirty-second year of Henry the Eighth: Or if a parliament be summoned to meet on the twenty-third of January in such a year, and, before, the meeting be prorogued to the twenty-fifth, and then holden, and a statute made by such parliament be (h) recited as made in a parliament holden on the twenty-third: Or if a parliament first holden in one year be continued by prorogation to another, and then sit again, and a statute made at such sessions be (i) recited as made in a parliament holden or begun at such second year (which is all one), instead of saying that it was made at a sessions of parliament then holden, and the indictment conclude *contra formam statuti prædicti*, the variances in strictness are fatal; for the court will not make any case better than the record has made it; and therefore where that expressly grounds it on the act of a supposed parliament, where there was no such act, the court will not find one out to make it good.

Also it hath been (k) adjudged, that a repugnancy in setting forth the time when a parliament was holden, is fatal; as if a statute be recited as made on such a day, in the first and second years of such a king, for it is impossible that one and the same day should be in two years. Also it is holden in (l) Croke's Reports, that an indictment was discharged for not shewing in what county a parliament was holden; but no reason is given for this opinion: (m) and it hath been adjudged, that the total omission of the day when the parliament was holden, is no fault in the recital of a statute. Also it seems to be (n) agreed, that a mistake in supposing a statute to have been made at a parliament holden

in such a year, when in truth it was then holden by prorogation, may be helped by the constant course of precedents upon such statute. Also it seems to be (o) agreed, that not only a mis-recital of the day whereon the parliament was holden, but even a mis-recital of the purview of a statute may be saved by a general conclusion *contra formam statuti*, without adding *predicti*, &c. But (p) I do not find it settled, whether a fault of this kind can be helped by the defendant's admittance, that there is such a statute as is supposed; and it will be difficult to maintain that the party's admittance of what the court judicially knows to be contrary to the truth, can make good any indictment.

(o) C. Car. 232, 233.
Palmer, 565.
Raymond, 191, 192.
3 Keb. 647, 648.
Lutwych, 140.
(p) Affirmed, C. Jac. 139.
Denied C. Eliz. 236.

As to the third of the particulars above-mentioned, *viz.* Whether the mis-recital of the title of a statute be fatal.

(q) Hardr. 324. *Sect.* 105. It is (q) said to have been holden by Sir Matthew Hale, that the mis-recital of the entitling of an act will not vitiate a replication, because it is not matter of substance; and a judgment is (r) said to have been lately given in the court of common pleas agreeable to this opinion; but the contrary is (s) said to have been since adjudged in the court of king's bench.

(r) 6 Mod. 62.
(s) 6 Mod. 62.

As to the fourth of the particulars above-mentioned, *viz.* What other mis-recitals of a statute are fatal.

(t) 2 R. Ab. 465. *Sect.* 106. (t) It is said to have been often adjudged, that a variance in reciting a statute to commence after the making, where the statute is express that it shall commence after the end of the sessions, is fatal. But I take it to be a settled rule, that a variance no way altering the sense of the statute does (u) no hurt; as where, in the recital of an oath prescribed by statute, the words, "*Sea of Rome*," are put for "*See of Rome*;" and "I do declare in conscience," instead of "I do declare in *my* conscience."

(u) 1 Ven. 172.
Skinn. 11. 52.

Also it seems to be (x) agreed, that a variance from an immaterial part of a statute does no hurt, (y) and therefore that where a statute contains several branches relating to several distinct matters, an omission of such branches as no way relate to the offence indicted does no hurt, because they are nothing to the present purpose. Also it hath been adjudged, that every mis-recital even of such branch is not fatal; as if it vary only in such a part of the description of the offence, as is put in only by way of flourish, and *ex abundanti*, and makes no necessary ingredient in the offence prohibited, nor needs any proof: as if in a prosecution on the statute of 12 Rich. 2. the (z) recital be that "none shall devise, speak, or tell any false news, lies, or other such false things, &c. *unde discordia aut aliqua lis (Anglicè Debates) inter magnates vel inter magnates et communitatem dicti regni oriri possint*;" where the words of the statute are, "That none shall devise, speak, or tell any false news, lies, or other such false things, &c. &c. whereof discord or any slander might arise within the said realm;" for the first words, *viz.* "That none shall devise, &c. any false news, lies, or other such false things, &c." are only material. Indeed as this case is reported by Croke, there is a mis-recital even in this part; for instead of "other false things," the recital is said to mention "other things," generally, omitting

(x) C. Car. 135, 136.
Palmer, 565.
1 Jones, 194.

Burrows, 999.

omitting the word "false;" but I suppose that this is a mistake of the printer, and that there is no such variance in the record of the case, because no exception is reported to have been taken to it.

Sect. 107. But if a mis-recital of such a part of the purview of a statute be not fatal, it seems *à fortiori* to follow, that a mis-recital of the preamble is not material, where the substantial part of the purview is well recited. And upon this reason chiefly, as I suppose, it hath been adjudged, that if in an action on the (a) statute of hue and cry for a robbery, the declaration recite the preamble to speak of the burning of houses, where the statute mentions arsons generally, without any particular mention of the arson of houses; or in an action for the slander of an earl, on 2 Rich. 2. c. 5. if the declaration in reciting the preamble mention only what relates to "earls, &c." and omit the clause concerning the "other great officers," (b) yet the plaintiff may have judgment especially after verdict. And these resolutions seem to weaken the authority of Parker's case reported by (c) Hutton, wherein it is said to have been holden by three judges against the opinion of Hobart, that the putting of the word *indicare* for *indictari* in the recital of the preamble of the said statute of hue and cry, in a writ grounded thereupon, is fatal.

Sect. 108. If an indictment on the eighth of Henry the Sixth, in reciting that part of the statute which declares in what actions the party grieved shall recover his damages, after having mentioned recoveries by verdict, omit the (d) words "or in any other manner;" or use the (e) words *assism novæ disseisinæ* for *assisam novæ disseisinæ*; (f) or recite the statute as giving the fine on a recovery by action *dicto domino regi*, where there is nothing to make good the word *dicto*; (g) or recite the statute relating to the bringing an action to be, "if the party after such entry make any feoffment, &c." where the words are, "if after such entry any feoffment be made," or (h) recite it to be, "if any person be put out *and* disseised" in the conjunctive, where the words of the statute are, "if any person be put out or disseised" in the disjunctive, the variances have been adjudged fatal. Yet (i) it hath been holden, that the last of these is an immaterial variance, because though the words above-mentioned be disjunctive in the statute, they have always been expounded in the copulative. Also it may be questioned how far the rest of these authorities may be law at this day, since of (k) late the court has not been so strict in recitals as formerly; and if an indictment fully recite a statute so far as it concerns indictments, a misprie in what concerns other matters seems to be much helped by the authorities of the cases above cited.

Sect. 109. It hath been (l) adjudged, that a total omission of the clause of a statute which ordains what the party shall forfeit, does no hurt. Yet if the statute be wholly mis-recited in such clause, as if the words (m) *admitteret* or *forisfaceret* be used in such clause for *amitteret* and *forisfaceret*, the exception for the variance seems to have greater weight. Yet if the word mis-recited be synonymous with the other which is rightly recited,

(a) Vide 3 Keb. 647. 661, 662.
2 Jones, 51.

(b) 2 Jones, 49, 50, 51.
3 Keble, 647.
3 Keb. 661, 662.
Vide C. Jac. 139.
(c) Hut. 56, 57.
3 Keb. 648, 662.
2 Jones, 50, 51.

(d) C. Eliz. 186.
(e) C. Eliz. 393.
(f) 1 Bulst. 218.

(g) C. Eliz. 307.
Parallel Case,
C. Eliz. 697.

(h) C. Eliz. 96.
697.

(i) C. Eliz. 307.

(k) 3 Keb. 662.

(l) 20 H. 6. 31, 32, which seems mistaken in the Abridgements.
F. Brief, 86.
B. Champ. 1.
Vide Plow. 84.
Dyer, 160.
(m) C. Jac. 135.

- (n) Vide C. Jac. 362. cited, and the (n) whole purport of both as fully expressed in one word, which is properly recited, as if both had been used, as it certainly is in the case above cited, wherein the word *foris-faceret* is rightly recited, and the word *admitteret* mis-recited, it may perhaps be questioned whether such an exception would be fatal at this day, especially considering that it is in a part of the statute which might as well have been omitted in the recital; and there is no variance but from a word wholly nugatory and superfluous, and the sense would be complete by the rejecting the word mistaken as surplus and insensible. But if in the mis-recital of such a clause, there be such a variance as carries with it a plain material repugnancy to the intent of the statute, (o) as where the words, "whoever shall do the same shall incur the pain, &c." are thus recited, "whoever shall do the contrary, shall incur the pain, &c." I do not well see how any thing can be said to make it good; for it is a general rule, that (p) repugnancies in indictments are fatal, and the prosecutor himself declares, that not those who do the thing indicted, but those who do it not are within the penalty of the statute.

As to the THIRD POINT, viz. How far it is necessary to bring the offence indicted within the very words of the statute.

- (q) C. Eliz. 535. Sect. 110. I take it for a general rule, that (q) unless the statute be recited, neither the words *contra* (r) *formam statuti*, nor any periphrasis, intendment or (s) conclusion, will make good an indictment, which does not bring the fact prohibited or commanded, in the doing or not doing whereof the offence consists, within all the material words of the statute. And upon this ground it hath been resolved, that an indictment of rape finding that the defendant such a day and place, A. B. &c. *felonice cepit et eam adtunc et ibidem carnaliter cognovit*, &c. *contra voluntatem suam*, &c. is not (t) sufficient without the word *rapuit*; because that is the word used by the statute which makes the offence felony. Also it hath been (u) adjudged, that indictments for perjury on 5 Eliz. c. 9. omitting the words *voluntarie et corrupte*, in setting forth the swearing; and indictments for striking in a church on 5 and 6 Edw. 6. c. 4. (v) omitting the words "to the intent to strike, &c.;" and indictments for aiding the procurors of the pope's bulls on the 13 Eliz. c. 4. (x) omitting the words "to the intent to set forth, &c. the usurped power, &c." and indictments for forestalling; on 5 and 6 Edw. 6. c. 14. setting forth, that the defendant bought certain goods of J. S. which he was about to sell at such a market, but (y) not expressly alleging, that "such goods were then coming to such market to be sold;" and (z) indictments for ingrossing on the same statute, setting forth that the defendant bought so much corn, &c. without alleging, that "he ingrossed, &c. by buying, &c." and (a) indictments for treason in compassing the king's death on 25 Edw. 3. having neither the word "compass" nor "imagine, &c." cannot be taken as indictments on such statutes.
- (g) C. Eliz. 535. See the Books cited to latter part of this section.
C. Eliz. 749. seems contrary.
Vide Hardres, 20.
Bunbury, 119.
177. 254.
Fortescue, 32.
(r) Dyer, 363.
1 Hale, 170, 171.
2 Roll. 227. 263.
2 Leonard, 211.
11 Coke, 58.
(s) C. Eliz. 147. 201.
2 Leonard, 211.
Rex v. Tre-lawney, East. 26 Geo. 3.
(t) 9 Edw. 4. 26.
B. Indict. 7.
Sup. c. 23. s. 77.
(u) C. Eliz. 147. 201.
2 Leonard, 211.
Co. Ent. 367, 368.
(v) C. Eliz. 231. 2 Leonard, 188. Noy, 171. (x) Dyer, 363. (y) 1 Roll. 421. (z) 2 Leon. 39.
(a) Kelyng, 8.

tutes. And the like hath been adjudged in many other (b) cases (1). (b) 11 Coke, 58.
Dyer, 346.
2 Roll. 227, 263.

Sup. sect. 104. 2 Roll. Abr. 81. 9 Ed. 4, 26, 27.

Sect. 111. Neither doth it seem to be always sufficient to pursue the very words of the statute, unless by so doing you fully, directly, and expressly allege the fact, in the doing or not doing whereof the offence consists, without any the least uncertainty or ambiguity; for it hath been (c) adjudged, that an indictment for perjury on 5 Eliz. c. 9. setting forth, that the defendant *tacto per se sacro evangelico falso deposuit*, &c. is not good, without directly shewing that he was sworn. Also it hath been (d) adjudged, that an information on the 18 Hen. 6. c. 17. for not abating so much of the price of wine sold as the vessels wanted of the statute-measure, is insufficient, if it do not expressly shew how much they wanted. Also it is said that an indictment on the statute of usury, setting forth, that the defendant took more than five in the hundred, is not good, without shewing in particular how much (2). (c) C. Eliz. 105.
(d) 2 Leon. 38, 39.

Sect. 112. As to the description of the person of the defendant, in order to bring him within the purview of a statute, which extends only to such kind of persons as are specially mentioned in it, it is a good (e) general rule, that every indictment must bring the defendant within all the descriptions mentioned in the body of the act, except they are such as carry with them the bare denial of a matter, the affirmation whereof is a proper and natural plea for the defendant; as where it is enacted, "that all persons having no reasonable excuse to be absent, shall go to their parish church, &c." in which case it is said, that it is not necessary to shew, that the defendant had no reasonable excuse, for this will come most properly in question from the plea of the defendant (f). Also it seems that there is no need, in describing the defendant, to set forth the place where the thing happened which brought him within the description, as hath been more fully shewn in the eighty-fourth section. Also it hath been adjudged, that it is (g) sufficient in describing the defendant to say, that he *existens* so and so, as the statute mentions, did the fact, without alleging that he was so at the time of the fact; for that shall be intended, as hath been more fully shewn in the sixty-first section. (e) Pop. 93, 94.
2 Leonard, 5.
Qu. 2 Keb. 582.
(f) Rex v.
Pollard, 2 Ld.
Raym. 1370. &
Rex v. Baxter,
5 Term Rep. 83.
(g) Moor, 606.
C. Jac. 610.
2 Leonard, 5.
2 Levinz, 229.
2 Roll. 226.
Con. 2 Roll. 263.
Qu. Raym. 378.
1 Keble, 852.

Sect. 113. It seems (h) agreed, that there is no need to allege in an indictment, that the defendant is not within the benefit of the provisoes of a statute whereon it is founded; and this hath been (i) adjudged, even as to those statutes which in their purview expressly take notice of the provisoes; as by saying, that none (h) Pop. 93, 94.
1 Jones, 157.
1 Levinz, 26.
Savil, 32.
2 Hale, 170, 171.
(i) Pop. 93, 94.

(1) Vide 2 Hale, 190, 191. Cro. Car. 283. And where the words of a statute are descriptive of the nature of the offence; or the purview of the statute; or are necessary to give a summary jurisdiction, the indictment must follow the very words, Burrow, 1037. But it is said the negative exceptions in a penal statute need not be set out. 1 Black. Rep. 230.

(2) So on the statute of 33 H. 8. c. 1. in defrauding by false tokens, and the 52 Geo. 3. c. 64. of false pretences, it is not sufficient to state merely that the prosecutor was defrauded by a "false privy token," or "a false pretence;" but the token or pretence used must be set out in the indictment. Vide Vol. 1. p. 323.

none shall do the thing prohibited, otherwise than in such special cases, &c. as are expressed in this act.

But as I take it, a conviction on a penal statute ought expressly to shew, that the defendant is not within any of its *provisoes*; for since no (k) plea can be admitted to such a conviction, and the defendant can have no remedy against it, but from an exception to some defect appearing in the face of it, and all the proceedings are in a summary manner, it is but reasonable that such a conviction should have the highest certainty, and satisfy the court, that the defendant had no such matter in his favour as the statute itself allows him to plead.

(l) Savil, 33. *Sect. 114.* It seems to be laid down as a general rule in (l) Savil's Reports, which is also confirmed by the Year Book of 11 Hen. 4. pl. 14. that if the statute whereon an indictment is grounded be particularly recited, the general conclusion, *contra formam statuti*, after the allegation of the fact, will supply an omission in it of a circumstance mentioned in the statute, which would be fatal without such a recital and conclusion; for since the statute is particularly recited, and the defendant charged with having done the offence against the form of it, and it is impossible that he could so have done, if any circumstance expressly required by the statute had been wanting, it seems that the offence may properly enough be said to be as fully set forth in the very words of the statute, as if such words had been repeated in the allegation of the offence, according to the common rule, that *verba relata hoc maxime operantur per referentiam ut inesse videantur*. Neither do I find this contradicted by any of the resolutions in the precedent sections; for it does not appear that there was such a recital and conclusion in any of the indictments therein referred to (m). Yet notwithstanding the omission of a circumstance mentioned in a statute may perhaps in such manner be holpen, it seems that the want of a certain description of the time or the place, or the things or the persons concerned, or the conclusion *contra pacem*, or an express and direct allegation of the fact itself, cannot be so supplied; for such omissions (n) vitiate an indictment drawn in the very words of the act.

As to the FOURTH POINT, viz. Whether an indictment grounded on a statute which will not maintain it, may be made good as an indictment at common law.

(o) C. Eliz. 231. *Sect. 115.* It seems formerly to have been (o) generally taken for granted, that no indictment whatsoever which is grounded on a statute, and concludes *contra formam statuti*, and cannot be made good by the statute, can be maintained as an indictment of an offence at common law. The chief reason whereof seems to be this, that it appears that the prosecution is intended to be grounded on a foundation which will not support it. But the contrary seems to have been adjudged in Page's Case (p) wherein it was resolved, that if persons be indicted specially on the statute of stabbing, and the evidence be not sufficient to bring them within the statute, they may be found guilty of general manslaughter at common law, and that the words *contra formam statuti*

(k) Qu. Salk. 81.

Douglas, 531.

(l) Savil, 33.
Sup. c. 23. s. 63.
2 Roll. 227.
S. P. C. 81.

(m) Sec Rex v.
Salomons, 1
Term Rep. 251.

(n) 2 Roll. 226.
seems contrary.

(o) C. Eliz. 231.
307. 697.
2 Leonard, 10.
Noy, 171, 172.
5 Coke, 99.
2 Roll. 263.
C. Car. 465.
2 Keb. 39. 569.
6 Modern, 17.
2 R. Abr. 82.
& 1 Jones, 379.
2 Hale, 170.
(p) Sum. 58.
2 Hale, 191.
Aleyu. 43, 44.

statuti shall be rejected as senseless, where the offence is prohibited by the common law only. And the same hath been since (q) adjudged as to other statutes; and, as I took it, was lately agreed in an information against the city of (r) Norwich (s).

(q) 1 Sid. 420.
2 Keble, 138.
1 Salkeld, 212.
(r) King v. City of Norwich, Hil. 5 Geo. 1.
1 Cowper, 648.
(s) Vide also Rex v. Smith, Trin. 20 Geo. 3. Doug. 441, 445, and Rex v. Mathews, 5 Term Rep. 162.

As to the FIFTH POINT, viz. How far it is necessary for an indictment on a statute to conclude *contra formam statuti*.

Sect. 116. It seems that judgment on a statute shall in no case be given on an indictment which does not so conclude; for granting that such judgment may in some cases be given in an action brought at common law, without a reference to any statute, as it is (t) said that judgment on 8 Hen. 6. c. 9. may be given on the old common law writ of assize of *novel disseisin*, yet it will not follow, that such judgment can in any case be given on an indictment drawn as for an offence at common law, without any reference to statute. For as to the said case of an assize of *novel disseisin*, it may be said that the statute of 8 Hen. 6. expressly says, "That the party may recover by such writ;" and therefore since there is no special writ of this kind formed upon the statute, and the party has (u) no authority to make out a writ himself in a new form, it is reasonable that he may recover by the old writ. But it (x) seems that judgment on this statute cannot be given on an action of trespass in the common law form, because there is a special writ of trespass in the (y) Register grounded on the statute; and it seems to be (z) agreed, that where there is a special writ grounded on a statute, judgment shall never be given on such a statute in an action brought at common law.

And in like manner, since every one who prosecutes an indictment is at liberty to draw it as he pleases, so that he observes the general rules of law concerning indictments, it seems to be taken as a common ground, that a judgment by statute shall never be given on an indictment at common law, as every indictment which doth not conclude *contra formam statuti*, shall be taken to be. And therefore (a) if an indictment do not conclude *contra formam statuti*, and the offence indicted be only prohibited by statute and not by common law, it is wholly insufficient, and no judgment at all can be given upon it. But if the offence were also an offence at common law, I take it to be in a great measure settled at this day, that (b) judgment may be given as for an offence at common law, though the indictment conclude *contra formam statuti*, as hath been more fully shewn in the precedent section.

Sect. 117. If there be more than one statute concerning the same offence, and the first of them was never discontinued, and the latter only (c) continue the former without making any addition to it, or only (d) qualify the method of proceeding upon it, without altering the substance of its purview, it seems agreed, that it is safe, in an indictment on any such statute, to conclude *contra formam statuti*; and it hath been (e) holden, that a conclusion *contra*

(t) 9 H. 6. 2.
B. Act. s. le
Stat. 6.
(u) 2 Inst. 407.
(x) 2 Inst. 200.
B. Parl. 75.
(y) Reg. 289.
(z) 9 H. 6. 2. 56.
19 H. 6. 54.
47 Ed. 3. 10.
8 H. 4. 13.
2 Edw. 4. 39.
B. Act. s. le
Stat. 6. 10.
Parl. 75.
F. Jud. 10.
Cessavit, 18.
Attach. sur Pro.
1. 3.
Benloe, 57.
C. Eliz. 759, 760.

(a) 2 Roll. 38.
1 Saund. 249.
1 Siderfin, 409.
2 Keble, 506.
1 Salkeld, 370.
Douglas, 445.
Cowp. 30.
(b) See s. 115.
2 Keble, 477.
1 Siderfin, 409.
1 Saunders, 249.
9 H. 6. 56.
F. Attach. sur
Pro. 1. 3.
Bnt 2 R. Ab. 82.
2 Keb. 566.
1 Jon. 379, 380.
seem contra.
Vide 2 Hale,
190, 191.
Cro Car. 283.

(c) C. Eliz. 250.
Owen, 135.
1 Lit. 423.
2 Hale, 173.
(d) Yelv. 116.
C. Jac. 187.
(e) Yelv. 116.
C. Car. 187.

contra formam statutorum, will in such cases vitiate the prosecution.—But where a statute hath been wholly discontinued, and is afterwards revived, there (f) seem to have been some opinions, that a prosecution on it ought to conclude *contra formam statutorum*.

(f) Owen, 135.
1 Lutw. 221.
2 Hale, 173.

Also where the same offence is prohibited by several independent statutes, there are some (g) authorities, that you must either conclude *contra formam statutorum* or *contra formam* of the particular statutes, naming them, and that if you barely conclude *contra formam statuti*, the indictment will be insufficient, for not shewing on which of the statutes it was taken. But there are also strong (h) authorities for the contrary opinion, which is also most agreeable to (i) precedents; to which may be added, that if it be a good objection to such an indictment concluding *contra formam statuti*, that it appears not on which of the statutes the prosecution is grounded, the same objection may as well be made to an indictment concluding *contra formam statutorum*; for it no more appears from such a conclusion on what statute the prosecution is grounded, than from the conclusion *contra formam statuti*; and yet it seems to be (k) generally admitted, that a conclusion *contra formam statutorum* is good where the indictment is for an offence prohibited by several statutes. Also where such an indictment concludes *contra formam statuti*, without shewing what statute is (l) intended, why may it not be said that such statute shall be taken as is most for the king's advantage, as well as where the indictment concludes *contra formam statutorum*, in which case it seems to be admitted, that it shall be so taken?

(g) C. Eliz. 760. 187.
2 Leonard, 5.
C. Jac. 142.
Aleyn, 49, 50.
2 Bulst. 258.
Dalton, c. 131.
(h) Crom. 104.
5 H. 7. 17.
C. Eliz. 186.
4 Coke, 48.
(i) 2 Roll. Abr. 79. 82.
Dalton, c. 129.
Aleyn, 50.
(k) Dyer, 155.
C. Eliz. 750.
Aleyn, 49, 50.
Lamb. b. 4. c. 5.
(l) Dyer, 155.
347.
2 Roll. 227.
5 H. 7. 17.
Owen, 135.
Sup. s. 90. con.
2 Leonard, 5.
2 Roll. 65.

But where a later statute ordains, that a former statute shall be executed in a new case not mentioned in the former, as 8 Hen. 6. c. 9. does, that 15 Rich. 2. c. 2. shall be executed in the case of a forcible detainer, which is not mentioned in 15 Rich. 2. or where a new statute adds a new penalty to an offence prohibited by a former statute, as (m) 23 Eliz. doth that of twenty pounds for a month's absence from church contrary to the tenor of 1 Eliz. it seems that it may with greater reason be argued, that if the indictment conclude *contra formam statuti*, it will be (n) insufficient, because it may seem that the offence is not punishable by any one statute only. Yet considering that the precedents in these cases generally conclude *contra formam statuti*, and the prosecution in truth depends on the addition made by the later statute, which seems of itself alone sufficient to support it, it may be reasonably argued, and seems agreeable to the later (o) opinions, that such a conclusion may be allowed in these cases also. However, it seems safe in any of the cases above-mentioned to conclude *contra formam (p) statuti*, which shall stand either for *statuti* or *statutorum*, or be rejected, in such manner as will best maintain the indictment.

(m) C. Jac. 142.
C. Eliz. 750.
2 Leonard, 5.

(n) Aleyn, 49, 50.

(o) 1 Mod. 191.
3 Levinz, 61.
1 Lutw. 212.
(p) Aleyn, 50.
6 Modernj. 140.
2 Hale, 165, &c.
Str. 602. 843.
1066.
Id. Raym. 1518.
Douglas, 42b.

As to the NINTH GENERAL POINT of this chapter, viz. What ought to be the form of the caption of an indictment.

Sect. 118. I shall take it for granted, that every such caption is erroneous, which doth not set forth with proper certainty, both the

the court in which, and the jurors by whom, and also the time and place at which, the indictment was found.

For the better understanding whereof I shall endeavour to shew what certainty of this kind is necessary.

1. In respect of the court before which the indictment was found.

2. Of the jurors by whom it was found.

3. Of the time when it was found.

4. Of the place at which the indictment was found.

As to the first of these particulars, *viz.* What certainty is necessary in *the caption* of an indictment in respect to *the court* before which it was found.

Sect. 119. It is certain, that every such caption must shew that the indictment was taken before such a court as had jurisdiction over the offence indicted; and therefore if it set forth, that any indictment whatsoever was taken before J. S. (*q*) steward, without shewing to whom he was steward, or in what court; or that an inquisition of death, upon view of the body, was taken before J. S. (*r*) mayor of London, or before J. S. steward to (*s*) such a person, and in such a court, without adding, that he was a coroner; or if it expressly call him a coroner, but do not also shew that he was such for the (*t*) district in which the inquisition was taken, it is insufficient. But it hath been adjudged (*u*), that it is sufficient to set forth, that it was taken before J. S. a coroner in the county, without saying that he was a coroner for the county, for that cannot but be intended.

(*q*) *Ld. Ray.* 710.
22 Ed. 4. 19.
B. Batteil, 7.
Indictment, 46.
(*r*) 22 Ed. 4. 13.
Summary, 207.
S. P. C. 96.
(*s*) 22 Ed. 4. 12.
(*t*) C. Eliz. 193.
2 Roll. 82.
22 Ed. 4. 16.
B. Bat. 7.
Indict. 46.
(*u*) *Plow.* 76, 77.
4 Coke, 41.

Sect. 120. Where (*x*) the caption of an indictment alleges it taken at the general sessions of the peace of such a county or burgh, it doth not seem necessary to add, that such sessions was holden for such county or burgh, because it could not but be so holden, if it were the general sessions of such a county or burgh; but if it had been only described as a general sessions holden in such county or burgh, it is said (*y*) to be a fatal exception, that it is not expressly alleged as holden for such county or burgh. But (*z*) *quare* if this be not helped by putting the county in the margin.

(*x*) 1 Sid. 247.
(*y*) 1 Keb. 329.
668. con. 635.
1 Levinz, 304.
2 Keble, 133.
128. 141.
(*z*) C. Eliz. 490.
Crown Cir. 125.

Sect. 121. There are some (*a*) authorities, that if the caption of an indictment before justices of peace take no notice of their commission to hear and determine felonies, &c. which is generally done by the clause *nec non ad diversas felonias, &c.* it is insufficient. But having already more fully considered this matter, c. 8. s. 33. I shall refer the reader to what is there said concerning it.

(*a*) S. P. C. 96.
Summary, 207.
2 Keble, 160.
B. Indict. 32.
But Qu. 22
Edw. 4. 12, 13.
B. Error, 186.
B. Indictment,
50.
2 Hale, 186.

Lamb. 46, 47. *Cro. Jac.* 633. 1 Vent. 33. and *Rex v. Carter.* Strange, 442. exactly in point, upon the authority of which *Rex v. Straw* was quashed, Hil. 10 Geo. 1. without debate.

Sect. 122. There are also several authorities, that the caption of an indictment before justices of peace is insufficient, unless either the words (*b*) *domini regis* or (*c*) *publicæ* be added after *pacis.*

(*b*) 1 Lev. 175.
2 Keble, 647.
1 Sid. 247. 422.
(*c*) 1 Keb. 37.
1 Siderfin, 422.

(d) 1 Sid. 422.
2 Keble, 582.

pacis. And it hath been sometimes holden, that even the words *domini regis* are not sufficient without the word (*d*) *nunc*, or some other, to shew whether it were the peace of the present king, or of some of his predecessors. The chief ground of these opinions seems to be the statute of 27 Hen. 8. c. 24. s. 4. by which it is enacted, "That in every writ and indictment that shall be made
" within any county palatine or liberty, whereby any thing shall
" be supposed to be done against the king's peace, it shall be
" supposed to be done against the king's peace, his heirs and
" successors, and not against the peace of any other person what-
" soever; any statute, grant, or usage, to the contrary notwith-
" standing." From whence, I suppose, it may have been collect-
ed, that by parity of reason, justices of peace ought to be styled,
in legal proceedings, justices of the king's peace, that it may ap-
pear that the peace of no other person, but of the king, is in-
tended. But since this is not expressly required by the said sta-
tute, it cannot but be intended, especially at this (*e*) day, when
none but the king can appoint justices of peace, that all justices
of peace must be justices of the public peace, or of the king's
peace, which is the same thing. Accordingly exceptions for the
want of these words have been often (*f*) over-ruled; and I take
them to be obsolete at this day, as it seemed to be lately settled
between the (*g*) King and Hawkins on a conviction of deer-steal-
ing.

(e) Vide c. 5. s. 1.

(f) 2 Keb. 385.
1 Siderfin, 247.
Qu. 1 Keb. 556.
1 Siderfin, 175.
(g) Adjudged
M. 3 Geo. 1.
3 Bar. 1903.

(h) 1 Mod. 24.
2 Keble, 380.
C. Eliz. 738.
(i) 1 Bulst. 203.
(k) 2 Keb. 128.
C. Eliz. 738.
Keil. 192, 193.
2 Keble, 385.
22 Ed. 4. 19.
B. Batteil, 7.
Indictment, 46.
(l) 1 Saund.
263.

(m) 1 Sid. 367.
5 Modern, 152.
2 Keble, 366.

(n) 10 Edw. 4.
15.
B. Indict. 34.
F. Indict. 20.
S. P. C. 95.
Summary, 206.
2 Keble, 139.

Sect. 123. But it seems generally agreed, (*h*) that if the caption of an indictment, at a sessions of the peace, do not mention before whom it was holden, or if it set it forth (*i*) generally as holden before justices, without shewing any thing of the nature of their commission, or as holden before justices (*k*) of the peace, &c. without naming any of them, or shewing for what place they were justices, or if it (*l*) describe them as justices *ad pacem in comitatu predict' conservand'*, omitting the word *assignat'*, it is insufficient. (*m*) Yet it hath been adjudged, that it is not necessary for the caption of an indictment taken at a general sessions of the peace to style any of the justices of the *quorum*, because it sufficiently shews that one or more of them were such, by shewing that the sessions was a general one.

Sect. 124. It hath been adjudged, (*n*) that the caption of an indictment setting it forth as taken *ad magnam curiam cum leta lentam*, is insufficient. The chief reason whereof seems to be this, that such a caption rather imports, that the indictment was taken at the court which had no jurisdiction to take it, than at the proper one; for it seems to be express, that it was taken at the court-baron, and mentions nothing in relation to the court-leet, but that it was holden together with the court-baron. And agreeably hereto it is said in the Year-Book of 10 Edw. 4. pl. 15. that if the caption had been *ad magnam curiam et ad letam*, it had been some sense, but that *cum leta* bears no sense. From whence it may be argued, that if a caption set forth an indictment as taken at a court-baron and court-leet, it may be good, because the court-baron having no manner of jurisdiction in criminal matters, and the court-leet having such jurisdiction, it may well be (*o*) intended that

(o) 1 Salk. 195.
Sup. c. 11. s. 6.

that the indictment was taken at the court-leet, and not at the court which had nothing to do with it. *A fortiori* therefore, if an indictment be set forth as taken *ad vis. franci pleg. cum cur' baron' tent'*, it shall be intended to have been taken at the court-leet; as it is (p) said to have been holden by the late Chief Justice Holt, who yet seemed to be of opinion, that if a court-baron had a jurisdiction of such matters as well as a court-leet, but in a different manner, such a caption would have been insufficient, for not shewing more expressly at which of the courts the indictment was taken. (p) 1 Salk. 195.

Sect. 125. It hath been adjudged, (q) that the not setting forth in the caption of an indictment taken at a leet, whether the court was holden by grant or prescription, is holpen by the multitude of precedents. (q) 1 Salk. 200.

As to the second particular, *viz.* What certainty is necessary in the caption of an indictment in respect of *the jurors* by whom it was found.

Sect. 126. It seems agreed, that no caption of an indictment, whether found at a (r) court-leet, or other inferior court, can be good without expressly shewing, that the jurors who found it were of the (s) county, city, or burgh, or other precinct, for which the court was holden, and that they were at least (t) twelve in number, and (u) also, that they found the indictment upon their oaths.—Also, indictments have been (x) quashed for an omission of the names of the jurors in the caption. But there is a (y) precedent in Saunders' Reports of a caption, setting forth, that the indictment was taken by twelve men, &c. without naming them, and yet no exception appears to have been taken on this account.—Also many indictments taken in inferior (z) courts, have been quashed for want of the words *proborum et legalium hominum* in the caption; but this exception hath been often overruled, as it hath been more fully shewn in the sixteenth section of this chapter.—Also many indictments in such courts have been quashed for want of the words (a) *jurat' et onerat'* in the caption; and also for want of the words (b) *adtunc et ibidem*, before the words *jurat' et onerat'*; and also for (c) want of the words *ad inquirendum pro dicto domino rege pro corpore comitatus*; and also for want of the words (d) *super sacramentum suum dicunt*, after the words *jurat' et onerat'*; and also for expressing the (e) oath to have been to inquire *pro corpore civitatis predictæ*, where the offence arose in and the sessions was holden for a burgh, &c. But it is (f) said, that in the caption of an indictment taken in the King's Bench, or at the (g) grand sessions, the words *super sacramentum suum dicunt* supply the want of the words *jurat' et onerat'*, &c.—Also, it is said to have been (h) adjudged, that the words *jurat. et onerat. ad inquirend. pro domino rege et corpore comitatus* are sufficient, without the word *pro* before *corpore*; and that the addition of the words *ad largum* after *inquirend.* does no (i) hurt; and that there is no need of the words *ad inquirendum pro corpore comitatus* in an (k) inquisition taken for

2 Hale, 167.
(r) 6 H. 4.
(s) Raym. 434.
C. Eliz. 677.
2 Keble, 160.
3 Keble, 807.
Vide sup. s. 33.
(t) C. Eliz. 654.
Sup. s. 15.
6 H. 4. 4.
41 Ed. 3. 31.
(u) 2 Keble, 676.
1 Siderfin, 140.
3 Modern, 201.
1 Keb. 629. 329.
See the cases cited to letters b, c, d, e, f, g, h, sections 122 & 123. p. 360. &
1 Salkeld, 371.
(x) 2 R. Abr. 82.
2 Keble, 470.
6 H. 4. 4.
Qu. 2 R. 3. 11.
Rastal, 553, 606.
(y) 1 Saund. 249.
Vide 13 H. 7. 20.
2 Keble, 366.
(z) 1 Keb. 629.
2 Keble, 471.
2 R. Abr. 82.
2 Keble, 366.
(a) 1 Keb. 101.
524. 629. 852.
2 Keble, 367.
Vide 3 Keb. 128.
Con. 2 Keb. 59.
2 Jones, 180.
(b) 1 Mod. 26.
2 Keb. 583. 610.
(c) 2 Keb. 471.
Shower, 272.
(d) 1 Sid. 140.
1 Keble, 498.
(e) 1 Saund. 249. (f) 1 Keb. 629. (g) 2 Keble, 471. (h) 6 Modern, 180. (i) 1 Sid. 140.
1 Shower, 272. 6 Mod. 95. (k) 6 Modern, 95. 180.

(l) *R. v. Grave-* for a particular purpose; and that the omission of the word
nor, adj. Hil. (l) *onerat.* is not fatal, if there be the word *jurat*, for that fully
 3 Geo. 1. implies it.

As to the third particular, *viz.* What certainty is necessary in the caption of an indictment, in respect of the time when it was found.

(m) 1 Sid. 229, *Sect.* 127. It seems (m) agreed, that such caption must set
 230. forth a certain day and year when the court was holden, before
 1 Keb. 37. 823. which the indictment was found (1), and must record it as then
 1 Modern, 81. found in the (n) present tense, and not in the preterperfect (2);
 1 Saunders, 393. found in the (n) present tense, and not in the preterperfect (2);
 1 Vent. 170. for it hath been (o) adjudged, that if it describe the sessions at
Rex v. Bunce, which the indictment was taken, as holden *die Martis et die Mer-*
 Andrews, 162. *curii*, or as holden on such a day in such a year of the king, with-
 (n) 1 Bulst. 203. out (p) ascertaining what king; or if it set forth the style of the
 Sup. c. 10. s. 9. day or year in any (q) figures but Roman, it is insufficient (3).
 (o) 4 Coke, 48. But it seems to be (r) agreed, that it is sufficient to express the
 (p) 2 Keb. 582. year of the king, without adding that of the Lord. Also it seems,
Vide sup. s. 87. that (s) *extitit presentatum* for *existit* is made good by the multi-
 (q) 1 Mod. 78. tude of precedents.
 2 Keble, 128.
 (r) *Vide sup.*
 s. 80. and c. 23.
 s. 90.
 (s) 1 Sid. 140. 368. 1 Keble, 37. 2 Keble, 367. 5 Coke, 120. F. Indictment, 20. B. Indict. 34.
 10 Ed. 4. 15.

As to the fourth particular, *viz.* What certainty is necessary in the caption of an indictment in respect of the place where it was found.

Sect. 128. It seems agreed, that if such caption either set
 (t) Dyer, 69. forth no (t) place at all where the indictment was found, or do
 (u) C. Jac. not (u) shew with sufficient certainty, that the place set forth is
 276, 277. within the jurisdiction of the court before which it was taken, as
 where it sets forth the indictment as taken at a sessions of the
 (x) C. Eliz. 137. peace holden for such a county at B. (x) without shewing in
 606. 738. 751. what county B. is, otherwise than by putting the county into the
 margin, is insufficient. Also if an act of parliament, whether it
 be in print or not, appoint, that the quarter-sessions of such a
 county shall be holden at such a place only, and not elsewhere,
 (y) Dyer, 135. except for cause of the plague, &c. it seems (y) that the caption
 of every indictment taken at any such sessions, is insufficient, un-
 less it expressly shew, that it was holden at such place. But it
 hath been (z) adjudged, that the caption of an inquisition as
 taken at B. before J. S. coroner of the king's liberty of B. afore-
 said, is good, without expressly shewing that B. is within the
 liberty of B. for it cannot but be intended.
 (z) 5 Coke, 120, 121.
Vide Pop. 208.
 C. Eliz. 490.

As to the TENTH GENERAL POINT of this chapter, *viz.* Upon what proof, and within what time after the offence, an indictment may be found.

Sect.

(1) The caption stated the sessions to be held *ad festum Epiphaniæ* instead of *Epiphaniæ*, and it was adjudged fatal. *Strange*, 698. An indictment taken at the adjourned sessions must shew when the original sessions began. *Strange*, 865. And if the court is stated to have been held on an impossible day, it will vitiate the indictment. *Rex v. Fearnly*, Trin. 26 Geo. 3. 1 Term Rep. 316.

(2) *Vide Rex v. Hall*, 1 Term. Rep. 320. where it is decided that a conviction may state the information in the preterperfect as well as in the present tense.

(3) *Vide 2 Hale*, 170. *Strange*, 261. *Andrews*, 137.

Sect. 129. It (a) seems, that before the first of Edward the Sixth no certain number of witnesses was required upon the indictment or trial of any crime whatever. For it seems to be generally (b) agreed, that the statutes of the first and second of Philip and Mary, in restoring the order of trial by the course of the common law, took away the necessity of two witnesses in all cases within those statutes; from whence it plainly seems to follow, that they were not required by the common law. It is holden (c) indeed by some, that, by the ancient common law, one witness was not sufficient to convict any person of high treason; and this is said to be grounded on the law of God, expressed both in the Old and New Testament. But granting that one witness was not sufficient for a conviction, it doth not follow but that he might be sufficient for an indictment.

(a) 3 Keble, 68.
B. Corone, 220.
2 Jones, 233.
(b) B. Cor. 220.
S. P. C. 164.
Dyer, 132.
1 Jones, 233.
Keilwood, 18.
49.
Vide 3 Inst.
24, 25, 26.
Sum. 208. 262.
1 Hale, 299,
300.
(c) 3 Inst. 26.
Raymond, 408.
See this subject
examined very
much at large
Fos. 232 to 246.

Also, however the law might have stood in relation to these matters before the Conquest, it seems to have been wholly altered long before the statute of Edward the Sixth. And I rather incline to this opinion, since I find it so little supported by the generality of the authorities cited by Sir Edward Coke for the proof of the contrary, which wholly relate either to the proof of an essoin, or of a summons (d) in a real action, or (e) of the default of persons summoned on a jury, or (f) other matters rather less to the point.

(d) Bract. 354.
(e) 35 H. 6.
46, 47.
(f) 48 Ed. 3.
30.
15 Ed. 4. 1.

And as to the above recited passages of Scripture, it may be answered, that those in the Old Testament concern only the judicial part of the Jewish law, which being formed for the particular government of the Jewish nation, doth not bind us any more than the ceremonial; and that those in the New Testament contain only prudential rules for the direction of the government of the church in matters introduced by the Gospel, and no way control the civil constitutions of countries. To which may be added, that whatsoever may be said either from reason or Scripture for the necessity of two witnesses in treason, holds as strongly in other capital causes, and yet it is not pretended, that there is or ever was any such necessity in relation of any other crime but treason.

1 Hale, 299.

Sect. 130. But by 1 Edw. 6. c. 12. s. 22. it is enacted, "That no person or persons shall be indicted, arraigned, condemned, or convicted for any offence of treason, petit treason, or misprision of treason, &c. unless the same offender or offenders be accused by two sufficient and lawful witnesses, or shall willingly and without violence confess the same."

Two witnesses
required in
treason.

Sect. 131. Also by 5 and 6 Edw. 6. c. 11. s. 8. it is further enacted, "That no person or persons shall be indicted, arraigned, condemned, convicted, or attainted, for any of the treasons in the act mentioned, or for any other treasons that then were, or afterwards should be, which should after be perpetrated, committed, or done, unless the same offender or offenders be thereof accused by two lawful accusers; which said accusers at the time of the arraignment of the party so accused, if they be then living, shall be brought in person before the party so accused, and avow and maintain what they have to say against the said party,

Or two lawful
accusers.

“ party, to prove him guilty of the treasons or offences contained
 “ in the bill of indictment laid against the party arraigned, unless
 “ the said party arraigned shall willingly, without violence, con-
 “ fess the same.”

Treasons to be
 tried as at com-
 mon law

Sect. 132. But by 1 and 2 Philip and Mary, c. 10. it is enacted, “ That all trials after that statute to be had, awarded, “ or made for any treason, shall be had and used only according “ to the due order and course of the common law.”

before the
 1 Edw. 6.

Sect. 133. Also by 1 and 2 Philip and Mary, c. 11. it is enacted, “ That all and every person and persons who shall be “ accused or impeached of any of the offences contained in that “ statute, or of any other offence or offences concerning the im- “ pairing, counterfeiting or forging of any coin current within this “ realm, shall and may be indicted, arraigned, tried, convicted or “ attainted by such like evidence, and in such manner and form “ as has been used and accustomed within the realm, at any time “ before the first year of Edward the Sixth.”

Two lawful wit-
 nesses required
 in open court.

Sect. 134. By 7 Will. 3. c. 3. it is further enacted, “ That no “ person or persons whatsoever shall be indicted, tried, or at- “ tainted of high treason, whereby any corruption of blood may “ or shall be made to any such offender or offenders, or to any “ the heir or heirs of any such offender or offenders, or of mis- “ prision of such treason, but by and upon the oaths and testi- “ mony of two lawful witnesses, either both of them to the same “ overt act, or one of them to one, and the other of them to ano- “ ther overt act of the same treason, unless the party indicted “ and arraigned, or tried, shall willingly, without violence, in “ open court confess the same, or shall stand mute, or refuse to “ plead; or in cases of high treason, shall peremptorily challenge “ above the number of thirty-five of the jury.”

Indictment to
 be found within
 three years.

Sect. 135. And by 7 Will. 3. c. 3. it is further enacted, “ That “ no person or persons whatsoever (such only excepted as shall “ be guilty of designing, endeavouring, or attempting any assas- “ sination on the body of the king, by poison or otherwise) shall “ be indicted, tried, or prosecuted for any such treason as afore- “ said, or for misprision of such treason, that shall be committed “ or done within the kingdom of England, dominion of Wales, “ or town of Berwick upon Tweed, unless the same indictment “ be found by a grand jury within three years next after the trea- “ son or offence done and committed.”

Vide 20 Geo. 2.
 c. 30.
 Post, c. 39.
 s. 12.

Sect. 136. But by 7 Will. 3. c. 7. it is provided, that nothing in this act “ shall any ways extend to any impeachment, or other “ proceedings in parliament, nor to any indictment of high trea- “ son, nor to any proceeding thereupon for counterfeiting his “ majesty’s coin, his great seal, or privy seal, his sign manual, or “ privy signet.”

Upon these statutes the following particulars seem most re- markable.

Sect. 137. FIRST, That where the statute of the first of Edward the Sixth requires, that the party be accused by two lawful .

lawful witnesses, and that of the fifth and sixth of Edward the Sixth, that he be accused by two lawful accusers, they both mean the very (a) same thing, because the common law admits of no other accusers but witnesses.

Sect. 138. SECONDLY, That according to the general (b) opinion, it is not required either by the first, or the fifth and sixth of Edward the Sixth, that such accusers or witnesses be present with the indictors in person, but that they may send their accusation to the indictors in writing under their hands, which will be sufficient even after their death. Also it is observable, that the books which speak of this matter do not expressly say, that such accusation must be upon oath, but surely this cannot but be intended; for how can any accuser be said to be a lawful witness if he be not upon his oath? But this is cleared by the seventh of William the Third, as to the treasons within that statute; for it expressly provides, "that no person shall be indicted thereof, but by and upon the oath and testimony of two lawful witnesses."

Sect. 139. THIRDLY, By the judgment both of Coke (c) and Hale, (d) one who can only witness, by hearsay, what he has heard a good witness say, is not a lawful accuser within any of these statutes; for if this were to be allowed, nothing would be more easy than, in any case, where there is one witness, to get a second, which would totally elude the provision of the statutes in requiring two lawful witnesses, &c.

Sect. 140. FOURTHLY, That the words, "unless the party shall willingly, without violence, confess the same," in the 1st, and 5 and 6 Edw. 6. are to be understood (e) where the party accused upon his examination, before his arraignment, willingly confesses the same without torture: but it is observable, that 7 Will. 3. is thus expressed, "unless the party indicted and arraigned, or tried, shall willingly, without violence, in open court confess the same."

confession upon the arraignment of the party.

Sect. 141. FIFTHLY, That one witness to one and another witness to another overt act of the very same (f) treason, have been construed to be sufficient, within the statutes of the first, and the fifth and sixth of Edward the Sixth; and the express words of the seventh of William the Third are agreeable hereto (1).

Sect. 142. SIXTHLY, That the statute of 1 and 2 Philip and Mary, c. 10. by enacting, "That all trials of treason shall from thenceforth be according to the course of common law," doth not (g) take away the necessity of two witnesses upon an indictment, required by the 1st, and 5 and 6 Edw. 6. c. 6. because the indictment is no part of the trial, but is more properly the accusation to be tried.

Sect.

(1) And a collateral fact, not tending to the proof of the overt acts, may be proved by one witness. Salkeld, 634. 5 State Trials, 17; or by the

confession of the prisoner, 8 St. Tr. 255. for the words of the statute are confined to the proof of the overt acts, Fos. 242.

(a) B. Cor. 220.
3 Inst. 25, 26.
Summary, 208.
1 Hale, 301.

(b) S. P. C. 161.
B. Corone, 2.
Summary, 208.
But 3 Inst. 25,
26. seems contrary.

1 Hale, 304.

(c) 3 Inst. 25.
(d) Sum. 208.
1 Hale, 306.
Con. Dyer, 99.
S. P. C. 164.
Foster, 234.
243.
B. Cor. 220.
Sed vide sup.
s. 134.

(e) 2 Andr. 66.
1 Hale, 304.
3 Inst. 25.
Kelynge, 18.
2 St. Tr. 488.
N. B. It was
decided in
Francis's case,
6 St. Tr. 58.
that these words
only mean a
Foster, 241.

(f) Raym. 407.
Kelynge, 9.
3 St. Tr. 204.
Foster, 237.

(g) S. P. C.
90. 164.
3 Inst. 24 to 27.
B. Cor. 220.
Foster, 235.

(h) B. Cor. 220. *Sect. 143. SEVENTHLY, (h)* That the said statute of 1 and 2 Philip and Mary doth not extend to misprision of treason. But this is expressly provided for by 7 Will. 3. as to such treasons as are within that statute, and therefore there must be two witnesses to the indictment, as well as to the trial of every such misprision.

(i) B. Cor. 220. *Sect. 144. EIGHTHLY, That (i)* petit treason is within the 1st, and 5 and 6 Edw. 6. and 1 and 2 Ph. and Mary, c. 10. but not within the 7 Will. 3; from whence it follows, that two witnesses are required to the indictment, and not to the trial of it; and that two witnesses are not necessary even upon the indictment, if (k) the party, upon his examination, confess it.

*Sect. 145. NINTHLY, That the statute of 1 and 2 Ph.*and Mary, c. 11. which enacts, "That all persons accused of any offences concerning the impairing, counterfeiting, or forging the coin, shall be indicted and tried as at the common law," hath been construed (l) to extend to clipping, and all other offences in impairing the coin, which have been made treasons since the said statute of 1 and 2 Ph. and Mary. From whence it may be probably argued, that the statute of 7 Will. 3. by "expressly providing, that nothing therein shall extend to high treason for "counterfeiting the coin," intended in like manner, that it should not extend to any other high treason concerning the coin (1).*

(l) 2 Jones, 233.
Vide B. Cor.
220.
3 Keble, 68.

By the statute 39, 40 Geo. 3. c. 93. in cases of treason, for compassing the death of the king, where the overt act alleged shall be "the assassination or killing of the king, or any direct attempt against his life, or any direct attempt against his person, whereby his life may be endangered or his person suffer bodily harm, the person or persons charged with such attempt shall and may be indicted, arraigned, tried, and attainted in the same manner and according to the same course and order of trial in every respect, and upon the like evidence, as if such person or persons stood charged with murder," notwithstanding the acts of W. 3. &c. (2)

As to the ELEVENTH GENERAL POINT, viz. In what cases an indictment may be quashed.

Sect.

(1) Indictments, being the foundation of all capital prosecutions, found in the absence of the party accused, and only the evidence for the king adduced, it is necessary that the proof of the offence should be substantial, Lord Coke, 3 Inst. 25. And it has been observed, with great strength of argument, that a grand jury ought to have the same persuasion of the truth as a petty jury, or a coroner's inquest, 4 State Trials, p. 183. But it is said by Lord Hale, 2 vol. 157. and confirmed by Pemberton, C. J. in Lord Shaftsbury's case, 3 St. Tr. p. 415. that as an indictment is merely an accusation, and the party is afterwards to undergo a full trial, they ought, upon probable evidence only, to find the bill. And it has been lately decided by all the judges, that a person committed as a principal in the same felony with another, and taken from his confinement, before the grand jury, by a surreptitious order to the gaoler, and without authority strictly regular, is a competent witness for that purpose. Indeed, many of the judges

were inclined to think, that if a grand jury should find a bill upon evidence palpably improper, and the party be afterwards convicted on it by lawful evidence before the petty jury, the validity of such a conviction could not be impeached, Dr. Dodd's case, O. B. February sessions, 1777. Cases in Crown Law, 141. A grand jury, however, ought not to find an indictment upon the evidence of incompetent witnesses; and therefore where an indictment against one Crossley was presented, and the only names on the back of it were Priddle and Holloway; and the grand jury, on its being proved to them that these two persons had been convicted of conspiracy, applied to the court at the Old Bailey in October sessions, 1788; the court told them, that they ought not to find the bill on such testimony alone; for having been convicted of an infamous crime, their competency was destroyed. MS.

(2) See Vol. 1. p. 19.

Sect. 146. I take it to be (*m*) settled, that by the common law the court may, in discretion, quash any indictment, for any such insufficiency, either in the caption, or the body of it, as will make any judgment whatsoever, given upon any part of it against the defendant, erroneous.

(*m*) 4 St. Tr. 187.
1 Sid. 54. 247.
2 Keble, 128.
1 Keble, 45.
Cro. Car. 584.
Palmer, 389.
Salkeld, 372.
4 St. Tr. 134.
Stra. 602.
Durnford and East, 316.
Sayer, 27. 65.
158. 161.
Burrow, 1127.
1129. 2116.
1 Wilson, 325.

Yet it seems, that judges are in no case bound, *ex debito justitiæ*, to quash an indictment, but may oblige the defendant either to plead or to demur to it. And this they generally do where it is for a crime of an enormous or public nature, as perjury, forgery, sedition, nuisances to the highways, and other offences of the like nature.

Neither will the court quash an indictment removed by *certiorari*, if a recognizance for the trial of it hath been forfeited. (1)

Sect. 147. Also it is enacted by 7 Will. 3. c. 3. "That no indictment for high treason, or misprision thereof (except only indictments for counterfeiting the king's coin, seal, sign or signet), nor any process or return thereupon, shall be quashed on the motion of the prisoner, or his counsel, for mis-writing, mis-spelling, false or improper Latin, unless exception concerning the same be taken and made in the respective court where such trial shall be, by the prisoner, or his counsel assigned, before any evidence given in open court upon such indictment; nor shall any such mis-writing, mis-spelling, false or improper Latin, after conviction on such indictment, be any cause to stay or arrest judgment thereupon: But nevertheless, any judgment given upon such indictment shall and may be liable to be reversed upon a writ of error, in the same manner, and no other, than as if this act had not been made."

How exceptions to an indictment for high treason shall be taken.

Sect. 148. It hath been settled (*n*) in the construction of this statute, that no such exception can be taken, after plea pleaded.

(*n*) Rookwood's Case, 4 St. Tr. 673 to 678.

Sect. 149. It is said (*o*) in Siderfin's Reports, that the court never (*p*) quasheth an information exhibited by a common person, but that it will quash an information exhibited by the attorney-general, or by the master of the crown-office, upon motion, if there be cause: But this was denied in one (*q*) Nixon's Case, wherein the court seemed to be agreed, that they never have, or will quash any information whatsoever.

(*o*) 1 Sid. 54.
152. 140.
Strange, 953.
1103. 1072.
Andrews, 174.
216.
(*p*) 1 Keb. 255.
(*q*) Rex v.
Nixon, Trin.
Salkeld, 372.

5 Geo. 1. Strange, 185. Burrow, 385. B. R. H. 365. Vide Douglas, 239.

As to the TWELFTH GENERAL POINT of this chapter, *viz.* What may be pleaded to an indictment, and in what manner.

Sect. 150. Having already shewn in this chapter how a defendant may plead (*r*) to an indictment, that the indictors were returned

(*r*) Sup. s. 25.

(1) Between quashing indictments and arresting the judgment, quashing is the strongest way; because they must be very grossly bad to have the court to destroy them at once, 1 Black. 275. Even on the part of a prosecutor, the court will see that no mischief or oppression ensues, and will impose terms before they grant leave to quash an indictment, 1 Black. 461. Vide Douglas, 239, 3 Burrow, 1468. For although it is frequently

done, Fos. 105. Cro. Car. 147. yet it is by no means of course, Strange, 946. But the reason of not quashing on motion, but leaving the party to demur, does not hold where the objection is to the jurisdiction of the court that has undertaken to proceed. 1 Burr. 389.—For a detail of cases from the modern Reporters, in which the court will or will not quash indictments, vide 3 Bac. Abr. 116. and 3 Comyn's Digest, p. 508. to 510. [H]

(s) Sup. s. 70,
71, 72.
Vide c. 23. s.
103.

(t) Finch, 385.
Summary, 202.
249. 254.
2 Hale, 239.
4 Comm. 332.

turned contrary to the purview of 11 Hen. 4. c. 9. and having also (s) shewn, how he may plead a misnomer, or wrongful addition; and intending in the following part of the book to shew, how he may plead a former acquittal, conviction or attainder, or a pardon, or other special plea, or the general issue; I shall in this place only take notice, that the defendant may plead any plea in abatement of an indictment of felony; and also plead over in bar, and take (t) the general issue also, in the same manner as an appellee may do, as hath been more fully shewn Ch. 23. Sect. 127. 138.

CHAP. XXVI.

OF INFORMATION.

INFORMATIONS are of two kinds. **FIRST**, Such as are merely at the suit of the king. **SECONDLY**, Such as are partly at the suit of the king, and partly at the suit of the party.

For the better understanding of the first of these, I shall endeavour to shew,

1. In what cases Informations at the suit of the king will lie.
2. What ought to be the form of Informations at the suit of the king.
3. How the law concerning them hath been altered by statute.

As to the **FIRST POINT**, viz. In what cases such informations at the suit of the king will lie.

(a) Thel. 1. 1.
c. 4. s. 9, 10, 11,
12, 13. 14.
Finch, 396.

Sect. 1. It hath been holden, that the **KING** shall put no (a) one to answer for a wrong done principally to another, without an indictment or presentment, but that he may do it for a wrong done principally to himself.

(b) Pre. 4 & 5
Wil. & Ma.
Infia, s. 5.
Shower, 116.
(c) Shower, 110.
1 Siderfin, 431.
7 Modern, 40.
Skinner, 108.
(d) C. Car. 557.
March, 52.
3 Keble, 101.
1 Levinz, 257.
1 Siderfin, 387.
5 Mod. 221.
7 Mod. 39.
Carthew, 384.
but no judgment was given
in this case. Skinner, 81. 2 Keble, 432. (e) Raym. 474. Skinner, 47. 1 Black. 386. (f) Raym. 251. Shower, 109. 113. C. Car. 579. (g) Raymond, 202. 5 Mod. 342. 7 Mod. 100. Salk. 78. (h) Shower, 111. (i) Raymond, 417. (k) 1 Sid. 174. (l) See precedent, 1 Saunders, 300, 301.

But I do not find this distinction confirmed by experience; for it is every day's practice, agreeable to numberless precedents, to proceed by way of **INFORMATION**, either in the name of the attorney-general, or of the master of the crown-office, for offences of the former kind; as for (b) batteries, (c) cheats, seducing (d) a young man or woman from their parents in order to marry them against their consent, or for any other wicked purpose; spiriting (e) away a child to the plantations; rescuing (f) persons from legal arrests; (g) perjuries, and subornations thereof; (h) forgeries; conspiracies, whether to accuse (i) an innocent person, or to impoverish (k) a certain set of lawful traders, &c. or to (l) procure a verdict to be unlawfully given, by causing persons bribed

bribed for the purpose to be sworn on *a tales*; and other such like crimes done principally to a private person, as well as for offences done principally to the king, as for (*m*) libels, (1) seditious words, (*n*) riots, false news, (*o*) extortions, nuisances, as in not (*p*) repairing highways, or obstructing (*q*) them, or stopping (*r*) a common river, &c. contempts, as in departing (*s*) from the parliament without the king's license, disobeying (*t*) his writs, uttering (*u*) money without his authority, escaping (*x*) from a legal imprisonment on a prosecution for a contempt, neglecting to keep watch and ward, abusing (*y*) the king's commission to the oppression of the subject, making a return to a *mandamus*, of matters (*z*) known to be false; and in general, any other offences against the public good, or against the first and obvious principles of justice and common honesty.

(*m*) Raym. 201. Shower, 118, 119. Carthew, 1. 1 Black. 269. 510. (1) And in this case there must be 14 days notice of trial. Fort. 357. (*n*) 5 Mod. 459. C. Car. 252. Show. 106. Skinner, 116. (*o*) Raym. 216. Carthew, 226. Bun. 311. (*p*) Raym. 384. (*q*) Shower, 110. 116. 1 Siderfin, 140. (*r*) Shower, 112. 116. (*s*) Shower, 114. 118. C. Car. 253. (*u*) Raymond, 185. (*x*) C. Car. 209. (*y*) Shower, 116. (*z*) Salkeld, 374.

Sect. 2. Also it seems, that of common right such an information, or an action in the nature thereof, may be brought for offences against statutes, whether they be mentioned by such statutes or not, unless other methods of proceeding be particularly appointed, by which all others are impliedly excluded.

Shower, 111. 115, 116, 117. 3 Modern, 117. 2 Andr. 128. Rastal, 686. Vital. 1. Vide 3 Leon. 237. & sup. c. 25. s. 4. 2 Andr. 127, 128.

Sect. 3. But I do not find it any where holden, that such an information will lie for any capital crime, or for misprision of treason.

Vide Shower, 109, 110. 2 Hale, * 151.

As to the SECOND POINT, viz. What ought to be the form of such information.

Sect. 4. Having already, in the chapter of INDICTMENTS, incidentally shewn the principal points relating to this matter, I shall only take notice in this place, that, seeing an INFORMATION differs from an INDICTMENT in little more than this, that the one is found by the oaths of twelve men, and the other is not so found, but is only the allegation of the officer who exhibits it, whatsoever certainty is requisite in an indictment, the same at least is necessary also in an information, and consequently, as all the material parts of the crime must be precisely found in the one, so must they be precisely alleged in the other, and not by way of (*a*) argument or recital.

(*a*) Salk. 375.

Yet it hath been adjudged, that where an information of perjury was drawn in this manner, "*Memorandum quod A. B. &c. dat Curie hic intelligi et informari quod Termino sancti Hill, &c. in rotulis continetur sic, viz. that such an action was brought, and a trial had thereon, &c. Et quod the defendant, at such trial, took such an oath, which was false, &c.*" without adding before such mention of the false oath, "*et ulterius dat Cur. hic intelligi;*" yet by reason of the late precedents the information is as (*b*) sufficient, at least after verdict, as if those words had been added. It must be confessed, that this is the most reasonable construction, for how can it be intended that it could be contained in the record of the trial, that such an oath was taken at it, or that it was false?

Vide Stra. 70.

(*b*) Raym. 34, 35. Ld. Raym. 370.

As to the THIRD POINT, viz. How the law concerning such informations hath been altered by statute.

The master of the crown office shall not file any information without leave of the Court.

1 Black. 542.
B. R. H. 247.

No process shall issue on an information until security be given to prosecute it with effect.

Recognizance to be filed.

Defendants entitled to costs unless the judge certifies.

Stu. 1131.

Sect. 5. It is recited by 4 and 5 Will. and Mary, c. 18. "That divers malicious and contentious persons had more of late, than in times past, procured to be exhibited and prosecuted informations in their Majesties court of king's bench at Westminster, against persons in all the counties of England, for trespasses, batteries, and other misdemeanors, and after the parties so informed against had appeared to such informations, and pleaded to issue, the informers had very seldom proceeded any farther, whereby the person so informed against had been put to great charges in their defence: and although at the trials of such informations verdicts had been given for them, or a *nolle prosequi* entered against them, they had no remedy for obtaining costs against such informers." And thereupon it is enacted, "That the clerk of the crown, in the said court of king's bench, for the time being, shall not without express order, to be given by the said court, in open court, exhibit, receive, or file any information for any of the causes aforesaid."

And by 4 and 5 William and Mary, c. 11. "The said clerk shall not issue out any process thereupon, before he shall have taken, or shall have delivered to him a recognizance from the person or persons procuring such information to be exhibited, with the place of his, her, or their abode, title or profession, to be entered to the person or persons against whom such information or informations, is or are to be exhibited, in the penalty of twenty pounds, that he, she, or they will effectually prosecute such information or informations, and abide by, and observe such orders as the said court shall direct; which recognizance the said clerk of the crown, and also every justice of the peace of any county, city, franchise, or town corporate, (where the cause of any information shall arise,) are by the same statute empowered to take."

And by 4 and 5 Will. and Mary, c. 18. it is further enacted, "That after the taking thereof by the said clerk of the crown, or the receipt thereof from any justice of the peace, the said clerk of the crown shall make an entry thereof upon record, and shall file a memorandum thereof in some public place in his office, that all persons may resort thereunto without fee."

And by 4 and 5 William and Mary, c. 18. it is further enacted, "That in case any person or persons against whom any information or informations for the causes aforesaid, or any of them, shall be exhibited, shall appear thereunto, and plead to issue, and that the prosecutor or prosecutors of such information or informations, shall not, at his and their own proper costs and charges, within one whole year next after issue joined therein, procure the same to be tried; or if upon such trial a verdict pass for the defendant or defendants, or in case the same informer or informers procure a *nolle prosequi* to be entered; then, in any of the said cases, the said court of king's bench is authorized to award the said defendant or defendants, his, her, or their costs, unless the judge, before whom such information shall

“ shall be tried, shall at the trial of such information, in open
 “ court, certify upon record, that there was reasonable cause for
 “ exhibiting such information.”

And by 4 and 5 Will. and Mary, c. 18. it is further enacted,
 “ That in case the said informer or informers shall not within
 “ three months next after the said costs taxed, and demand made
 “ thereof, pay to the said defendant or defendants the said costs,
 “ then the said defendant and defendants shall have the benefit of
 “ the said recognizance, to compel them thereunto.”

Recognizance shall stand as a security for costs.

Sect. 6. But by 4 and 5 Will. and Mary, c. 18. it is provided,
 “ That nothing hereof shall extend, or be construed to extend, to
 “ any other information than such as shall be exhibited in the
 “ name of their Majesties coroner or attorney, in the court of king’s
 “ bench, for the time being, commonly called the master of the
 “ crown-office.”

The Attorney General not restrained by this act from filing informations *ex officio*.

From whence it follows, that informations exhibited by the Attorney-General remain as they were at the common law.

For the better understanding this statute, I shall endeavour to shew,

1. In what cases the Court will order an information to be filed.
2. How the party may be relieved against process issued against him, before any recognizance given.
3. Where the defendant shall have costs.
4. Whether it extends to all kinds of informations.

As to the first particular, *viz.* In what cases the court will order an information to be filed.

Sect. 7. It seems to have been the general practice not to make such an order, without first making a rule upon the person complained of to shew cause to the contrary; which rule is never granted, but upon motion made in open court, and grounded upon affidavit of some misdemeanor, which if true, doth either for its enormity or dangerous tendency, or other such like circumstances, seem proper for the most public prosecution. And if the person upon whom such rule is made, having been personally served with it, do not, at the day given him for that purpose, give the court good satisfaction, by affidavit, that there is no reasonable cause for the prosecution, the court generally grants the information; and sometimes, upon special circumstances, will grant it against those who cannot be personally (c) served with such rule, as if they purposely absent themselves, &c.

Law of Nisi Prius, 210.

(c) Stra. 1044.
B. R. H. 271.

Sect. 8. But if the party on whom such rule is made, shew to the court a reasonable cause against such prosecution; as that he has been before indicted for the same cause, and acquitted; or that the intent of the (d) prosecution is to try a civil right, as the title to land, &c. which is not yet determined; or that the com-

(d) C. Jac. 212.
4 Burr. 1963.
2024.
B. R. H. 241.

plaint

plaint is trifling, vexatious, or oppressive, (1) the court will not grant the information, unless there be some particular and extraordinary circumstances in the case; the determination whereof being wholly left to the discretion of the court, cannot well come under any certain stated rules.

(e) 1 Black.
Rep. 2.

(f) 1 Black.
Rep. 18.

(g) 1 Black.
Rep. 48.

(h) 2 Strange,
1181.

Burr. 785. 1162.
Black. Rep.

432.
Douglas, 589.

1 Term Rep.
653.

(i) St. Tr. 113.
Black. Rep. 443.

(k) Black. Rep.
541.

(l) Str. 70.

(m) Str. 498.

Doug. 284. 387.

3 Bac. Ab. 475.

(n) 2 Str. 918.

(o) 2 Stra. 1193.

1 Wils. 18.

(p) 2 Stra. 1234.

(q) 2 Stra. 1157.

(r) B. R. II. 24.

(s) Burr. 316.

402.

(t) Burr. 548.

(u) Strange, 999.

(a) B. R. II.

210.

(v) Burr. 385.

(z) B. R. II.

211.

(u) Black. 542.

(b) Rex v. Wat-

son, 2 Term

Rep. 199. (c) Rex v. Webster, 3 Term Rep. 388.

(d) Carth. 14.

(e) 2 Str. 1107.

Andr. 310.

(f) 2 Str. 1162.

(g) 1 Wils. 7.

(h) 1 Wils. 7.

(i) 1 Wils. 41.

(k) 2 Burr. 1099.

(l) 1 Str. 21.

(m) 1 Str. 413.

(n) 2 Lord

Raym. 1377.

(o) Str. 788.

(p) Str. 834.

† Sect. 9. The court will not grant an information against a private person for reading a pretended proclamation (e). Nor against a husband for endeavouring to retake his wife contrary to articles of separation (f). Nor against persons who assemble with a lawful design, notwithstanding some unlawful and irregular acts ensue (g). Nor against justices acting improperly in their public capacity, unless flagrant proof of corruption appears (h). Nor against ministers for converting brief-money (i). Nor for bribing electors (k). Nor for a perjured intrusion to a living, upon an affidavit that it was simoniacal (l). Nor for a libel if it appear to be true (m). Nor for offences committed upon the high seas (n). Nor against a dissenter for refusing the office of sheriff (o). Nor against an offender, although the penalty of the offence is vested in the Crown (p). Nor for words spoken of a justice in his public character (q). Nor for attempting subornation (r). Nor for sending a challenge, if the informant had previously imparted a challenge (s). Nor in favour of one cheat against another cheat (t). Nor for a general charge of extortion (u). Nor for striking a magistrate in the execution of his office, if the magistrate struck first (x). Nor for an offence against a private statute (y). Nor if a civil suit is depending upon the same subject (z). Nor against the members of a corporation for a misapplication of the corporation money (a). Nor against a magistrate for having improperly convicted a person, unless the party complaining make an exculpatory affidavit (b). And in general the discretion of the court in granting an information is guided by the merits of the person applying; by the time of the application; by the nature of the case; and by the consequences which may possibly result from the granting it (c).

† The Court will grant an information for reproaching the office of magistracy, or defaming the character of magistrates (d). For taking away a young woman from her guardian, although chancery has committed the offender for a contempt (e). Or from her putative father (f). For not examining evidence upon oath under a reference and rule of court (g). Or for demanding a shilling, by a justice, to discharge his warrant, and committing the party for not paying it (h). For seducing a man to marry a pauper, in order to exonerate the parish (i). For seducing a woman, habituated to drinking, to make her will (k). For voluntarily absenting, by a justice, from sessions (l). For refusing to put an act in execution (m). For bribing persons to vote at corporation elections (n). For publishing an obscene book (o). For blasphemy (p). For unduly discharging a debtor by judges of an inferior

(1) A party applying for an information must waive his right of action; but if the court on hearing the whole matter are of opinion that it is a pro-

per subject for an action, they may give the party leave to bring it. Rex v. Sharren, 1 Term Rep. 189.

inferior court (*q*). For refusing, by the captain, to let the coroner come on board a man of war (*r*). For keeping great quantities of gunpowder (*s*). For a justice making order of removal and not summoning the party (*t*). For impressing a captain as a common seaman maliciously (*u*). For speaking treasonable words, although the offender has been previously punished; *viz.* in an academical way, by the vice-chancellor (*x*). For contriving the escape of French prisoners (*y*). For giving a ludicrous account of a marriage between an actress and a married man (*z*). For contriving pretended conversations with a ghost with intention to accuse another of having murdered the body of the disturbed spirit (*a*). For procuring a female apprentice to be assigned, though with her own consent, to another, for the purposes of prostitution (*b*). Against a justice of peace as well for granting as for refusing an ale licence improperly (*c*). Against a justice of the peace who from illegal and corrupt motives discharges the person committed by another magistrate under the vagrant act (*d*). For entering libellous reflections in the books of a corporation respecting the administration of justice in a cause in which the corporation were party (*e*). Against a person whose trial is coming on at the assizes for distributing hand-bills in the assize town, vindicating his conduct and reflecting on the prosecutors (*f*).

(*q*) Hard. 135.
(*r*) Str. 1097.
(*s*) Str. 1167.
(*t*) Andr. 238.
(*u*) 1 Black. 19.
(*x*) 1 Black. 37.
(*y*) 1 Black. 286.
(*z*) 1 Black. 294.
(*a*) 1 Black. 392.
401.
(*b*) 1 Black. 439.
(*c*) Rex v. Holland, 1 Term Rep. 692.
(*d*) Rex v. Brooke, 2 Term Rep. 190.
(*e*) Rex v. Watson, 2 Term Rep. 199.
(*f*) Rex v. Joffe, 4 Term Rep. 285.

As to the second particular, *viz.* How the party may be relieved against process issued against him, before any recognizance given according to the statute.

Sect. 10. It seems that he may move the court (*g*) to set it aside, as having issued contrary to the directions of the statute.

(*g*) Salk. 376.
2 Lilly, 61.
Hardw. 247.
Strange, 1042.

As to the third particular, *viz.* Where the defendant shall have costs—I shall observe,

FIRST, That if the information be tried at bar, the defendant can have no costs within this statute; for the words are, (*h*) that the court is authorized to award costs, &c. “unless the judge before whom the information shall be tried, shall at the trial, in open court, certify upon record, that there was a reasonable cause for exhibiting such information;” which is most naturally to be understood of a trial at *nisi prius*; and it would be absurd to suppose, that the statute intended that the justices of the king’s bench, at a trial before themselves, should make a certificate to themselves. To which may be added, that where a cause is of such consequence as to be tried at the bar, it may reasonably be intended to be out of the purview of the statute, which was chiefly designed against trifling and vexatious prosecutions.

(*h*) Clerk’s Case, Farresly, 47.
Strange, 1131.
874. 33. 1069.
1039. 1042.
1 Black. 356.
1 Wils. 261. 139.
3 Com. Dig. 517.
Comb. 345. 225.
Douglas, 314.
3 Black. 1305.
Salk. 193.
Bull. N. P. 333.
211.
Bunbury, 90.
B. R. H. 247.
Sayer’s Law of Costs, 290.

Sect. 11. SECONDLY, That if there be several defendants, and any one of them found guilty, those who are acquitted cannot have (*i*) costs within this statute; and this is agreeable to the construction made of the statutes which give costs to defendants in civil actions, by force whereof no defendant in such like case could recover costs before the statute of 8 and 9 Will. c. 10.

(*i*) Salkeld, 194.
2 Wilson, 21.

Sect. 12. THIRDLY, That it hath been adjudged in the construction of these words, “The court of king’s bench is authorized

“rized

(k) Reg. v. Davis, adj. Mich. 10 Annae, and also Stra. 1131. Rex v. Woodfall, vide 2 Chan. Case, 191.

“ rized to award to the defendant his costs, where the judge who “ tries an information does not at such trial certify, that there was “ a reasonable cause for the information (k),” that the said court is bound of right, in every such case, to award them, whether the acquittal were upon the merits, or only from a slip in point of form, and howsoever notorious the offence might be; for where a court is authorized by statute to do a matter of justice to the party, upon certain circumstances, it has no discretionary power of considering whether it ought to do it, or not, when a case appears to be within those circumstances.

Vide 19 Geo. 2. c. 34. for costs respecting smuggling informations, and also 4 Geo. 3. c. 15.

To which may be added, that the statute, being general as to all cases wherein the judge who tries the information doth not certify a reasonable cause, seems to imply, that it shall be left to such judge only for this purpose, to consider whether the prosecution were reasonable or not; and it is the prosecutor's folly not to apply to him.

3 Burr. 1817. 1819. Rex v. Filewood, 2 Term Rep. 145.

† FIFTHLY, That in case the defendant be acquitted on an information, he is not intitled to costs beyond the extent of the recognizance entered into by the prosecutor, which is limited by the statute to Twenty Pounds.

Rex v. Brooke, 2 Term Rep. 197.

† SIXTHLY, That the court will not (on motion) compel the prosecutor of an information to give security for the costs, in case the defendant should be acquitted, over and above the recognizance in Twenty Pounds required by the statute 4 and 5 Will. and Mary, c. . s.

Comb. 225. 419. 2 Stra. 874. B. R. H. 159. 3 Burr. 1804. 1 Black. Rep. 356. 1 Bac. K. B. 275.

† SEVENTHLY, That the prosecutor of an information for a misdemeanor shall pay costs for not proceeding to trial pursuant to notice, notwithstanding issue may not have been joined a twelvemonth. But the liability of a prosecutor of an information to pay costs for not going on to trial, must be understood to relate only to cases where the prosecution is carried on entirely at the instance of a private individual; for if the king's name be more than barely made use of, then the general rule, that the crown neither pays nor receives costs, attaches.

Rex v. Chamberlain, 1 Term Rep. 103.

† EIGHTHLY, That under the statute of 4 and 5 Will. and Mary, c. 11. s. 3. the representatives of the prosecutor are entitled to the costs taxed during his life, though no personal demand was ever made by him; for though it takes away the remedy by attachment it does not affect the debt, and when costs are taxed they become a debt. But where a rule had been made for the prosecutor of an information to pay costs for not proceeding to trial pursuant to notice, it was held that the executor of the defendant (who died after the making of the rule, but before the costs were taxed) was not entitled to them; nor would he have been liable if the testator had been ruled to pay them.

2 Stra. 874.

Hullock, 578.

As to the fourth particular, viz. Whether the before-mentioned statute 3 and 4 Will. and Mary, c. 18. extends to all kinds of information.

Sect. 13. It seems clear, that this statute extends to all informations whatsoever exhibited by the master of the CROWN OFFICE. And though it may be objected, that an information in the nature of a *Quo Warranto*, being a proper means to try a right, is not within the meaning of the statute; which mentioning trespasses, batteries, and other misdemeanors, may be reasonably construed to intend such other misdemeanors only as are of an inferior nature, like to those specified, which are generally wrangling and frivolous ones; yet seeing this is a remedial law, and therefore ought to be largely construed, and that such information may be as vexatious as any others, and always supposes a usurpation of some franchise, and every such usurpation is certainly a misdemeanor, it hath been settled that this statute doth extend to them.

Finch, 522.
2 Inst. 282. 495.
1 Salk. 374.
Carth. 504.
Ld. Raym. 426.
Strange, 1042.
Bul. N. P. 210.
1 Com. 485.
3 Com. 263.
4 Com. 307.
1 Black. 34. 46.
187. 579.
1 Bur. 402.
1 Wils. 244.

Sect. 14. But when the offices so usurped were annual offices, it was found very difficult and oftentimes impracticable by the laws in being to bring to a trial and determination the right of such persons to the said offices within the compass of the year. And when the offices were not annual, divers acts prejudicial to the good order of such cities were done before the right could be determined. It is therefore enacted by 9 Ann. c. 20. "That in case any person or persons shall usurp, intrude into, or unlawfully hold and execute, the office or franchise of mayor, bailiff, portreeve, or other officè within a city, town corporate, borough, or place in England or Wales, it shall and may be lawful, to and for the proper officer of the court of queen's bench, the court of sessions of counties palatine, or the court of grand sessions in Wales, with the leave of the said courts respectively, to exhibit one or more information or informations, in the nature of a *quo warranto*, at the relation of any person or persons desiring to sue or prosecute the same, and who shall be mentioned in such information or informations to be the relator or relators against such person or persons so usurping, intruding into, or unlawfully holding and executing any of the said offices or franchises, and to proceed therein in such manner as is usual in cases of informations in the nature of a *quo warranto*."

See 1 Geo. 1.
st. 2. c. 13.

Burr. 402. 575.
869. 1485. 1812.
1564. 1963.
2022. 2024.
2120. 2147.
2143. 2277.
2523.
Black. 95.
Coke's Ent.
527.
Salkeld, 374.

And by 9 Ann. c. 20. "If it shall appear to the said respective courts, that the several right of divers persons to the said offices or franchises may properly be determined on one information, it shall and may be lawful for the said respective courts to give leave to exhibit one such information against several persons, in order to try their respective rights to such offices or franchises."

And by 9 Ann. c. 20. "Such person or persons against which such information or informations in the nature of a *quo warranto* shall be sued or prosecuted, shall appear and plead as of the same Term or sessions in which the said information or informations shall be filed, unless the court, where such informations shall be filed, shall give further time (1) to such person or persons

(1) After the rules are made absolute against divers defendants, the court may direct that there shall be only one information against all. Burr. 573. 1270. Vide Cowp. 489.

“ persons against whom such information shall be exhibited, to plead.”

And by 9 Ann. c. 20. “ Such person or persons who shall sue or prosecute such information or informations in the nature of a *quo warranto*, shall proceed thereupon with the most convenient speed that may be.”

(8) 5 Com. Dig. 389.
2 Modern, 234.
Str. 582. 952.
Burr. 2277.
2143.
4 Modern, 58.
Rex v. Ponsonby, 25 Geo. 2.
Queen v. Blagden, B. R. H. 248.
Sayer's Law of Costs, 293.

Sect. 15. And by 9 Ann. c. 20. it is further enacted and declared, “ That in case any person or persons, against whom any information or informations, in the nature of a *quo warranto*, shall, in any of the said cases, be exhibited in any of the said courts, shall be found or adjudged guilty of an usurpation, or intrusion into, or unlawfully holding and executing any of the said offices or franchises, it shall and may be lawful to and for the said courts respectively, as well to give judgment of *ouster* against such person or persons, of and from any of the said offices or franchises, as to fine such person or persons respectively for his or their usurping, intruding into, or unlawfully holding and executing any of the said offices and franchises, &c.” (8)

“ And by 9 Ann. c. 26. s. 5. it shall and may be lawful to and for the said courts respectively to give judgment that the relator or relators, in such information named, shall recover his or their costs of such prosecution: and if judgment shall be given for the defendant or defendants in such information, he or they for whom such judgment shall be given, shall recover his or their costs therein expended against such relator or relators, such costs to be levied by a *capias ad satisfaciendum, fieri facias*, or *elegit*.”

(9) 11 Hen. 4. c. 3.
(10) 14 Ed. 3. c. 6.
9 Hen. 5. c. 4.
4 Hen. 4. c. 3.
8 Hen. 6. c. 12.
and 15. 32 Hen. 8. c. 30. 18 Eliz. c. 14. 21 Jac. 1. c. 13. 16 & 17 Car. 2. c. 8. (styled in 1 Ventris, 100. an omnipotent act.) 4 & 5 Ann. c. 16. 9 Ann. c. 20. 5 Geo. 1. c. 13. 4 Burr. 1099. Str. 1011. Co. Lit. 260. Douglas, 115.

Sect. 16. And by 9 Ann. c. 20. s. 7. “ the statute for the amendment (9) of the law, and all the statutes of jeofails (10) shall be extended to informations in nature of a *quo warranto*, and proceedings thereon, for any of the matters in the said act mentioned.”

See Winchelsea Causes, 4 Burr. Rep. 1963. 2521.
Rex v. Dicken, 4 Term Rep. 282.

Upon this statute a rule was made to regulate the discretion of the Court, that after twenty years possession of a corporate franchise, no information in the nature of *quo warranto* should be granted to disturb it; but that since that time each case stood on its own circumstances; but this being found too long a period, a new general rule was made by the Court, that when a person had been in quiet possession of a corporate franchise for six years, they would not under any circumstances suffer it to be disturbed. But the legislature interposed soon afterwards.

From the 1st day of Trinity Term, 1793, defendants to informations in the nature of *quo warranto*, for the exercise of any office, may plead the holding it six years or more, &c.

† And now by 52 Geo. 3. c. 58. in order to secure the freedom of election, and the quiet, good order and tranquillity of cities, boroughs, and towns corporate, it is enacted, “ that the defendant or defendants to any information in the nature of a *quo warranto*, for the exercise of any office or franchise in any city,

“ city, borough, or town corporate, whether exhibited with leave
 “ of the Court, or by his majesty’s attorney general, or other offi-
 “ cer of the crown on behalf of his majesty, by virtue of any
 “ royal prerogative or otherwise, and each and every of them
 “ severally and respectively to plead, that he or they had first
 “ actually taken upon themselves, or held or executed the office
 “ or franchise which is the subject of such information, six years
 “ or more before the exhibiting of such information, such six
 “ years to be reckoned and computed from the day on which
 “ such defendant so pleading was actually admitted and sworn
 “ into such office or franchise; which plea shall and may be
 “ pleaded either singly, or together with and besides such plea
 “ as he or they might have lawfully pleaded before the passing
 “ of this act, or such several pleas as the Court on motion shall
 “ allow; and if, upon the trial of such information, the issue
 “ joined upon the plea aforesaid shall be found for the defend-
 “ ant or defendants, or any of them, he or they shall be entitled
 “ to judgment, and to such and the like costs as he or they
 “ would by law have been entitled to, if a verdict and judgment
 “ had been given for him or them upon the merits of his or their
 “ title.”

† But by 32 Geo. 3. c. 58. s. 2. it is provided “ That in every
 “ such case the prosecutor of such information may reply to such
 “ plea, any forfeiture, surrender, or avoidance, by the defendant,
 “ of such office or franchise happening within six years before
 “ the exhibition of such information, whereon the defendant may
 “ take issue, and shall be intitled to costs in manner aforesaid.”

Forfeiture of
 office within six
 years before in-
 formation, may
 be replied to
 such plea.

† And by 32 Geo. 3. c. 58. s. 3. it is further enacted, “ That
 “ if any person or persons against whom any such information
 “ as aforesaid shall be exhibited shall derive title under an elec-
 “ tion, nomination, swearing into office, or admission by any
 “ person or persons, the title of such person or persons against
 “ whom such information shall be exhibited, shall not be de-
 “ feated or affected by reason or on account of any defect in the
 “ title of such person or persons so electing, nominating, swear-
 “ ing into office, or admitting, in case such person or persons
 “ under whom title shall be derived as aforesaid was or were in
 “ exercise *de facto* of the franchise or office (in virtue of which
 “ he or they so elected, nominated, sworn in, or admitted) at a
 “ period six years at least previous to the time of filing such in-
 “ formation, and his or their title shall not have been questioned
 “ by any legal proceeding carried on with effect.”

Title derived
 under an elec-
 tion not to be
 affected on ac-
 count of defect
 in the title of
 the person elect-
 ing, if he was
 in the exercise
 of his office six
 years previous
 to the informa-
 tion.

† And by 32 Geo. 3. c. 58. s. 4. it is further enacted, “ That
 “ the mayor, bailiff, sheriff, town clerk, or other officer of any
 “ corporation, having the custody of, or power over, the records
 “ of the same, shall, upon the demand of any person, being an
 “ officer or member of such corporation, on the payment of one
 “ shilling, permit such person, on any day or days, except Christ-
 “ mas day, Good Friday, and Sunday, between the hours of nine
 “ in the morning and three in the afternoon, to inspect the books
 “ and papers wherein the admission or swearing-in of the free-
 “ men,

Officer having
 the custody of
 corporation re-
 cords, to permit
 any member
 thereof to
 inspect the
 book of admis-
 sion of freemen,
 &c. on penalty
 of 100*l*,

“men, burgesses, or other members or officers of such corporation shall be entered, and to have copies or minutes of the admission, or the entry of swearing-in of any one or more of such freemen, burgesses, or other members or officers, upon paying sixpence for every one hundred words for writing the same; and if such mayor, bailiff, sheriff, town clerk, or other officer, shall refuse or deny to any person, hereby intitled to demand it, the inspection of such books or papers, or to have copies or minutes thereof as aforesaid, such mayor, bailiff, sheriff, town clerk, or other officer shall, for every such offence, forfeit and pay the sum of one hundred pounds, together with full costs of suit, to him, her, or them, who shall inform and sue for the same, within one year after such offence committed, by action of debt, bill, plaint, or information, in any of his majesty's courts of record at Westminster, wherein no essoin, protection, wager of law, nor more than one imparlance, shall be allowed.”

Upon these statutes the following particulars are remarkable.

(a) 1 Bur. 434.
1 Term Rep. 2.
1 Black. Rep. 470.
(b) Burr. 869.
Black. 187.
(c) Stra. 547.
Douglas, 588.
(d) 3 Burr. 1812.
(e) Cro. Eliz. 547.
Stra. 637.
(f) Ld. Raym. 1409.
(g) See Rex v. Whitwell, 5 Term Rep. 85.

† FIRST, If a person in answer to a motion for an information *quo warranto* can shew to the Court that his right to the franchise in question has been already determined on a *mandamus*; or that it hath been acquiesced (a) in for six years; or that it depended on the right of those who voted for him, which hath not been yet tried; or that the franchise no ways concerns the public (as all those which relate to the government of a corporation, (b) or the election of members of parliament (c), and fairs, and markets, (d) are said to do), but is wholly of a private nature (e), as a coney warren, &c.; (f) or that the election by which he claims is agreeable to charter; or that he never acted under it, (g) the Court will not grant the information, unless there be some particular and extraordinary circumstances in the case.

Rex v. Stacie,
1 Term Rep.
Rex v. Spearing.
See 1 Black.
Rep. 471.
Cowp. 507.
Rex v. Mein,
3 Term Rep.
595.

† SECONDLY, It is not precisely determined how far a derivative title to a corporate franchise may be impeached when the original holder died possessed of it undisputed; for the rights of electors possessed *de facto* of a franchise cannot be impeached by an information in the nature of a *quo warranto* against the elected. But when there is no other mode of trying the right of the elector to vote, the Court will grant an information *quo warranto* against the elected.

Rex v. Hearn,
2 Term Rep.
777.

† THIRDLY, The Court will not grant an information in the nature of *quo warranto* against a person exercising a corporate franchise to which he has been legally elected, until he has been removed by the corporation, although he has committed an offence which might amount to a forfeiture.

Rex v. Bond,
2 Term Rep.
767.

† FOURTHLY, That the party applying for the information standing in the same circumstances as the person against whom he applies, as when the granting the information may disfranchise so many as to endanger the dissolution of the corporation, the Court will exercise their discretion and refuse the information. But the fact that the defendant's title had been before attached by

by a similar information and abandoned, will have no influence with the Court.

† FIFTHLY, The Court will refuse to grant an information in the nature of *quo warranto* because the party applying for it had agreed not to enforce a bye-law upon which he now grounded his attempt to impeach the defendant's title. But it is no objection to an application for an information against a mayor for his not having taken the sacrament within the proper time before his election that the relators concurred in his election, because that defect is a latent one, arising from the omission of an act positively required by the legislature.

Rex v. Mortlock, 3 Term Rep. 300.

Rex v. Smith, 3 Term Rep. 573.

† SIXTHLY, An information in the nature of *quo warranto* lies against a portreeve of a borough and manor, who as portreeve is the returning officer of the borough.

Rex v. Mein, 3 Term Rep. 596.

† SEVENTHLY, That an application for an information *quo warranto* made on the affidavits of several persons of whom all but one have consented to the election proposed to be impeached, may be granted on the affidavit of that one if he avow himself to be the relator.

Rex v. Symonds, 4 Term Rep. 223.

† EIGHTHLY, No information *quo warranto* can be granted against any corporation as a body for any usurpation on the crown, except in the name of the Attorney General.

Rex v. Carmarthen, 2 Burr. 869.

† NINTHLY, That where any one of several issues in a *quo warranto* information is found for the prosecutor, on which judgment of ouster is given, he is intitled to costs on all the issues.

Rex v. Downes, 1 Term Rep. 453.

† TENTHLY, It is not sufficient in an application to the Court for an information, to state that the defendant being elected tendered himself to be sworn in; for there must be a *user* as well as a claim of a franchise in order to found an application for an information in the nature of a *quo warranto*.

Rex v. Whitmore, 5 Term Rep. 85.

† ELEVENTHLY, That before the exhibiting of any information in the nature of a *quo warranto*, the relator ought to enter into a recognizance in twenty pounds to pursue the same with effect, &c. pursuant to the statute 4 and 5 Will. and Mary, c. 18. before recited; for that statute extends to all informations whatever exhibited by the master of the Crown office; and that if the prosecutor do not plead to trial within a twelvemonth after issue joined, the defendant is intitled to costs to the extent of such recognizance.

Carth. 503. Salk. 376.

B. R. H. 247. 2 Stra. 1042.

† TWELFTHLY, That the prosecutor of an information in the nature of a *quo warranto* shall pay costs for not proceeding to trial pursuant to notice.

1 Stra. 33. Sayer, 130.

† THIRTEENTHLY, That the statute 9 Ann. c. 20. does not extend to give costs in an information in the nature of a *quo warranto*, unless for the usurpation, &c. of corporate offices and rights to freedom in corporations, or other corporate rights.

Rex v. Williams, 1 Burr. 402. 1 Black. Rep. 93.

Rex v. Pickers-
gill, 4 Term
Rep. 809.

† FOURTEENTHLY, That a defendant in execution for the contempt and for the costs on a *quo warranto* information is intitled to be discharged under the lords' act.

2 Stra. 1039.
2 Burr. 786.
4 Burr. 1963.

† FIFTEENTHLY, That the court will in its discretion, and according to the circumstances of the case, discharge a rule for a *quo warranto* information with costs.

AND now I am, in the second place, to consider the nature of such information as is partly at the suit of the king, and partly at the suit of the party, which is commonly called an INFORMATION QUI TAM.

See 3. 7 Wils.
259.

And this having a great affinity with actions on statutes, I shall consider them together, and endeavour to shew,

1. In what cases they lie.
2. What ought to be the form of them.
3. In what courts they may be brought.
4. In what county.
5. Within what time.
6. Who are disabled to bring them.
7. Whether there may be a nonsuit in them.
8. Whether the informer or defendant may appear by attorney.
9. In what cases there shall be costs.
10. Whether the defendant may wage his law, or take advantage of a protection.
11. In what manner the defendant is to plead to such an information or action.
12. By whom the replication shall be made.
13. In what manner the issue shall be joined, and where it shall be tried.
14. Where the verdict may be found as to part of the information against the informer, and as to other part for him.
15. What judgment on such an information or action is good.
16. Whether the penalty of a penal statute may be compounded or granted over.

As to the FIRST POINT, viz. In what cases an information or action *qui tam* will lie.

When an act only gives a remedy to the party grieved, it is not to be considered as a penal statute. B. R. H. 412.

Sect. 17. I (a) take it for granted, that they lie on no statute which prohibits a thing as being an immediate offence against the public good in general, under a certain penalty, unless the whole or part of such penalty be expressly given to him who will sue for it; because (b) otherwise it goes to the king, and nothing can be demanded by the party.

(a) 2 Andr. 127. (b) 2 Andr. 128. 2 Jones, 234. 1 Andr. 139, 140. Stra. 828.

But

But where such statute gives any part of such penalty to him who will sue for it "by action or information, &c." I take it to be settled at this day, that any one may bring such action or information, and lay his demand (c) *tam pro domino rege quam pro seipso* (d).

L. quin. Ed. 4. 117, 118. (d) 4 Coke, 13. 12 Coke, 131.

Also where a statute prohibits, or commands a thing, the doing or omission whereof is an immediate damage to the party, and also highly concerns the peace, safety, or good government of the public, or the honour of the king, or of his supreme courts of justice, as the statutes of the (e) scandal of great men; of (f) hue and cry, and those that restrain certain suits in the (g) civil or canon law courts, or even in inferior (h) common law courts, it seems to have been the general opinion, that the party grieved may, and it is holden (i) by some, that he ought to, bring his action on such statute *tam pro domino rege quam pro seipso*. And it seems to be taken (k) as a ground in some books, that where ever the king is to have a fine on an action on a statute, the action must be so laid; but not where the defendant is only to be amerced. But I much question, whether this be a good general settled rule in relation to this matter; since in an action on the statutes of hue and cry, the defendapt shall (l) only be amerced; and yet such action may certainly be laid *tam pro domino rege quam pro seipso*.

Also in actions, which, by the common law, a man may bring *tam pro domino rege quam pro seipso*, as in those for injuries to the party, mixed with a high contempt to the king, (as where a (m) judge refuses to allow the benefit of the king's pardon to a prisoner, unless he will give him such a bribe; or where one makes a (n) rescous of one taken on a *capias utlagatum*, at the suit of the party, or the sheriff suffers one taken on such a *capias* to (o) escape), the plaintiff is (p) said to have his election to lay his action this way, but not to be compelled so to do. To which may be added; that the plaintiff cannot so lay his action for a common trespass at common law, and yet therein the defendant is to be fined.

Neither does the opinion I would contend against, seem to be confirmed by the constant course of precedents; but, on the contrary, many of those on the statutes against (q) forcible entries, and on the statutes against (r) illegal distresses, do not lay the action *tam pro domino rege quam pro seipso*; and yet there are (s) authorities in this last case, as well as in the former, that the defendant is liable to be fined. But the case of an (t) action on 2 and 3, Edw. 6. c. 13. wherein it seems clear that it is not necessary to lay the action *tam pro domino rege quam pro seipso*, does not seem to come up to the point; because it is generally holden, that the defendant is only amerced in such action, being in nature of action of debt, and not finable, as it is said (u) that he may be in an indictment or information grounded on the (x) contempt of the statute.

(u) Moor, 911. C. Jac. 538. 611. (x) Savil. 62

As to the SECOND POINT, viz. What ought to be the form of such information or action.

Sect. 18. Having in the precedent chapter, section 92. endeavoured to shew, that there is no need that such information or action conclude *contra pacem*, and in section 95. whether it be necessary for them to conclude *in contemptum regis*; and in sect. 100. that they need not recite the statute whereon they are grounded; and in sections 101, 102, &c. what mis-recitals of a statute will be fatal; and in sect. 110, 111, &c. how far it is necessary to bring the case within the very words of the statute; and in sect. 116, 117. how far it is necessary to conclude *contra formam statuti*; and in sect. 115. in what cases one may have judgment on a statute, in an action brought at common law;

I shall in this place observe only these following particulars :

(y) C. Jnc. 104.
But see *Rex v. Salamans*, 1 Term Rep. 249. where it is doubted whether a person can be convicted of two distinct offences in the same information.
(z) 1 Sid. 368.
2 Kebble, 366.
2 R. Abr. 696.
C. Jnc. 529.
C. Eliz. 835.
Bunbury, 12. 63.
Vide *Rex v. Taylor*, 1 Bac. Abr. 39. 41.

Sect. 19. FIRST, If an information contain several offences against a statute, and be well laid as to some of them but defective as to the rest, the informer may have judgment for so much as is well laid. (y) As where the words of the statute are fully pursued in the description of some of the offences and not of others; (z) or where some of the times that the defendant hath offended against the statute are expressed with convenient certainty, and others not; as where it is alleged that the defendant, for eleven months, and more, from the tenth of September in such a year, unto the ninth of September in the year following, used a trade without having been an apprentice, &c. or was absent from church, &c. in which cases judgment shall be given for the eleven months. But if the whole time be expressed inconsistently, as that the defendant was an offender eleven months, from the first of November in such a year to the first of August following, the whole is void for the repugnancy, as hath been more fully shewn, chap. 25. sect. 62.

(a) 1 Jones, 201.
Cro. Car. 256.
Plowden, 77, 78.
Dyer, 93.
3 Lev. 374, 375.
Qu. Dalis. 66, 67.
Moor, 64, 65.
B. Act. sur le Stat. 4.
27 H. 8. 23.
(b) B. Act.
Pop. 5.
L. Quin. Ed. 4. 117.
See *Rastal*, 686.
Vit. 1. 427, 428.

Sect. 20. SECONDLY, It seems to be settled at this day, that it is in the election of him who brings an action on a penal statute, which gives one moiety of the forfeiture to the king, and another to the informer, either to have a writ against the defendant, *quod reddat (a) domino regi et A. B. qui tam, &c. quas eis debet*; or to have it in this form, *quod reddat A. B. qui tam, &c. quas ei debet*.

Also it seems to be settled, that whether the writ be in the one form or the other, it is well pursued by a declaration in the name of the plaintiff only. (b)

Also, it seems to be doubtful, whether there be any necessity that either the writ, or count, in any such action, do express that it is brought by it for the king as well as the party, as hath been more fully shewn in the seventeenth section; and there is a (c) precedent for such an action brought in the king's name by A. B. *qui pro seipso in hac parte sequitur*.

(c) *Rastal*, 427.
(d) Jones, 261, 262.
C. Car. 256.
Coke's Ent. 731.

But seems (d) agreed that every information must be in this form, that the informer *tam pro domino rege quam pro seipso sequitur*, even where it is brought on a statute which gives one third part of the penalty to a third person.

But I find some difference as to the forms of such informations,

as to some other respects; for sometimes they say, (e) that the action accrues to the informer, *qui tam*, &c. to demand the sum forfeited for the king and himself; and (f) sometimes that it accrues to the king, and to the informer, *qui tam*, &c. and (g) sometimes, that it accrues to the king and to J. S. &c. (*viz.* where the statute divides the penalty into three parts, &c.) and also to the informer *qui tam*, &c. and sometimes they have no (h) clause at all of this kind.

And (i) *quære*, if it be not fatal to have any such clause where the penalty is not recoverable by the information, but requires a subsequent one, grounded on the conviction.

Also, sometimes such informations pray process against the defendant, to bring him in to (k) answer to the informer, *qui tam*, &c. only; sometimes (l) to answer *tam domino regi quam* A. B. *qui tam*, &c. and (m) sometimes to answer *de et super præmissis* generally, without expressing to whom.

Sect. 21. THIRDLY, Regularly it is safest for every such information or action to demand the very sum due to the informer, and neither more or less; for it hath been adjudged, (n) that if an action on a statute demand the whole forfeiture for the informer, where the statute gives part of it to the king, it is insufficient.

Also it hath been holden, (o) that if the information make no demand at all, or demand more or less for the party than appears to be his due, it is insufficient as to him, yet (p) perhaps it may be good as to the share of the forfeiture given to the king.

Cunningham v. Bennet, Trin. 1 Geo. 1. C. B.

Also it hath been (q) adjudged, that it is sufficient to demand the share due to the informer, without making any mention of that due to the king.

Also, (a) where the *quantum* of the forfeiture depends upon the finding of the jury, as it does on the statute of Forestalling, it hath been adjudged sufficient to leave a blank (1) for the sum.

Also it hath been (s) adjudged, that a popular action may conclude "*ad grave damnum*," without adding, "of the plaintiff:" because every offence, for which such action is brought, is supposed to be a general grievance to every body.

Sect. 22. FOURTHLY, It is enacted by 18 Eliz. c. 5. sect. 1. "That none shall be admitted or received to pursue against any person or persons, upon any penal statute, but by way of information or original action, and not otherwise."

And it hath been adjudged that no popular action, since this statute, can be brought on a former statute, either by (t) bill in the king's bench, or by (u) plaint in an inferior court, but only by original writ or information; whether the statute on which such action is grounded (v) inflict a penalty generally, without saying how

(1) Q. As to the blank, if it would not be bad? 1 Bac. Abr. 38. *in notis*.

- (1) 4 & 5 P. & M. 5. s. 32, 33, 34.
 6 Coke, 19.
 Moore, 412.
 (y) 5 Eliz. 4. s. 31, 39.
 C. Eliz. 544. Noy, 60.

(z) 1 R. Abr. 537.

(a) Vide 2 D. Abr. 279, 280.
 3 Leon. 237.

how it shall be recovered, or expressly give a recovery by bill or plaint, &c.; as that of 4 and 5 Ph. & Mary, against (1) making kerseys without having served an apprenticeship; and that of 5 Eliz. c. 4. against (y) following any other trade without having served an apprenticeship.

Yet the contrary hath been since expressly adjudged (z) as to such former statutes as expressly give a recovery by bill or plaint, because the statute of 18 Eliz. c. 5. doth not mention original writs, but original actions; and a suit by bill or plaint is an (a) original action in the court in which it is commenced, and therefore may reasonably seem to be only within the intent of the statute, where it is removed into a superior court, and there proceeded upon. And if this be the meaning of the statute, (1) I see not how any suit whatever, by bill or plaint on any penal statute, can be within the purview of it while such bill or plaint continue in the court in which they were commenced, whether the statute on which they are brought do expressly mention them, or leave the method of suing to the general construction of law. To which may be added, that the statute 21 Jac. 1. c. 4. sect. 1. seems to suppose, that actions on penal statutes may indifferently be brought by writ, plaint, bill, or information; for the words are, "That all offences hereafter to be committed against any penal statute, for which any common informer or promoter may lawfully ground any popular action, bill, plaint, suit, or information, before justices of assize, &c. shall be commenced, &c. by way of action, plaint, bill, information, or indictment in the proper county, before the justices of assize, &c."

(b) C. Eliz. 434.
 615.
 Vide C. Eliz. 76, 77.
 3 Leon. 237.

However, it seems clear, (b) that no suit, by bill or plaint, by a party grieved, suing upon a clause either expressly or impliedly relating to himself only, is within the said statute of 18 Eliz. For it is expressly provided, sect. 6. "That it shall not restrain any certain person, body politic or corporate, to whom, or to whose use any forfeiture is limited by any statute, and not generally to any person that will sue; but that every such person may sue as before." (c)

(c) C. Eliz. 76, 77.
 3 Leon. 237.

But where the party particularly grieved by an offence against a statute sues for a forfeiture generally limited to any one who will sue for it, he seems to be as much within the restraint of the said statute, as if he were not the party grieved.

(d) Lutw. 162.

Sect. 23. FIFTHLY, (d) In an action on a statute, which requires some officers at one certain time after their admission, and others at another, to qualify themselves by certain acts, it is safest, expressly to shew the time when the defendant was admitted to his office,

(1) In an action on the 21 Hen. 8. c. 13. s. 26. for non-residence, it was objected that this was a proceeding by bill, whereas it should have been by information or original according to the statute 18 Eliz. c. 5.; but the court said that a proceeding by bill is an original action within the 18 Eliz. c. 5.

and that "original" as there read does not mean "original writ," but "original action," as contradistinguished from proceedings in inferior courts and the Star Chamber, where the proceedings were in a summary way by libel or complaint. Leigh v. Kent, 3 Term Rep. 365.

office, and that he neglected to qualify himself in the time limited; and also, that he actually exercised his office after such neglect.

Sect. 24. SIXTHLY, It is said (e) that the fact is sufficiently alleged after a *quod cum* in an action on a statute, but not in an information. (c) Showet, 37.

As to the **THIRD POINT**, *viz.* In what courts such an information or action may be brought.

Sect. 25. Having already, c. 5. sect. 33. endeavoured to prove, that where a statute appoints that a penalty shall be recovered in any of the king's courts of record, the offence may be indicted before justices of oyer and terminer, though not in a court-leet, or of (f) pie-powder, or such others, instituted for special purposes; and intending under the next particular, incidentally to consider what suits may be brought in the courts of WESTMINSTER HALL, on penal statutes, I shall only take notice in this place, that where a statute limits suits by an informer *qui tam* to other courts, yet any (g) one may, by construction of law, exhibit an information in the Exchequer for the whole penalty for the use of the king.

Con. Hut. 99.
1 Jones, 193.
Littleton, 163.
C. Cal. 112.
1 Ventris, 8.
(f) G. Eliz.
530.
6 Coke, 20.

(g) 2 Andr. 127,
128.
C. Jac. 173,
179.
See post, s. 39

As to the **FOURTH POINT**, *viz.* In what county such information or action may be brought.

Sect. 26. It is enacted by 31 Eliz. c. 5. s. 5. "That in any declaration, or information, not being exhibited by such officers of record, as had in respect of their offices before the time of the said statute lawfully used to exhibit informations, or sue upon penal laws; and not (h) concerning champerty, buying of titles, or extorting, or the king's customs, &c. or usury or fore-stalling, &c. the offence against any penal statute shall not be laid to be done in any other county but where the matter alleged to be the offence was in truth done: And that the defendant may traverse, and allege, that the offence supposed to be committed, was not committed in the county where it is alleged; which being tried for the defendant, or if the plaintiff be thereupon nonsuit, the plaintiff shall be barred in that action or information."

(h) Par. 1. B. 1.
c. 80. sect. 17.
Law of Nisi
Prius, 195.

Sect. 27. It is further enacted by 31 Eliz. c. 5. s. 6. "That all suits for using unlawful, or not using lawful games, or for not having bows or arrows, or for using a trade without having been brought up in it, (i) shall be sued and prosecuted in the general quarter-sessions of the peace, or assizes of the same county where the offence shall be committed, or otherwise inquired of, heard and determined, in the assizes, or general quarter-sessions of the peace of the same county where such offence shall be committed, or in the leet within which it shall happen, and not in any wise out of the same county where such offence shall happen or be committed."

(i) Farren, *quod tam v. Williams*,
Cowper, 369.

In the construction of this statute the following particulars seem most remarkable:

Sect. 28. FIRST, That it hath been adjudged, that the defendant

(k) 2 Andr. 180.
the contrary ad-
judged.

C. Eliz. 735, 736.

dant can have no advantage of the above-recited clause, which appoints, that all offences against penal statutes shall be laid in the proper counties but (k) only by way of plea; and this construction seems very agreeable to the purport of the said clause; the words whereof are, "That the defendant may traverse the county, &c. which being tried for him, or if the plaintiff be thereupon nonsuit, the plaintiff shall be barred, &c."—But this point is otherwise settled by 21 Jac. 1. c. 4. s. 3.

(l) C. Eliz. 645.

(m) 1 Vent. 8.

C. Jac. 178.

Sect. 29. SECONDLY, That the said clause extends (l) not to any suit by a party grieved, or by the (m) attorney-general, but only to those brought by common informers.

(n) C. Jac. 178,
179.

Salkeld, 373,
Hobart, 184.

Sect 30. THIRDLY, That the last recited clause concerning suits for using a trade without having been brought up in it, &c. which are appointed to be brought at the assizes or sessions, in the proper county, and not in any wise out of the county, restrains not an information in the (n) king's bench or exchequer, for such offence happening in the same county where those courts are sitting; for the negative words of the statute are not, that such suits should not be brought in any other court, but, that they shall not be brought in any other county; and the prerogative of these high courts shall not be restrained without express words. (1)

(o) Vide Hob.
184. 327.

C. Jac. 85.

(p) 1 Keb. 584.

2 Keb. 99. 125.

3 Keb. 247, 418.

1 Sid. 309, 400.

But where the offence is in a different county, such suits, in those, or any other courts, out of the proper county, seem to be within the express (o) words of the statute; yet it was long a very great (p) question, whether an action of debt or information in the courts of Westminster-hall, were not to be construed to be out of the meaning of them: but this point is now settled in the construction of the statute of 21 Jac. 1. c. 4. as shall be more fully shewn hereafter.

(q) Vide Ho-
bart, 251. & B.
1. p. 384.

Raymond, 394.

Sect. 31. It is enacted by the said stat. of 21 Jac. 1. c. 4. "That all offences to be committed against any penal statute, for which any common informer or promoter may lawfully ground any popular action, bill, plaint, suit, or information before justices of the assize, justices of *nisi prius* or gaol-delivery, justices of oyer and terminer, or justices of peace, in their general or quarter sessions (except offences against the statute concerning (q) recusancy, &c. or maintenance, &c. or the king's customs, &c. or transporting gold, or silver, or munition, or wool, or leather, &c.) shall be commenced sued, prosecuted, tried, reviewed and determined, by way of action, plaint, bill, information or indictment before the justices of assize, justices of *nisi prius*, justices of oyer and terminer, justices of gaol-delivery, or before the justices of the peace of every county, city, borough or town corporate, and liberty, having power to inquire of, hear and determine the same, in England or Wales, wherein such offences

(1) See Hill v. Dechain, Stiles, 382. and Sparrow v. Urquhart, 2 Burr. 1042. that the jurisdiction of the superior courts may be ousted by necessary implication as well as express words, and therefore in the case of Cates *qui tam* v. Mellish, on the statute 25 Geo. 3. c. 51. which creates penalties of fifty pounds and ten pounds, and enacts

that the former shall be sued in any of the courts at Westminster, and provides that it should and might be lawful for justices of the peace, &c. to hear and determine the latter; the court held that the proviso ousted the superior courts of the jurisdiction as to the ten pound penalties, 3 Term Rep. 442.

“offences shall be committed, in any of the courts, places of judgment, or liberties aforesaid, respectively, only at the choice of the parties who shall commence suit, or prosecute for the same, and not elsewhere, save only in the said counties, or places usual for those counties, or any of them: and that the like process in every popular action, bill, plaint, information or suit, to be commenced, sued or prosecuted, by force of, or according to the purport of this act, be had and awarded, to all intents and purposes, as in an action of trespass *vi et armis* at common law. And that all and all manner of informations, actions, bills, plaints, and suits whatsoever, to be commenced, sued, prosecuted, or awarded, either by the attorney-general, or by any officer whatsoever, or by any common informer, or other person whatsoever, in any of his majesty's courts at Westminster, for or concerning any of the offences aforesaid, shall be void.”

Sect. 32. By 21 Jac. 1. c. 4. s. 3. it is further enacted, “That if on the general issue the offence be not proved in the same county in which it is laid, the defendant shall be found not guilty,” as shall be more fully shewn under the eleventh particular.

Sect. 33. And by 21 Jac. 1. c. 4. s. . “No officer shall receive, file, or enter of record, any information, bill, or plaint, count or declaration, grounded on the said penal statutes, or any of them, which by this act are appointed to be heard and determined in their proper counties, until the informer or relator hath first taken a corporal oath before some of the judges of that court, that the offence or offences laid in such information, &c. was or were not committed in any other county than where, by the said information, &c. the same is, or supposed to have been committed, &c. the same oath to be there entered of record.”

Vide Cro. Car.
316.
4 Inst. 272.
2 Inst. 193.
Salkeld, 367.
1d. Ray. 426.
Carthew, 503.

In the construction of this statute I shall observe the following particulars :

Sect. 34. FIRST, That as the law is now (*r*) settled, no action of debt, or information, or other suit whatever, can be brought in any court of Westminster Hall, on any penal statute made before the said statute of 21 Jac. c. 4. for any offence not therein excepted, for which the offender may be prosecuted in the country, (*s*) unless such offence shall be committed in the same county in which the court shall sit; and surely this cannot but be thought most agreeable to the meaning as well as the letter of the said statute; the whole provision whereof would be to little purpose, if such suits should be construed out of it. And as to the objection, that if all suits on penal statutes should be wholly taken from the superior courts, all offences against them would become dispunishable by the offender's removing himself out of the county wherein he committed them, because the courts in the statute mentioned have no jurisdiction out of the counties wherein they sit, it hath been (*t*) answered, that process of outlawry will lie against such offenders, by virtue of the above-recited clause of the said statute, which gives the like process in all suits prosecuted according to the purport of it, as in actions of trespass at the common law.

(*r*) 1 Salk. 372.
Carthew, 465.
5 Modern, 425.
2 Levinz, 204.
3 Inst. 192.
con. adjudged.
1 Ventris, 8.
1 Levinz, 249.
3 Levinz, 71.
3 Keble, 804.
2 Keble, 340.
401. 447. 458.
1 Sid. 303. 359.
400.
Same case
doubted,
1 Ventris, 364.
2 Levinz, 204.
Litch. 192.
Sup. sect. 30.
1 Lutwyche, 165.
Strange, 1081.
Raymond, 394.
(*s*) 1 Jones, 193.
Sup. sect. 30.
Strange, 415.
(*t*) 1 Salkeld, 373

Sect.

(u) 1 Salk. 372.
Hick's Case,
Carthew, 465.

Sect. 35. SECONDLY, That (u) where a subsequent statute gives an action of debt, or any other remedy, for the recovery of a penalty in any court of record generally, it so far impliedly repeals the restraint of 21 Jac. c. 4. and consequently leaves the informer at his liberty to sue in the courts of Westminster Hall.

(x) 1 Ventris, 8.
C. Car. 112. 146.
Hetley, 101.
10 Jones, 193.
Hutton, 98, 99.
(y) C. Car. 112.
Salkeld, 372.

Sect. 36. THIRDLY, That the statute of 21 Jac. c. 4. gave (x) no jurisdiction to the courts therein mentioned, over any offences, in relation to which they had none before; and (y) therefore that suits for such offences must be brought in the courts of Westminster Hall in the same manner as before.

Lit. Rep. 163. Hutton, 98, 99. 2 Keble, 106. Strange, 1103. Andrews, 27. 174. 291. 1 Vin. Ab. 203. 6 Viner, 342.

(z) 1 Jones, 193.
Rex v. Martel,
Bull. N. P. 196.

Sect. 37. FOURTHLY, That (z) the statute hinders not the removal of any indictment into the Kings's Bench by *certiorari*; after which it may either be tried there, or in the country by *nisi prius*.

Lloyd v. Skut,
Douglas, 353.
N. (91).

† **FIFTHLY,** That a writ of error lies from the King's Bench to the Exchequer Chamber in a *qui tam* action of debt.

(a) C. Car. 316.
Vide 4 Inst. 272.
2 Inst. 193.

Sect. 38. SIXTHLY, That (a) an officer, by receiving an information without such a previous oath, that the offence arose in the same county in which it is laid, doth not make the same proceedings upon it erroneous; for the act is only directory to the officer, but doth not intend that such oath shall be made parcel of the record; and therefore the omission of it cannot be assigned for error; and yet the act is express, "that such oath shall be entered of record." But *quære*, if the Court may not properly be (b) moved to set aside such process; as having issued contrary to the directions of the statute? (†)

(b) Vide Salk.
376.
Sup. sect. 10.

(c) Cro. Eliz.
645.
Noy, 71.

Sect. 39. SEVENTHLY, That no (c) suit by a party grieved is within the restraint of the statute.

Shower, 354. 3 Leonard, 237.

Shipman, qui
tam v. Henbest,
4 Term Rep.
109.

† **EIGHTHLY,** That the statute 21 Jac. 1. c. 4. only restrains the proceedings on penal statutes in the superior courts, where the informer before the passing of that statute might have sued in the inferior as well as in the superior courts, "by action, bill, "plaint, suit, or information;" and therefore if a previous statute give certain penalties to be recovered "by action of debt or information in the courts at Westminster;" and by a subsequent clause give jurisdiction to "the justices of assize, of gaol-delivery, "and of the peace, to inquire of the premises; and to hear or determine the same," the inferior courts can only proceed by indictment

(†) This clause of the statute was thought to be *obsolete*, 1 Bac. Abr. 64. *notis*. But on a motion to stay proceedings in a penal action, because the plaintiff had not filed any affidavit, that the offence was committed within the county, or within a year before the action was brought, according to the direction of this statute, the Court held, that an act of parliament cannot be repealed by non user, and therefore stayed the filing of the declaration, *White v. Boot*, 2 Term. Rep. 274. But in an

action or information in the superior courts, the want of such an affidavit is not a sufficient ground to stay the proceedings on motion after verdict, *Leigh v. Kent*, 3 Term Rep. 362. or in any previous stage of the cause, *Balls v. Atwood*, 1 H. Black. Rep. 546. for that the statute 21 Jac. 1. c. 4. does not controul any of those penal statutes on which actions are to be brought in the superior courts, 3 Term Rep. 364. See Andrews, 25.

dictment or presentment; but the informer may bring an action of debt in the courts at Westminster.

As to the FIFTH POINT, *viz.* Within what time such information or action may be brought.

Sect. 40. It is to be observed, that all popular actions were limited to a certain time by 7 Hen. 8. c. 3. But this (*d*) statute being repealed by 31 Eliz. c. 5. I shall take no farther notice of it. (*d*) Vide B. Act. Pop. 6. Law of nisi prius, 195.

Sect. 41. It is enacted by the said statute of 31 Eliz. c. 5. sect. 5. "That all actions, suits, bills, indictments, or informations which shall be brought for any forfeiture upon any statute penal, made, or to be made, whereby the forfeiture is or shall be limited to the queen, her heirs or successors only, shall be brought within two years after the offence committed; and not after two years. And that all actions, suits, bills, or informations, which shall be brought for any forfeiture, upon any penal statute, made, or to be made, except the statutes of tillage, the benefit and suit whereof is and shall be by the said statute limited to the queen, her heirs or successors, and to any other that shall prosecute in that behalf, shall be brought by any person that may lawfully sue for the same, within one year next after the offence committed; and in default of such pursuit, that then the same shall be brought for the queen's majesty, her heirs or successors, any time within the two years after that year ended. And if any action, suit, bill, indictment, or information, shall be brought after the time so limited, the same shall be void. And it is provided, that where a shorter time is limited by any penal statute, the prosecution must be within that time." 4 Moderu, 144.
1 Shower, 353.
Noy, 71.
Carthew, 232.
Lat. Ray, 78.
Douglas, 235.

Sect. 42. By 18 Eliz. c. 5. s. 1. it is also enacted, "That upon every information which shall be exhibited on any penal statute, a special note shall be made of the very day, month, and year of the exhibiting thereof into any office, or to any officer, which lawfully may receive the same, without any antedate thereof to be made; and that the same information be accounted and taken to be of record from that day forward, and not before: and that no process be sued out upon such information, until the information be exhibited in form aforesaid, &c. and that every clerk making out process contrary to this act shall forfeit forty shillings, &c."

Sect. 43. By 21 Jac. 1. c. 5. it is farther enacted, "That no officer shall receive, file, or enter of record, any information, bill, plaint, count, or declaration, grounded on any penal statute (being (*d*) within the provision of the said statute of 21 Jac. c. 4.) until the informer or relator hath first taken a corporal oath, before some of the judges of the court, that he believes in his conscience, the offence was committed within a year before the information or suit, within the county where the said information was commenced, &c." (*e*) Cro. Car. 316.
2 Inst. 192.
4 Inst. 292.
Salkeld, 376.
For this matter see the 38th sec.

In the construction of these statutes, I shall observe the following particulars:

Sect.

(f) Hob. 270.
4 Mod. 144.
1 Shower, 353.
Bull. N. P. 195.

Sect. 44. FIRST, That (e) if an offence prohibited by any penal statute be also an offence at common law, the prosecution of it, as of an offence at common law, is no way restrained by any of these statutes.

(g) 3 Bac. Abr.
505.
Shower, 353,
354.
Noy, 71.

Sect. 45. SECONDLY, That if a suit on a penal statute be brought after the time limited, the defendant needs not plead the statute, but (f) may take advantage of it on the general issue.

(h) C. Car. 331.
C. Jac. 366.
Vide Dalis. 60.
3 Wils. 250.

Sect. 46. THIRDLY, That if an information *qui tam* be brought after the year on a penal statute, which gives one moiety to the informer, and the other to the king, it is naught only (g) as to the informer but good for the king.

(i) Sup. s. 38.
C. Eliz. 645.
3 Leon. 237.
Shower, 354.
Carthew, 232.

Sect. 47. FOURTHLY, That the party grieved is (h) not within the restraint of these statutes, but may sue in the same manner as before.

Ld. Raymond, 78. B. N. P. 195.

(k) Shower,
353, 354.

Sec. 48. FIFTHLY, That it seems not to be settled, whether the suing of a *latitat* within the year be a sufficient commencement of a suit on a penal statute, to avoid the limitation of these statutes? (1)

(l) Shower, 353.
Bull. N. P. 195.
Vide Cowper,
366.

Sect. 49. SIXTHLY, That it (l) seems also to be questionable, Whether a suit by a common informer on a penal statute, which first gives an action to the party grieved, and in his default, after a certain time, to any one who will sue, be within the restraint of these statutes?

Sect. 50. SEVENTHLY, That it seems questionable, whether the clause in 31 Eliz. c. 5. s. 4. by which it is enacted, "That nothing in the said act contained shall extend to champerty, king's customs, or forestalling, &c. but that every such offence may be laid in any county, any thing in the said act to the contrary notwithstanding," do except the said offences out of the above-recited clause relating to the time within which suits on penal statutes must be brought? For the words above-mentioned, viz. "but that every such offence may be laid in any county," seem to restrain the generality of the precedent, which says, "that nothing in the act contained shall extend to such offences."

As to the SIXTH POINT, viz. What persons are disabled to bring such an information or action.

Sect. 51. It is enacted by 31 Eliz. c. 5. s. 1. "That no person, other than the party grieved, shall be received to inform, or sue upon any penal statute, that before that time hath been for any misdemeanour, by any order of any of the queen's majesty's courts,

(1) It has been determined that it is a sufficient commencement of the suit, Carthew, 232. Shower, 353. But if the writ were not sued out till after the year, though by relation it would be within the time, the plaintiff ought to be nonsuited, 3 Burrow, 1241. Bull. N. P. 195. and the real

day of suing out the writ, which shall be considered as the commencement of the suit, may be shewn in the pleadings, 3 Burrow, 1423. But it must be sued out within one year next after "the offence committed," Lloyd *qui tam v. Williams*, 3 Wils. 250.

"courts, ordered not to follow or pursue any suit upon any penal statute."

† And it hath been adjudged, that neither an infant; nor a corporation can sue as a common informer. Strange, 1241.

As to the SEVENTH POINT, viz. Whether there may be a nonsuit in such an information or action.

Sect. 52. It seems agreed, that notwithstanding the king (*m*) cannot be nonsuit in any information or action wherein he himself is the sole plaintiff, yet any (*n*) informer *qui tam*, or (*o*) plaintiff in a popular action, may be nonsuit, and hereby wholly (*p*) determine the suit as well in respect of the king as of himself. (*m*) Co. Lit. 139.
F. Nons. 13.
B. Nons. 68.
Prerog. 116.
(*n*) Co. Lit. 139.
B. Nons. 68.
Prerog. 116.

(*o*) B. Nons. 35. (*p*) 37 H. 6. 5. B. Nons. 35. See Moulton *qui tam* v. Bingham, 2 Term Rep. 511. *notis.* The statute of 14 Geo. 2. c. 17. for judgment as in the case of a nonsuit does not extend to an information *qui tam* for the king and party, Parker, 92.

Also it seems agreed, (*q*) that the Attorney General may enter a *nolle prosequi* (which, as (*r*) some say, has the effect of a nonsuit) to any information or action brought by the king only. (*q*) Lit. 139.
Burrow, 72. 220.
(*r*) Coke Lit. 159.
Vide 1 Sid. 420.

Qu. Salkeld, 21. 2 Lord Raymond, 1039.

As to the EIGHTH POINT, viz. Whether the informer or defendant may appear by attorney.

Sect. 53. It seems agreed, that after (*s*) plea pleaded on an indictment, information, or action, for any crime whatsoever, under the degree of (*t*) capital, the defendant might always, by the favour of the Court, be permitted to appear by attorney. Also it seems, that generally the Court might always dispense with the personal appearance of the defendant, even before (*u*) plea pleaded, (*x*) except in such cases wherein a personal appearance is required by some statute, as it is in (*y*) *præmunire*, &c. in which cases it seems generally agreed, that an appearance by attorney cannot be admitted without some special writ or grant to that purpose, whether the defendant be a peer (*z*) or commoner. It is said indeed, in Roll's Reports, that Sir (*a*) Anthony Mildmay was suffered to plead a pardon to a *præmunire* by attorney, and no mention is made of any such writ or grant. But I presume that there was a clause to this effect in his pardon. (*s*) B. Att. 53,
54. 63. 101.
9 Edw. 4. 2.
9 Edw. 4. 1.
22 Assize, 73.
(*t*) B. Att. 63.
(*u*) Dyer, 346.
9.
1 Levinz, 146.
Vide 21 Edw. 4. 77.
7 H. 6. 21.
(*x*) F. Att. 48.
53. 104.
3 Inst. 125.
39 Edw. 3. 7.
15 H. 7. 9.
F. N. B. 66.
Vide B. Att. 69. 81, 82.
(*y*) 15 H. 7. 9.

37 H. 6. 27. 3 H. 7. 6. C. Jac. 462, 616. 22 Edw. 4. 33, 34. (*y*) See cases letter t. 39 Edw. 3. 7. (*z*) 1 Roll, 190. 2 Bulstrode, 299.

Sect. 54. By 18 Eliz. c. 5. s. 1. it is enacted, "That every informer, upon any penal statute shall exhibit his suit in proper person, and pursue the same only by himself, or by his attorney in court (1); and that he shall not use any deputy or deputies at all." How an informer shall sue.

Sect. 55. By 29 Eliz. c. 5. s. 21. it is recited, "That divers of her majesty's subjects, dwelling in the remote parts of the realm, had been many times maliciously troubled upon informations and suits exhibited in the courts of the king's bench, common pleas, and In what cases the informer may appear by attorney.

(1) Therefore an infant cannot be a common informer, for he must sue by guardian, Maggs v. Ellis, M. 25 Geo. 2. and he cannot be an attorney, because he cannot be sworn, March, 92.

and exchequer, upon penal statutes, and had been drawn up upon process out of the countries where they dwell, and driven to attend and put in bail, to their great trouble and undoing:—"For the reformation thereof it is enacted, "That if any person "or persons shall be sued or informed against, upon any penal "law, in any of the said courts, where such person or persons "areailable*by law, or where by the leave or favour of the "Court such person or persons may appear by attorney, in every "such case, the person or persons so to be impleaded or sued, "shall and may, at the day and time contained in the first process served for his appearance, appear by attorney of the same "court where the process is returnable, to answer and defend "the same, and not be urged to personal appearance, or to put "in bail for the answering such suits."

Does not extend
to alien defend-
ants.

Sect. 56. By 31 Eliz. c. 10. s. 20. it is enacted, "That "this shall extend only to the natural subjects born, or to be "born, within the dominions of the queen's majesty, her heirs or "successors, and to persons made free denizens, and to no "others."

As to the NINTH POINT, viz. In what cases there shall be costs on such an action or information.

I shall endeavour to shew,

1. Whether an informer shall, in any case, have his costs;
2. In what cases the defendant shall have them.

As to the first of these particulars, viz. Whether an informer shall in any case have his costs.

(b) 2 Keb. 781.
1 R. Abr. 574.
1 Lutw. 200.
1 Ventris, 133.
Salkeld, 206.
Moor, 65.
3 Levinz, 374.
(c) 2 Inst. 288.

Sect. 57. I take it to be in a great measure settled, (b) that an informer upon a popular statute, shall in no case whatsoever have his costs, unless they be expressly given him by such statute; for it is certain that he cannot recover them by the common law, for that doth not (c) give costs in any case.

Gilbert's C. P. 258.

(d) 6 Edw. 1. c. 1.

Neither can he recover them by the statute of Gloucester (d), which gives the demandant his costs in all cases wherein he shall recover his damages; for this seems to suppose some damages to have been done to the demandant in particular, which cannot be said in any popular action; and therefore such actions have always been construed to be out of the benefit of this statute.

(e) 2 Keb. 781.
1 R. Abr. 516,
517. 574.
1 Jones, 447.
C. Car. 552.
1 Lutw. 200.
2 Inst. 289.
Carthew, 230.
Skin. 363. 367.
Holt, 172.
12 Modern, 46.

But it seems agreed, (e) that an action on a statute, by the party grieved, for a certain penalty given by such statute, is within the statute of Gloucester, because such penalty is intended him by way of recompense for his particular damage by the offence prohibited; and if he could recover that only, and no more, by way of costs, it would be in most cases in vain for him to sue for it, since the costs of suit would exceed it.

Comb. 224.

But it is said, that no costs shall be recovered in an action on a statute which gives no certain penalty to the party grieved, but only his damages in general, &c. if such a statute be introductive of

of a new law, and give a remedy in a (f) point not remediable at the common law. But there is not that inconvenience in this case as in the former; because no certain sum being specified, the jury may give the plaintiff a full satisfaction by way of damages.

† But it hath been adjudged, that in an action brought against a hundred on the statute 1 Geo. 1. c. 5. s. 6. to recover damages for injuries committed by rioters, the plaintiff is entitled to costs.

† Also that a party grieved suing the hundred on the statute 9 Geo. 1. c. 22. for setting fire to the plaintiff's house, is entitled to costs, although they together with the damages exceed the sum limited in the statute.

† Also that on a *bonâ fide* composition of a penal action by leave of the Court, the plaintiff may be allowed a reasonable sum for his costs; and that on motion the defendant may pay the penalty into court with costs.

† Also that if a plaintiff in an action on a popular statute obtain a verdict, and the judgment is arrested for a defect in the pleadings, he shall not have costs.

As to the second particular, *viz.* In what cases the defendant shall have costs.

Sect. 58. It is enacted by 18 Eliz. c. 5. which is made perpetual by 27 Eliz. c. 10. "That if any informer, or plaintiff, on a penal statute shall willingly delay his suit, or shall discontinue, or be nonsuit in the same, or shall have the trial or matter passed against him therein, by verdict or judgment of law, that then, in every such case, the same informer or plaintiff shall yield, satisfy and pay unto the party defendant his costs, charges, and damages, to be assigned by the Court in which the same suit shall be attempted, &c."

In the construction hereof, I shall take notice of the following particulars :

Sect. 59. FIRST, That it seems to be agreed, that no action on any statute by the party (g) grieved, is within the purview of this statute, the whole purport whereof seems clearly to relate only to common informers: yet if such action by the party grieved, be "for any offence or wrong (h) personal, immediately supposed to be done to the plaintiff or plaintiffs;" or whatsoever the nature of the action may be, if the plaintiff (i) might have costs, in case judgment should be given for him, he shall pay them on a nonsuit or verdict against him, &c. by virtue of (k) 23 Hen. 8. c. 15. and (l) 4 Jac. 1. c. 3.

Sect. 60. SECONDLY, That it hath been holden, that where judgment is given against an informer because the Court in which he (m) sues has no jurisdiction of the cause, or (n) because the statute on which he grounds his information is discontinued, yet he shall pay costs within the intent of the said statute of 18 Eliz. c. 5. which shall have a liberal construction, and was intended to prevent

(g) 1 Salk. 30.
1 Andr. 116.
Cro. Eliz. 177.
Noy, 71.
2 Leon. 116.
(h) C. Eliz. 177.
(i) Hutton, 22.
(k) 2 Danv.
Abr. 224.
(l) 2 Danv. 225.
Ld. Raym. 27.
Savil, 50.
1 Burr. 402.
1723.
Bac. Abr. 522.
(m) 2 Keb. 581.
1 Siderfin, 311.
2 Stra. 1103.
6 Viner, 341.
3 Term Rep.
364.
(n) 2 Keb. 106.
42.
Qu. Hutt. 35, 36.
Vide Cowp. 367.
Bunbury, 72.

prevent all vexatious informations; and surely such ill-grounded prosecutions cannot but be thought as such.

Rex v. Jones,
B. R. H. 159.
3 Burr. 1304.

† **THIRDLY**, That in an information, if the prosecutor does not go on to trial, especially after notice and without its being countermanded, the defendant shall have his costs.

Law qui tam v. Worrel, 1 Wils. 177.

† **FOURTHLY**, That if to an information on 8 Geo. 1. c. 19. for killing game, the defendant plead a conviction before a justice for the same fact, and has judgment for want of a replication, he shall have his costs.

Wilkinson qui tam v. Allatt,
Cowp. 366.

† **FIFTHLY**, That a *qui tam* informer is liable to costs on 18 Eliz. c. 5. as well as an informer suing for the whole penalty upon a nonsuit on an action of debt on the 21 Hen. 8. c. 13. s. 26. for non residence, though part of the penalty is limited to the king.

Barnes, 124.

† **SIXTHLY**, That if the defendant obtain a verdict in a *qui tam* action of debt on the 5 Eliz. c. 4. for exercising a trade contrary to that statute, he is entitled to costs.

Town of Dover v. Hodgson,
1 Wils. 139.

† **SEVENTHLY**, That where a defendant obtains a verdict in a *qui tam* information he shall have costs, although he himself removed the information from the sessions into the court of king's bench.

Elde qua tam v. Stephens, 2 Ld. Rayn. 1333.

† **EIGHTHLY**, That if it appear upon the record that the plaintiff is a common informer, the Court will not, after a verdict for the defendant, receive an affidavit that the suit was really prosecuted for the benefit of another person, in order thereby to exempt the nominal plaintiff from costs under 18 Eliz. c. 5.

English qua tam v. Cox, Cowp. 322.

† **NINTHLY**, That the Court will not stay proceedings in a *qui tam* action until the costs of a *non pros.* in a former action by a different plaintiff against the same defendant be paid.

1 Stra. 697.
1 Wils. 266.
Real v. Mackey,
2 Stra. 1206.
Shindler v. Roberts, Bull. N. P. 197.
Cowp. 24.

† **TENTHLY**, That the Court will stay proceedings in a *qui tam* action when the plaintiff resides abroad, until he give security to pay costs, or, as it is said in one case, where the plaintiff is a foreigner, though resident in England; and that if a prosecution upon a penal statute be brought in a feigned name, the Court will oblige the real prosecutor to give security for cost; but that they will not insist on such security merely on account of the poverty of a plaintiff.

Parker qui tam v. Mactellan, 3 Term Rep. 137.

† **ELEVENTHLY**, That if the Court see reason to suspect that a *qui tam* action is prosecuted merely for the issue money, they will on motion permit it to be paid into court to abide the event of the suit.

As to the **TENTH POINT**, viz. Whether the defendant, in such an action or information, may wage his law, or take advantage of a protection.

(a) 10 H. 7. 18.
Br. Leygege,
63. 106.
Co. Lit. 295.

Sect. 61. It is said (a) to have been ruled, that the defendant ought not to be admitted to wage his law in any such action or information, because they are founded on a statute; nor do I find

find any authority to the contrary. But perhaps it may be questioned, how far the reason given for the opinion above-mentioned may be conclusive, since such an action or information doth not seem so (*p*) properly grounded on a statute, as on the contempt of it. (*p*) Vide 21 H. 7. 15.

But as to the question, Whether the defendant can take advantage of a protection? there seems to be near the same number of authorities on each (*q*) side. But there is no great need nicely to examine these matters, since generally it is expressly provided by penal statutes, that neither wager of law, nor protection, shall be admitted in any suit brought upon them. (*q*) In the affirmative, F. Protect. 98. 122. Keilway, 135. In the negative, F. Protection, 61. 105. 21 Ed. 3. 13. Coke Lit. 131. Vide 2 R. Abr. 323.

As to the ELEVENTH POINT, viz. In what manner the defendant is to plead to such an information or action.

Sect. 62. I shall take it for granted, that he must answer to the whole (*r*) time laid in such information or action; and that if he have any (*s*) special matter for his excuse or justification, he must set it forth (1) with all convenient certainty; and that if he plead the general issue to the whole, he must depend upon it, and not (2) together with it plead also a special plea, either to the whole or part of the charge. (*r*) Bridg. 115. (*s*) Vide Bridg. 114. 115.

† And it hath been adjudged, that although the statute 21 Jac. 1. c. 4. s. 4. enables the defendant to plead the general issue, and to give the special matter in evidence, yet he cannot avail himself under such plea of any matter which goes to the jurisdiction of the Court. 4 Term Rep. 109.

But for these matters I shall refer the reader to the books which treat of pleading in general:

And in this place shall only consider,

1. Where a prior suit depending may be pleaded to such an information or action.

2. Where a pardon, or release, or a recovery in a former suit, may be pleaded to such action or information.

3. What is a good general issue; and where it may be pleaded.

As to the first particular, viz. Where a prior suit depending may be pleaded to such an information or action.

Sect. 63. It seems agreed, (*t*) that wherever any suit on a penal statute may be said to be actually depending, (*u*) it may be pleaded in abatement of a subsequent prosecution, being expressly averred to be for the same offence. (*t*) C. Eliz. 261. 1 Roll. 49. 134. (*u*) Doug. 240.

Neither (*x*) will it be any exception to such a plea, that the offence (*x*) C. Eliz. 61. 1 Roll. 49. 50.

(1) For a *quitam* information cannot be quashed on motion, Strange, 953. except for defect of jurisdiction, Rex v. Williams, 1 Burr. 385.

(2) 1 Roll. 49, 50. 134. A defendant cannot

plead double in *qui tam*, Strange, 1044. Barn. K. B. 17.; for the statute of 4 Ann. c. 16. which allows double pleading does not extend to penal actions, Heyrick v. Foster, 4 Term Rep. 701.

offence in the subsequent prosecution is laid on a day different from that in the former.

(y) Hobart, 209. Neither (y) doth a mistake in such a plea of the very day whereon the suit pleaded as prior was commenced, seem to be material on the issue of *nul tiel record*, if it appear in truth to have been commenced before the other, and for the same matter.

(z) Hobart, 138. And if two informations be exhibited on the very same day, it seems (z) that they may mutually abate one another, because there is no priority to attach the right of the suit in one informer more than in the other.

(a) C. Eliz. 261. Also it seems, that an (a) information or bill (b) the same day that they are filed, may be so far said to be depending, before any process issued upon them, that they may be pleaded in abatement of any other suit on the same statute. And from the same reason it seems also, that a writ of debt may be so pleaded after it is returned; because then it seems to be agreed, that it may properly be said to be depending; and whether it may not also be so pleaded before it be returned, seems questionable; because, according to some (c) opinions, a writ may be said to be depending as soon as purchased. (3)

As to the second particular, viz. Where a pardon, or release, or a recovery in a former suit, may be pleaded to such an information or action,

(d) 11 Co. 63, 66. Sect. 64. It seems agreed, that notwithstanding the king have such an interest in every penal statute, that he may (d) proceed in a suit brought upon it by a common informer, after the death, release, or nonsuit of such informer, hanging the prosecution; and may also totally prevent any such suit, by first (e) suing for the whole penalty himself; or may totally bar it by a pardon or release (f) precedent to its commencement; yet if it be actually commenced before any suit by the king, the informer hath such an interest in the part of the penalty assigned him by the statute, that the king can no (g) way discharge, or suspend the suit, as to (e) such part.

(f) 38. 3 Inst. 194. 11 Coke, 65, 66. (f) F. Dec. tant. 5 Charter, 21. B. Act. Pop. 3, 1. 1 H. 7. 3. 37 H. 6. 4. 3 Inst. 194. 5 Edw. 4. 2, 3. (g) C. Eliz. 138. 1 Leonard, 119. 1 H. 7. 3. 37 H. 6. 4. Hutton, 82. B. Act. Popham, 3, 4. 3 Inst. 194. (h) Savil, 23.

(i) Noy, 100. Also it seems that the king can in (i) no case bar the suit of a party grieved, nor proceed in it after the death of the plaintiff, &c.

(k) F. Dec. tant. 4, 5. Also it seems agreed, (k) that a conviction or acquittal *bonâ fide* in any action or information on a penal statute, whether by the party grieved, or a common informer, or a release *bonâ fide* from the party grieved, or common informer, (l) after such a conviction, hath always been a good bar of any subsequent prosecution for the same offence.

(l) 9 Edw. 4, 4. 11 Coke, 65, 66. 9 Edw. 4, 4. (l) 3 Roll. 33. B. Act. Popham, 7. 5 Ed. 4. 2, 3.

But

(3) The day of suing forth the writ is the commencement of the suit, 3 Burrow, 1123

But for the better settling of these matters, the statute of 4 Hen. 7. c. 20. was made, by which is recited, "That it had been usual for offenders against penal statutes to cause popular actions to be commenced against them by covin of the plaintiffs, or else when such actions had been commenced against them, to delay the same either by non-appearance, or by traverse and hanging the same, to cause the like action popular to be brought against them by covin for the same cause and offence, and therein by covin of the plaintiff to be condemned, either by confession, feigned trial, or release, which condemnation or release, so had by collusion and covin, did use to bar the plaintiff in the action sued in good faith; and thereupon it is enacted, "That if any person sue with good faith any action popular in bar of the said action; or else, that he before that time barred the plaintiff in any such action popular, that then such plaintiff, with good faith, may aver, that such recovery or bar were by covin; and if such collusion or covin so averred, be lawfully found, such plaintiff shall recover, &c. and the defendant condemned of covin or collusion, as aforesaid, shall have two years imprisonment, &c. and that no release of any common person to any such party, whether before or after any action popular, or indictment of the same, had, or commenced, or made, hanging the said action, shall be any wise available or effectual to let or surcease the said action, indictment, process, or execution." Provided always, "That no plaintiff or plaintiffs be received to aver any covin in any action popular, where the point of the same action, or else the covin or collusion, have been once tried, or lawfully found with the plaintiff or plaintiffs, or against them, by trial of twelve men, and not otherwise."

No recovery on an information shall be had by conclusion.

Sect. 65. It is (m) said, that if a recovery in a former suit be pleaded in bar of any popular action, the plaintiff may, by reason of the express words of the statute, aver, that such recovery was by covin, without shewing wherein the covin consisted. (1) But otherwise such a general pleading would be vicious. (m) Plowd. 49, 50.

As to the third particular, viz. What is a good general issue, and where it may be pleaded.

I shall observe the following particulars.

Sect. 66. FIRST, That if the defendant plead *nil debet* to an action or information *qui tam*, it is safest to say that he owes (n) nothing to the informer, nor to the king; because if he only plead, that he owes nothing to the informer, it may be objected, (o) that the whole declaration is not answered, which makes a demand for the king as well as the informer: yet perhaps it may be a good answer (p) to such objection, that in the plea that he owes nothing to the informer, it is necessarily implied that he owes nothing to the king, and therefore needs not be expressed.

Vide Law of nisi prius, 225.
(n) Vide Coke's Ent. 165, 167.
(o) Hob. 327, 328.
1 Vent. 122.
(p) 2 Lev. 375.
C. Car. 10, 11.

Sect.

(1) But the plea must state that the plaintiff in the other action had priority of suit, or, on demurrer, it will be bad. Jackson v. Gissing, Trin. 15 Geo. 2. Stra. 1169. 2 Levinz, 141. Burrow, 1133. Black. 437.—The record of the former recovery cannot be given in evidence upon *nil debet*;

it must be specially pleaded; and then the plaintiff may reply *nil tuel record*, or that it was a recovery by fraud to defeat a real prosecutor; which the plaintiff could not be prepared to shew upon the general issue. Breden *qui tam* v. Harman, Strange, 701.

(q) 21 H. 6. 20. *Sect. 67.* *SECONDLY*, That if there be more than one defendant, they ought (q) not to plead jointly, that they are not guilty, but severally, that neither they, nor any of them, are guilty, &c.

F. Deci. tant. 6.
2 R. Abr. 707.
Bull. N. P. 197.

Sect. 68. *THIRDLY*, That wherever the breach of the statute, whereon such suit is grounded, is alleged only from a matter *in pais*, and not from matter of record, the defendant may plead, that he owes nothing, or that he is not guilty, &c. (1): but if it be alleged from a matter of record, such a plea is not good; because a record is not triable by the country, but only by itself.

(r) 2 R. Abi.
683.
Con. pl. 11.
(s) 2 R. Abr. 683.
1 Bacc. Abi. 8vo.
edit. 68.

Sect. 69. *FOURTHLY*, That if the defendant be within the benefit of any proviso of a penal statute, he might, according to some, always give it in (r) evidence on the general issue, in a suit on such statute; but if he have matter in his discharge depending on a subsequent statute, it hath been holden (s) even since the statute of 21 Jac. 1. c. 4. that he must plead it specially, and cannot give it in evidence. But this seems contrary to the express purview of the said statute; by which it is enacted, "That if any suit shall be brought against any person for any offence against any penal law, either by, or on the behalf of the king, or by any other, or on the behalf of the king and any other, it shall be lawful for such defendant to plead the general issue that he is not guilty, or that he owes nothing, and to give such special matter in evidence to the jury that shall try the same, which matter being pleaded, had been sufficient in law to have discharged the said defendant against the said suit, and the said matter shall be then as available, to all intents and purposes, as if it had been sufficiently pleaded in bar."

Sect. 70. Also it is enacted by the same statute, par. 2. "That if the defendant to any suit, commenced by, or on the behalf of the king or any other, for any offence against any penal statute, plead, that he oweth nothing, or, that he is not guilty, and the plaintiff or informer, upon evidence to the jury, shall not prove the offence laid in the said suit, and that the same offence was committed in the same county in which it is laid, the defendant shall be found not guilty."

Sect. 71. It is provided by the last paragraph of the said statute, "That no clause thereof shall extend to any suit on any law against popish recusants, &c. or against champerty, &c. or concerning defrauding the king of his custom, &c. or the transporting of gold, or silver, or munition, &c. or wool, or leather, but that such offence may be laid in any county, at the pleasure of the informer."

Vide sup. s. 50.

But *quære*, if the last words of this proviso, *viz.* "but that such offence may be laid in any county," do not restrain the exception intended by it to that part of the statute only which relates to the laying the offence in the proper county? For if so, the defendant

(1) 21 H. 7. 14. Bro. Issues joins, 23. and see the case of *Coppin qua tam v. Carter*, where "not guilty" was pleaded to an action of debt on a penal statute, and held not such a nullity as warrants

judgment to be signed for want of a plea, and the court was inclined to think that this is a good plea, 1 Term Rep. 402. Vide 21 Jac. 14. par. 4.

defendant in a suit on the laws mentioned in it, may give the special matter in evidence on the general issue, as well as in a suit on any other penal statute.

As to the TWELFTH POINT, viz. By whom the replication is to be made in such an information or action.

Sect. 72. It seems agreed, (t) that regularly a replication to a special plea to an information in the courts of Westminster-hall, shall be made by the attorney-general only, who, in respect of the king's interest in the suit, is presumed to be most proper to be consulted concerning it; and by the same reason it (u) seems, that such replication in a suit before justices of assize, shall be made by the clerk of the assizes only. Also it is said, (x) that the replication to a general issue in an information *qui tam* in the courts of king's bench or exchequer, may be made in the name of the attorney-general only, by the usage of those courts. But in most of the (y) precedents I can find of actions *qui tam*, the replication is made by the plaintiff only. Also I find a demurrer by the informer only to a plea in bar to an (v) information *qui tam*, without any mention of the attorney-general. And if the attorney-general, &c. shall absolutely refuse to make a replication to any plea to an information, surely the informer may be (z) admitted to make it himself; for otherwise it would be in the power of the attorney-general, &c. by refusing to make a replication, wholly to defeat the suit. (1)

(t) 6 Coke 20.
Cro. Jac. 538.
C. Eliz. 138.
2 Roll, 33.
B. Attaint. 127.
Co. Ent. 365.
366, 367, 368.
395.
Rastal, 410.
(u) C. Jac. 502.
(x) 1 Andr. 49.

(y) Co. Ent.
159, 163, 165,
166, 167.
(y) Co. Ent. 371.

(z) Sup. s. 64.
5 Coke, 48.

As to the THIRTEENTH POINT, viz. In what manner the issue is to be joined in such an information or action, and where it shall be tried.

Sect. 73. It had been laid down (a) as a settled rule, that where the king is to have no part of the thing demanded in an action on a penal statute, but only a fine or amercement; there is no necessity, either in the joining of the issue or *venire facias*, to use the words *qui tam pro domino rege*, &c. but that it is sufficient simply to name the party, as in actions at common law; for the king seems to have little more interest in such suits than in actions at law. Yet wherever the plaintiff may declare *tam pro domino rege quam pro seipso*, it seems (b), that it can be no fault to use those words as well in the joining of the issue, &c. as in the beginning of the suit. And if the king be to have part of the penalty demanded, it hath been (c) adjudged to be a fatal fault, and not amendable after verdict, not to mention that the plaintiff sues *tam pro domino rege quam pro seipso* in the joining of the issue. But *quære*; for there are many (d) precedents where the issues in such actions have not mentioned the plaintiff as suing for the king, but have simply named him by his proper name, as in other actions; and where he is expressly named in the declaration as suing for the king as well as for himself, why should it be intended that he sues otherwise in the progress of the action. (2)

(a) C. Car. 336.
Co. Ent. 160,
161, 164, 348.
350.

(b) Rastal, 406,
407.
Co. Ent. 349.
(c) 1 Vent. 122.
2 Keble, 788.
Sup. s. 17, 20.

(d) Co. Ent.
159, 163, 165,
166, 167.
Sup. s. 17, 20.

As

(1) If the plaintiff reply in the exchequer the defendant shall rejoin four days, or judgment *nil dicit* shall be entered—and if the plaintiff demur, the defendant shall join in six days, or judgment shall be entered as aforesaid. 4 Com. Dig. "Information" (D) 6.
(2) Vide the usual form of pleading in this case 1 Bac. Abr. Actions *qui tam* (D).

As to the place where such issues shall be tried.

(e) See the three last sections of the statute, and the 22d, 47th, and 49th sections of this chapter.

Sect. 74. It is enacted by 18 Eliz. c. 5. "That no jury shall be compelled to appear in any of the queen's courts at Westminster, for the trial of any issue in any suit (by a common (e) informer) upon any penal law, for any offence committed above thirty miles from the city of Westminster, except in case where the attorney-general for the time being, for some reasonable cause in that behalf to be shewed, shall require the same to be tried at the bar, in any of the courts of the queen's majesty, her heirs or successors, at Westminster aforesaid; which request shall be noted on the backside of the writ of *distringas* thereupon awarded; to the end the sheriff, or his bailiff, may, and shall signify the same to the jury that are in such case impannelled."

Strange, 1085.
Andrews, 67.

† And by 24 Geo. 2. c. 18. s. 3. "Every *venire facias* for the trial of any issue, in any action or information upon any penal statute in any of the courts of record at Westminster, counties palatine of Lancaster, Chester, and Durham, and the principalities of Wales, shall be awarded of the body of the proper county where such issue is triable."

As to the FOURTEENTH POINT, *viz.* Where a verdict may be found as to part against the informer, and as to part for him.

(f) 2 R. Abr. 707, 708.
Lane, 19. 59, 60.
Vide *Rex v. Hale, Cowper*, 728.

Sect. 75. It seems (f) that regularly, if an offence against a statute be of such a nature that it may be committed by a single person, without the concurrence of any other, and several persons be jointly charged in one information for one act done by them all against such statute, one of them only may be found guilty, and the rest acquitted; because, though the words of the information seem to import a joint charge against all the defendants, yet, in judgment of law, each of them is charged severally for his own offence, which cannot but be several, whether the act, in the doing whereof it consisted, were done by one or more; and accordingly the issue must be, (g) that neither they, nor any of them, are guilty. And for the like reasons, if one be informed against for having offended against a statute for more times, or in a higher degree than can be proved, as for not coming to church during the space of ten months, where he can be proved to have been absent but eight months, &c. or for (h) ingrossing a thousand quarters of wheat, where the evidence amounts but to seven hundred, he may be found guilty so far as the evidence goes, and not guilty for the residue; for such offences are not in the nature of entire contracts, which regularly must be fully proved in the same manner as they are alleged, but are in the nature of trespasses, which it is sufficient to prove for any part. But if the offence against a statute consist in making a contract contrary to the purview of it, as in the case of usury, it is (i) said, that if it be alleged as having been made by two, it must be so proved likewise, because it is a rule of law, that if contracts be not proved as they are laid, they shall not be taken to be the same. (1)

(g) Sup. s. 67.

(h) 2 R. Abr. 707.
Lane, 59, 60.

(i) Lane, 19. 59, 60.

As

(1) Where an offence, made penal by statute, is, in its nature single, one single penalty only can be recovered, though several join in committing it.

But if the offence be in its nature several, each offender is separately liable to the penalty. *Rex v. Clark, Cowper*, 610.

As to the FIFTEENTH POINT, viz. What judgment on such an information or action is good.

Sect. 76. It hath been adjudged, that where a statute, as that of recusancy, for instance, ordains that the offender shall forfeit such a sum, and that the sum so forfeited shall be divided into three parts, whereof one-third shall go to the king, and one to the informer, and the other to the poor, &c. and that if the offender do not pay, &c. within such a time, he shall be committed, &c. the judgment on an information *qui tam* on such statute may be general, that the (k) king and the informer shall recover the whole (l) sum, without making any mention how it shall be distributed, or that the party shall be committed (m) for non-payment, &c.

But on such an information, if the judgment for the recovery of the forfeiture be given wholly for the informer, without any mention of the king, it hath been holden, (n) that it is totally erroneous.

Yet it hath been adjudged, that if on an information *qui tam*, wherein, as it is laid, the informer hath no right to any part, but the king ought to have the whole, judgment be given that the defendant shall forfeit the sum mentioned by the statute, and that the king shall have one moiety, and the informer the other, such judgment is erroneous (o) only as to the latter part, wherein it awards to whom the penalty shall go; but shall stand for the clause concerning the forfeiture, which sufficiently entitles the king to the whole.

And it hath been adjudged, (p) that if there be no clause at all concerning the forfeiture in a conviction on a penal statute, but only a judgment *quod convictus est*, it is sufficient, for the forfeiture is implied.

† Also that wherever the act expresses the amount of the penalty, or leaves it to the discretion of the magistrate, there must be a judgment of forfeiture as well as a conviction (q). But where the act, as the 9 Ann. c. 14. says, "That the offender shall forfeit five times the value, &c." all the judgment the court can give is *quod convictus est*, and a new action must be brought upon that judgment for the forfeiture (r).

† Also that one who is convicted on a penal statute cannot be apprehended on a Sunday for non-payment of the forfeiture (s).

† Also that judgment on a *qui tam* action may be entered either jointly or severally; for the whole penalty or for the distinct moiety; but that the more regular way is to enter it jointly for the whole.

† It hath also been adjudged, that a judgment in a popular action may be affirmed as to one part, and reversed as to the other; as where damages and costs were given on 9 Ann. c. 14. it was reversed as to the damages and costs, and affirmed as to the debt.

† Also it hath been adjudged, that if the jury find a verdict for the plaintiff's generally in a penal action, and the plaintiff apply it to one count, he cannot afterwards apply it to another, though the former

Lut. 159. 162.
5 Mod. 431.
Cro. Car. 504.
Co. Ent. 362.
Salkeld, 383.
(k) 1 Andr. 139,
140.
Vide Style, 329
330.
(l) 2 R. Abr.
102.
Vide 2 Keble,
820.
(m) 1 Andr. 139
140.
(n) Style, 329,
330.

(o) 2 Andr. 123,
129, 130.

(p) Rex v.
Hawkins, M.
3 Geo. 1.

(q) Stra. 858.
2 Burr. 1163.

(r) Stra. 1048.
50.

(s) 1 Term Rep.
265.

Hart *qui tam* v.
Hawkins, 1
Black. Rep.
373.

Frederick v.
Lookup, 4 Burr.
2018.

Holloway *qui*
tam v. Bennet,
3 Term Rep.
448.

former is bad in law, and though the evidence would have warranted the verdict on any other count.

As to the SIXTEENTH POINT, viz. Whether the penalty of a penal statute may be compounded or granted over.

Strange, 167.
1 Wils. 79. 130.
4 Burr. 1929.
An indictment
on a popular
statute cannot
be compounded
after conviction,
Berry qui tam v.
Levy, Black.
113.

Sect. 77. It is enacted by 18 Eliz. c. 5. "That no informer, or plaintiff, shall or may compound or agree with any person or persons, that shall offend, or that shall be surmised to offend against any penal statute, for an offence committed or pretended to be committed, but after answer made in court unto the information or suit in that behalf exhibited or prosecuted; nor after answer but by the order or consent of the court in which the same information or suit shall be depending; on pain that whosoever shall offend, in making of composition, or other misdemeanor, contrary to the true intent and meaning of this statute, or shall by colour or pretence of process, or without process, upon colour or pretence of any matter of offence against any penal law, make any composition, or take any money, reward, or promise of reward, for himself or to the use of any other, without order or consent of some of her majesty's courts at Westminster, and shall be thereof convicted, shall stand on the pillory, &c. and for ever be disabled to pursue or be plaintiff or informer in any suit or information upon any statute popular or penal; and shall also forfeit ten pounds, &c."

(t) Law of nisi
præ, 196.
See the three
last sections of
the statute,
and the 22d, 47th, and 49th sections of this chapter.

Sect. 78. It seems (t) clear, both from the preamble and the whole tenor of the statute, that it extends only to suits by common informers; and not to those by a party grieved.

Wilkinson *qui*
tam v. Allot,
Cowp. 366.

† It is also decided that this statute extends to *qui tam* informers as well as to those who sue for the whole penalty.

(u) Hutton, 35.

Sect. 79. But it hath been (u) holden, that it extends as well to subsequent penal statutes, as to those which were in being when it was made.

(v) 1 Keb. 106.
1 Siderfin, 311.

And also it extends (x) to the compounding of suits commenced in courts which have no jurisdiction, as much as if they had a jurisdiction.

It does not extend to compounding informations laid before magistrates.—vide vol. i. p. 477.

(y) 7 Co. 36, 37.
Moor, 763.
Hobart, 183.
3 Inst. 186, 187.
2 R. Abr. 187.
seems contrary.

Sect. 80. It is enacted and declared by 21 Jac. 1 c. 3. (which as to these matters appears both by the preamble and body of the statute, and many former (y) resolutions, to be made in affirmance of the common law), "That all commissions, grants, licences, charters, and letters patents, made or to be made to any person or persons, bodies politic or corporate whatsoever, of power, liberty, or faculty, to dispense with any others, or to give licence or toleration, to do, use, or exercise any thing against the tenor or purport of any law or statute, or to give or make any warrant for any such dispensation, licence, or toleration to be had or made, or to agree, or compound with any others for any penalty or forfeitures limited by any statute, or of any grant or promise

“ promise of the benefit, profit, or commodity of any forfeiture, penalty, or sum of money, that is or shall be due by any statute, before judgment thereupon had; and all proclamations, &c. any way tending to the furthering of the same, are altogether contrary to the laws of this realm, and shall be utterly void, &c.” —And it is farther enacted, “ That all such commissions, &c. shall be examined, heard, tried, and determined by and according to the common laws of this realm, and not otherwise.”

Sect. 81. But it is provided, “ That this act shall not extend to any warrant or privy seal, made or directed by the king to the justices of either bench, or the exchequer, or of assize, or ofoyer and terminer and gaol-delivery, or peace, or other justices for the time being, having power to hear and determine offences done against any penal statute, to compound for the forfeitures of any penal statutes, depending in suit and question before them, or any of them respectively, after plea pleaded by the defendant.”

Sect. 82. It is said by Sir (?) Edward Coke, that such justices, by such warrant, &c. can make such composition for the use of the king only. However it seems, that by the eighteenth of Elizabeth, they may give leave to an informer to (a) compound with a defendant after plea pleaded. (c.) 3 Inst. 178. (a) Vide supra, s. 64, 65, 66.

+ *Sect. 83.* It is a rule of the court of king's bench that where leave is given to compound, the king's half of the composition shall be paid into the hands of the master of the crown-office for the king's use. 4 Burr. 1929.

+ *Sect. 84.* It hath been decided, that the giving leave to compound is merely discretionary; and leave has been given to a defendant to compound after a verdict for the plaintiff. 1 Stra. 167. 1 Wils. 79, 130. Maughan v. Walker, 5 Term Rep. 98.

+ *Sect. 85.* It hath also been decided, that if a defendant obtain a rule to stay proceedings, upon payment of a sum agreed upon between him and the plaintiff, the court will enforce the payment of that sum by attachment. 5 Term Rep 257.

Sect. 86. Also it is provided, “ That the said act shall not extend to any grants, letters patents, or commissions, heretofore granted, of, for, or concerning the licensing of the keeping of any tavern or taverns, or selling, uttering, or retailing of wines to be drunk or spent in the mansion-house or houses, or other place, in the tenure or occupation of the party or parties, or selling or uttering the same; or for or concerning the making of any compositions for such licenses, so as the benefit of such compositions be reserved and applied to and for the use of his majesty, his heirs or successors, and not to the private use of any other person or persons.”

CHAP. XXVII.

OF PROCESS.

AND now I am come to such process as is to be awarded upon an Appeal, an Indictment, or an Information.

(a) Lamb. b. 1.
c. 8.
Dalton, 123.
Crompt, 150.

For the better understanding the nature whereof (having premised that it seems plain from the nature of the thing, that there can be (a) no need of it where the defendant is present in court, but only where he is absent), I shall consider it,

1. In general; without any particular regard to process of outlawry.

2. In particular; with regard to such process only.

And I shall examine the nature of such process in general, without any particular regard to process of outlawry, under the following particulars:

1. Where it is well awarded into a county different from that wherein the court sits from which it is awarded.

2. What kind of process shall issue on an indictment, appeal, and information.

3. In what manner it is to be executed.

4. What is required by statute, in relation to process on informations.

5. What is the proper process on a default.

6. What after a removal by *certiorari*.

7. Where it shall be said to be discontinued, or discontinued, or put without day.

8. How far an error in process is fatal.

As to the FIRST POINT, viz. Where such process is well awarded into a county different from that wherein the court sits from which it is awarded.

(b) 19 Assize, G.
F. Barr. 279.
B. Juris. 105.
F. Assize, 446.

Sect. 1. It seems (b) to be a good general rule that no process without writ can be well awarded on any indictment or appeal, &c. from any court out of the county wherein it sits.

(c) S. P. C. 146.
Summary, 196.
2 Hale, 198, 199.
Vide sup. c. 21.
s. 22.

But it seems agreed, (c) that such process by writ may, by the common law, be well awarded into any county of England, either by the court of king's bench or by justices of *eyre*, upon an indictment, &c. before them.

Also it is clear, that justices of oyer and terminer have the same power, in relation to persons indicted or appealed before them of felony, by force of 5 Edw. 3. c. 11. whereby it is recited, "That in times past, some persons appealed or indicted of divers felonies

felonies in one county, or outlawed in the same county, had been dwelling or received into another county, whereby such felonious persons indicted and outlawed had been encouraged in their mischief, because they might not be attached in another county ;” and thereupon it is enacted, “ That justices assigned to hear “ and determine such felonies, shall direct their writs to all the “ counties of England, where need shall be to take such persons “ indicted.”

Sect. 2. It is observable, that the mischief complained of in the preamble of this statute relates as well to persons appealed, as to those who are indicted ; and therefore it seems reasonable to construe them also to be within the meaning of the purview, though they be not within the letter of it, which extends only to persons indicted.

Sect. 3. It seems questionable, (*d*) whether justices of peace, being assigned (*e*) by their commission to hear and determine felonies, are as well within the meaning as the letter of this statute ? For as on the one side it may be urged, that this, being a remedial law, ought to receive as favourable and large an interpretation as the words will admit, so on the other side it may be said, that the preamble of the statute, making mention as well of persons appealed, as those who are indicted, cannot be thought to have any manner of regard to justices of the peace before whom no appeal lies ; and nothing can be more reasonable than to construe one part of the statute by another.

(*d*) *Crompt. 119.*
Lamb. b. 4. c. 8.
 (*e*) *Vide sup. c.*
8. s. 33.

Sect. 4. But by 22 Hen. 8. c. 5. s. 5. “ Justices of peace of “ the shire, &c. wherein any decayed bridge, shall be, &c. shall “ make process into every shire within this realm, against any “ persons who ought to amend such bridge, being presented before them to be decayed, &c.”

Dalton, c. 193.
4 Burn, 46.
Crom. 151, 152.
Lamb. b. 4 c. 8.

Also they have the like power by other statutes in many other cases ; for which, not being so proper for this treatise, I shall refer the reader to the authors which more particularly treat of the Office of a Justice of Peace (1).

As to the SECOND POINT, *viz.* What kind of process shall issue on an appeal, indictment, and information.

I shall endeavour to shew,

1. Where such process ought to have the clause of *non omittas*.
2. In whose name, and under what *teste* it is to be made.
3. What is the proper process on indictments for crimes of an inferior nature.
4. What is the proper process on informations.

5. What

(1) By the commission of the peace justices in sessions have power to make and continue process upon indictments found before them, until the

persons indicted are taken, surrendered, or outlawed, *Burn, tit. “ Process.”*

5. What is the proper process on appeals, and on indictments of treason, felony, and mayhem.

6. How many days there ought to be between the *teste* and return of such process.

As to the first particular, *viz.* Where such process ought to have the clause of *non omittas*.

(*f*) *Crom.* 149. *Sect. 5.* It is laid (*f*) down in some books as a general rule, that in every suit, to which the king is a party, the process ought to have the clause *non omittas propter aliquam libertatem, &c.*
Lamb. b. 4. c. 8.
Dalton, c. 132.
41 Assize, 17.
B. Franc. 18.
Process, 102. *F. Prerog. 21.* *1 Hale, 577.* *2 Hale, 202.* *Vide infra, s. 17.*

(*g*) *Coke's Ent.* *Sect. 6.* But I do not find this rule observed as to all kinds of suits by the king, in the best precedents. For though the said clause is mentioned in every award of process on (*g*) indictments (except only (*h*) one) and even on (*i*) informations *qui tam*, in (*h*) *Ibid.* 358.
 (*i*) *Ibid.* 365 to 368.
 (*k*) *Ibid.* 372.
 376. 379. 381.
 387.
 1 *Coke*, 16, 17.
 (*l*) *Coke's Ent.* 390.
Sect. 6. But I do not find this rule observed as to all kinds of suits by the king, in the best precedents. For though the said clause is mentioned in every award of process on (*g*) indictments (except only (*h*) one) and even on (*i*) informations *qui tam*, in (*h*) *Coke's Entries*, yet it is omitted in all awards of process I can find on informations of (*k*) intrusion on the king's lands, or of (*l*) trover and conversion of his goods; and yet these are at least as much, if not more properly, the suits of the king, than the former.

As to the second particular, *viz.* In whose name, and under what *teste* such process is to be made.

(*m*) *Vide 4 Inst.* *Sect. 7.* It is expressly (*m*) enacted by 27 Hen. 8. c. 24. s. 3.
 205.
 "That all manner of process upon indictment of treason, felony, or trespass, to be made in every county palatine, and other liberty, shall be made only in the name of the king; and that every such person, having such county palatine, or any other such liberty, to make process, &c. shall make the *teste* in the name of the person that hath such county-palatine, &c."

(*n*) *Vide Lamb.* *Sect. 8.* And as to process on indictments in any other courts, there can be no (*n*) doubt but that it ought also to be in the name of the king. And if it issue from the court of king's bench, it (*o*) seems clear, that it ought to be under the *teste* of the chief justice, or of the senior judge of the court, if there be no chief justice: and if it issue from any other court, there seems to be the same reason that it ought to be under the *teste* of the first in the commission; and that such a *teste* will be sufficient. It is holden indeed by (*p*) *Lambard*, that every process on an indictment before justices of peace, ought to be under the *teste* of some two justices: but there are precedents to the contrary in (*q*) *Crompton*; and even in (*r*) *Lambard*. Neither do the (*s*) authorities cited by *Lambard* seem to come up fully to his point; for they seem to amount to no more than this, that one justice of the peace cannot award process on an indictment, but that two of them at least must do it, and that sitting the court in the sessions: and indeed it seems plainly to appear, from the (*t*) commission itself, that one justice has no authority either to take an indictment, or to proceed upon it. But I do not see the consequence, that because an indictment cannot be taken, or proceeded upon, by less than two, therefore the process cannot be *tested* by less than two.
 (*p*) *Lamb. b. 4. c. 8.*
 See *Dalt. c. 132.*
 (*q*) *Crompt. 232.*
 (*r*) See the printed precedents in the end of his *Elrenarcha*.
 (*s*) *B. Peace, 6.*
 7.
Vide 14 H. 7.
 8. b.
Crompt. 151.
 (*t*) *Vide sup. c. 8. s. 24, 25.*
Dalton, c. 132.

As to the third particular, viz. What is the proper process on indictment for crimes of an inferior nature.

Sect. 9. It seems clear, both from the (u) books which speak of this matter, and the constant course of (x) precedents, that a *venire facias* (which is but in nature of a summons to cause the party to appear) is a proper process to be first awarded on an (y) indictment for any crime, whether against the common law or statute, under the degree of treason, felony, or (z) mayhem, except in such cases wherein other (a) process is directed by some statute. Also such a *venire* seems to be the first proper process on an information in the crown office, for a debt claimed by the king, as having been forfeited by a *felo de se*.

Sect. 10. If it appear by the (b) return to such *venire*, that the party has lands in the county whereby he may be distrained, the (c) distress infinite shall be awarded from time to time, until he do appear, and by force hereof he shall (d) forfeit on every default so much as the sheriff shall return upon him in issues. But if a *nil* be returned on such a *venire*, a (e) *capias*, *alias* and *pluries*, shall issue, &c.

(u) Crompton, 150, 151. Dalton, c. 112. Lamb. b. 1. c. 8. F. Assize, 17. 32 H. 6. 10. (x) Co. Ent. 358. 362, 363. (y) Finch, 356. (z) Vide sup. c. 23. s. 156. Rastal, 263. (a) 1 Saun. 271. (b) Crompt. 150. Lamb. b. 4. s. 8. Dalton, c. 132. Dalt. Sh. c. 34. 78. (c) Reg. Jud. 1. Finch, 352, 353. Dalt. Sh. c. 31. 78. Dalt. c. 152. (d) Vide 2 Danv. Abr. 296. s. 5. 2 Inst. 453, 451. (e) Lamb. b. 4. c. 8. Crompt. 150, 151. F. Tresp. pass, 252. Dalt. c. 152. 11 H. 6. 4. Finch, 352.

Sect. 11. It is said in Fitzherbert's (f) Abridgement, "That in oyer and terminer, if the party at the first day make default, a man may have a *venire facias*, or a *pone per vadios*, &c. at his election;" the meaning whereof perhaps may be this, that if the defendant, being summoned on the *venire*, do not appear, the prosecutor may either take out a second *venire*, or a (g) *pone per vadios*, &c. But I cannot (h) find any express authority, or precedent, to justify the making either a *pone per vadios*, &c. or a *capias*, the first process on any indictment under the degree of mayhem or felony, &c. except only where such process is expressly given by some statute.

As to the fourth particular, viz. What is the proper process on informations.

Sect. 12. It seems, that a *capias* against a (i) commoner, and a (k) *distringas* against a peer, are the first proper processes on an information for an intrusion on the king's lands, or for a (l) trover and conversion of his goods: and either an attachment (m) or *subpœna* (n), at the election of the informer, were, by the common law, proper processes on all informations *qui tam* on popular statutes. And so was a (o) summons in all originals in debt on such statutes, in the same manner as in an action of debt at (p) common law; and an (q) attachment, or *pone per vadios*, &c. in other actions on such statutes, in the same manner as in actions upon the case, and in actions of trespass at (r) common law.

(i) Co. Ent. 372. 367. 379. 381. 1 Coke, 16. (k) Co. Ent. 397. (l) Co. Ent. 390. (m) Co. Ent. 365, 366, 367, 368. (n) Co. Ent. 370, 371. 395. 1 Andr. 48. (o) Co. Ent. 158. 164. 166. Rastal, 599. (p) Finch, 352. (q) Co. Ent. 43. (r) Finch, 355.

Sect. 13. And it is enacted by 21 Jac. 1. c. 4. by which all popular suits on penal statutes are restrained to their proper counties, as is shewn at large in the preceding (s) chapter of Informations, "that the like process in every popular action, bill, "plaint,

(s) Vide c. 26. s. 32. to 39.

(t) See Finch, 345. 352. 355.
 (u) 1 R. Abr. 463. 780. 793.
 pl. 4. the same case.
 Palmer, 449.
 1 Keble, 159.
 2 R. Abr. 277.

“plaint, information, or suit to be commenced, sued, or prosecuted, by force of, or according to the purport of the said act, be had and awarded, to all intents and purposes, as in an action of trespass *vi et armis* at the common law.” And (t) consequently the process in all such suits must now be by attachment, or *pone per vadios*, &c. and after by distress infinite, where by the return the party appears to be sufficient, (u) otherwise by *capias*.

Sect. 14. It is, as I take it, the usual practice of the Crown Office, on a criminal information, first, to award a *subpœna*; and after the return thereof, if no appearance be entered in four days, and an affidavit be made of the service of the *subpœna*, to make out a *capias* of course, where the defendants are informed against in their private capacity, and a (x) *distringas*, where they are sued as a corporation aggregate.

As to the fifth particular, *viz.* What is the proper process on appeals, and on indictments of treason, felony, and mayhem.

(y) 3 Mod. 265.
 2 Hale, 194.
 (z) Co. Ent. 50.
 F. Exigent, 28.
 Finch, 346.
 351.
 Rastal, 45.

Sect. 15. It seems certain, that a *capias* is the first process in all indictments of (y) treason or felony, and in (z) all appeals whether of mayhem or of felony; from whence it seems reasonable to conclude, that it ought also to be the first process in an indictment of mayhem, as well as of felony or treason.

there is a precedent seemingly contrary.

As to the sixth particular, *viz.* How many days there must be between the *teste* and return of all such process.

(a) Co. Lit. 134.
 Salkeld, 374.
 3 Salkeld, 371.
 1 Lev. 61.
 9 Coke, 118.

Sect. 16. It seems agreed, that there ought to be at least fifteen days between the *teste* and return of every process awarded from the king's bench into any (a) foreign county. But that this is not required in process awarded into the same county wherein the court sits.

As to the THIRD POINT, *viz.* In what manner such process is to be executed.

(b) Dalt. c. 132.
 B. Franch. 18.
 1 Hale, 577.
 2 Hale, 202.
 (c) 41 Ass. 17.
 B. Process, 102.
 F. Prerog. 21.
 (d) B. Prerog. 109.
 Franch. 31.
 By 29 Car. 2. c. 7. s. 6. all process, &c. served on the Lord's day, except in “treason, felony, and breach of the peace,” is void.

Sect. 17. It is laid down as a (b) general rule, that wherever the king is a party to the suit, as he certainly is to all informations and indictments, the process ought to be executed by the sheriff himself, and not by the bailiff of any franchise, (c) whether it have the clause *non omittas*, &c. or not, and whether the defendant be within a franchise, or in the county at large; for the king's prerogative shall be preferred to any franchise: but it is said, (d) that this is to be intended only where, in the grant of the franchise, no mention is made of causes to which the king is a party.

As to the FOURTH POINT, *viz.* What is required by statute in relation to process on informations.

(e) Sup. c. 26.
 s. 6. 10.

Sect. 18. It is enacted by 4 and 5 Will. and Mary, c. 18. “That no process shall issue on any information to be exhibited by the master of the crown-office, till the prosecutor has given such a (e) recognizance, as by the said act is directed.” Also it is

is enacted by 18 Eliz. c. 5. "That (*f*) no process shall issue on (*f*) Sup. c. 26.
 "any information on a penal statute, till a special note be made s. 40, 41, 42.
 "of the time when such information was exhibited, &c."—But 44, 45, 46, 47.
 these matters having been already handled in the chapter of Informations in the places cited in the margin, I shall refer the reader thither, for the fuller consideration of them.

As to the FIFTH POINT, viz. What is the proper process upon a default.

Sect. 19. It seems, that if a defendant appear to an (*g*) indictment or (*h*) appeal of felony, and afterwards, before issue joined, make an escape, whether from his (*i*) bail, or from an actual (*k*) prison, the *capias*, *alias*, and *pluries*, &c. shall be awarded against him, unless there had been an *exigent* before, in which case a new (*l*) *exigent* shall be immediately awarded. And if the defendant, against whom no *exigent* had been before awarded, make such default after issue joined, and an inquest awarded to try it, it seems, (*m*) that a *capias*, &c. shall be awarded against him *ad audiendum juratum*, &c. and, as I take it, the same day on which the *capias* is returnable, shall be given to the inquest; for it seems (*n*) agreed, that the inquest shall never be taken by default in the case of felony, as it may for an inferior crime.

127. (*n*) S. P. C. 70. F. Exig. 10. Corone, 173. B. Waiver de Choses, 39. 16 Assize, 13.
 B. Appeal, 54.

But in such case, if the *exigent* had before been awarded, it (*o*) seems that a new *exigent* in the common form shall be awarded; and that thereby both the issue and inquest are without day. And it is said in some (*p*) books, that such *exigent* shall be *ad audiendum judicium*: but this seems questionable; since it seems to be (*q*) agreed, that the defendant may save himself from judgment by a render at any time before the return of the *exigent*.

(*q*) F. Exig. 10. B. Waiver de Choses, 39. Corone, 192.

Sect. 20. It is said (*r*) by Sir Matthew Hale, that the defendant in such case appearing on the *exigent*, shall plead *de novo*, because the issue and inquest are *sine die* by the award of the *exigent*; but this seems to be made a *quare* by (*s*) Staundforde; and the (*t*) authorities whereon it seems to be chiefly founded are very obscure, and as it seems may well be understood in this (*u*) sense, that the court may cause the same inquest to come to try the same issue, which, according to (*x*) Brook, though it be put without day by the *exigent*, is not waived by it, unless the defendant fail to render himself before the return of it.

The stat. 48 Geo. 3. c. 58. enacts, "That whenever any person shall be charged with any offence for which he or she may be prosecuted by indictment or information in his majesty's court of king's bench, not being treason or felony, and the same shall be made appear to any judge of the same court by affidavit, or by certificate of an indictment, or information being filed against such person in the said court for such offence, it shall and may be lawful for such judge to issue his warrant under his hand and seal, and thereby to cause such person to be apprehended and brought before him or some other judge of the same

(*g*) Sum. 211.
 2 Hale, 201, 202.
 (*h*) 16 Ass. 13.
 26 Assize, 51.
 (*i*) 16 Ass. 13.
 F. Exig. 10.
 Qu. Crompt. 150.
 (*k*) 16 Ass. 51.
 (*l*) 19 H. 8. 1.
 B. Process, 1.
 seems contrary.
 (*m*) S. P. C. 70.
 2 Hale, 224.
 B. Waiver de Choses, 39.
 F. Exig. 10.
 Process, 113.
 16 Assize, 13.
 (*o*) 26 Ass. 51.
 S. P. C. 70.
 Summary, 211.
 B. Waiver de Choses, 39.
 F. Exigent, 10.
 Corone, 196.
 (*p*) 26 Ass. 51.
 Crompton, 150.
 F. Corone, 196.
 Summary, 211.
 (*r*) Sum. 211.
 2 Hale, 225.
 (*s*) S. P. C. 70.
 (*t*) F. Exig. 10.
 16 Assize, 13.
 (*u*) F. Cor. 173.
 (*x*) B. Waiver de Choses, 39.
 B. Process, 148.
 B. Exigent, 67.

“ same court, or before some one of his majesty’s justices of the
 “ peace, in order to his or her being bound to the king’s majesty
 “ with two sufficient sureties, in such sum as in the said warrant
 “ shall be expressed, with condition to appear in the said court
 “ at the time mentioned in such warrant, and to answer to all and
 “ singular indictments or informations for any such offence; and
 “ in case any such person shall neglect or refuse to become bound
 “ as aforesaid, it shall be lawful for such judge or justice respec-
 “ tively to commit such person to the common gaol of the county,
 “ city, or place where the offence shall have been committed, or
 “ where he or she shall have been apprehended, there to remain
 “ till he or she shall become bound as aforesaid, or shall be dis-
 “ charged by order of the said court in term time, or of one of
 “ the judges of the said court in vacation, and the recognizance
 “ to be thereupon taken shall be returned and filed in the said
 “ court, and shall continue in force until such person shall have
 “ been acquitted of such offence, or, in case of conviction, shall
 “ have received judgment for the same, unless sooner ordered by
 “ the said court to be discharged; and that where any person,
 “ either by virtue of such warrant of commitment as aforesaid,
 “ or by virtue of any writ of *capias ad respondendum*, issued out
 “ of the said court, is now detained, or shall hereafter be com-
 “ mitted to and detained in any gaol for want of bail, it shall be
 “ lawful for the prosecutor of such indictment or information to
 “ cause a copy thereof to be delivered to such person, or for the
 “ gaoler, keeper, or turnkey of the gaol wherein such person is or
 “ shall be so detained, with a notice thereon indorsed, that unless
 “ such person shall, within eight days from the time of such de-
 “ livery of a copy of the indictment or information as aforesaid,
 “ cause an appearance, and also a plea or demurrer to be entered
 “ in the said court to such indictment or information, an appear-
 “ ance and the plea of not guilty will be entered thereto in the
 “ name of such person; and in case he or she shall thereupon,
 “ for the said space of eight days after such delivery of a copy of
 “ the indictment or information as aforesaid, neglect to cause an
 “ appearance, and also a plea or demurrer, to be entered in the
 “ said court to such indictment or information, it shall be lawful
 “ for the prosecutor of such indictment or information, upon an
 “ affidavit being made and filed in the said court of the delivery
 “ of a copy of such indictment or information, with such notice
 “ indorsed thereon as aforesaid, to such person, or to such gaoler,
 “ keeper, or turnkey, as the case may be, which affidavit may be
 “ made before any judge or commissioner of the said court
 “ authorized to take affidavits in the said court, to cause an
 “ appearance and the plea of not guilty to be entered in the said
 “ court to such indictment or information for such person, and such
 “ proceedings shall be had thereupon as if the defendant in such
 “ indictment or information had appeared and pleaded not guilty,
 “ according to the usual course of the said court; and that if,
 “ upon the trial of such indictment or information, any defendant
 “ so committed and detained as aforesaid, shall be acquitted of
 “ all the offence therein charged upon him or her, it shall be law-
 “ ful for the judge before whom such trial shall be had,
 “ although he may not be one of the judges of the said court of
 “ king’s

“ king’s bench, to order that such defendant shall be forthwith
 “ discharged out of custody as to his or her commitment as afore-
 “ said, and such defendant shall be thereupon discharged accord-
 “ ingly.”

Sect. 21. Before I proceed to the SIXTH POINT, viz. What is the proper process to be awarded after a removal by *certiorari*, it may not be improper to premise some things concerning the nature of a *CERTIORARI*. 2 Hale, 210 to 216.

1. As to what courts a writ of *certiorari* lies.
2. Where the court of king’s bench uses a discretionary power in granting, denying, and filing a *certiorari*.
3. What restraints are put upon a *certiorari* by statute.
4. How the *fiat* for a *certiorari* is to be signed.
5. To whom a *certiorari* ought to be directed.
6. Where a record may be removed into the court of king’s bench without a *certiorari*.
7. What is to be done by a defendant before the allowance of a *certiorari*.
8. How far a *certiorari* is a *supersedeas* to the court below.
9. In what manner a *certiorari* is to be returned.
10. Where a record is removed by a *certiorari*.
11. What is to be done by the court above, where the record is not removed.

As to the FIRST POINT, viz. To what courts a *certiorari* lies: I shall endeavour to shew,

1. Whether a *certiorari* lies to all inferior courts in general.
2. Whether to those of the Cinque Ports.
3. Whether to those of Wales.
4. Whether to those of London,

As to the first particular, viz. Whether regularly a *certiorari* lies to all inferior courts in general.

Sect. 22. It seems agreed at this day, that regularly the court of king’s bench, having a general (a) superintendency over all other courts of criminal jurisdiction, whether they be of an ancient or (b) newly created jurisdiction, may award a *certiorari* as well as the court of chancery, to remove the proceedings before any such courts, unless the statute or (c) charter which erects them expressly give them an absolute judicature, exempt from such superintendency; as the (d) statutes concerning the commissioners of the Cambridgeshire Fens, &c. are said, by some, to have done.

Sect. Long’s Case, C. Eliz. 48.
 (a) Carthew, 494. 501.
 S. P. C. 70.
 Ld. Raymond, 216. 469.
 12 Mod. 386.
 643. 145.
 7 Mod. 138.
 5 Modern, 446.
 3 Salkeld, 79.
 5 Modern, 446.
 2 Burr. 1040.

1 Black. 233. 1 Salkeld, 148. 2 Lev. 86. 2 Burr. 319. 1 Lev. 312. Con. 41 Assize, 22. Lord Raymond, 836. B. Cor. 193. *Certiorari*, 8. (b) 1 Salkeld, 144. Lord Raymond, 580. 148. (c) C. (at. 29). 3 Modern, 93, 94. (d) 1 Siderfin, 296. Con. 1 Keble, 43. 2 Keble, 722.

(e) 1 Sid. 226. 2 Keble, 81, 82. 12 Mod. 145. 4 Inst. 294, 295. (f) 1 Salk. 144. 10 Mod. 278. Farresly, 118. (g) 3 Mod. 229, 230. 836. Ld. Raymond, 836. Cowper, 749. 2 Lev. 223. 1 Salkeld, 146. 148. 1 R. Abr. 395. Aleyn, 49. Farresly, 138. 12 Mod. 197. 1 Hale, 158. Douglas, 723. 5 & 6 W. & M. c. 11. s. 5. (h) Carthew, 194. 421. 491. 1 Salk. 44. 396. (i) 3 Modern, 93, 94. (k) 1 Salkeld, 145. Strange, 609. Fort. 374. Ld. Raymond, 469. 8 Modern, 331. 1 Keble, 129. March, 196, 197. 199. Raymond, 186. (l) 1 Modern, 44, 45. Ld. Raymond, 469. Douglas, 531. 1 Ven. 67. 1 Levinz, 288. Raymond, 186. C. Jac. 336. Bunb. 61. Strange, 1263. Burrow, 1042. 1 Lev. 288. 1 Ven. 66, 67, 68.

(m) Cowp. 458. (n) Rex v. Bolton, Mich. 26 Geo. 3. (o) Ld. Raym. (p) 1 Lord Raym. 580. (q) Doug. 749. (r) Andr. 27. (s) Strange, 849. 944. (t) Stra. 900. (u) 1 Ld. Raym. 1482. (v) 1 Str. 470. (x) 1 Burr. 1040. (y) 2 Burr. 1458. (z) 2 Wils. 35. (e) 4 Burr. 2244. † It lies also to remove a presentment in a court-leet, and when removed, the presentment is traversable (m); to remove examinations taken before justices of the peace in pursuance of the 2 and 3 Ph. & M. c. 10. (n); to a jurisdiction created by a private act of parliament (o); to remove proceedings before commissioners of bankrupts (p); to remove proceedings in an action from the courts of the counties palatine (q); to remove informations before justices of assize against a parson for non-residence (r); to remove an indictment for not doing statute labour on the highway (s), or for not repairing a bridge (t); to the quarter-sessions of a corporation (u). So also to remove proceedings before two justices (v); as orders of conviction on the Conventicle Act, 22 Car. 2. c. 1. (x); an order on an appeal from scavengers rate (y); an order of bastardy if applied for in six months (z). So also it lies to remove an inquisition taken by the sheriff under a private act of parliament, and the verdict and judgment thereon (a).

As to the second particular, viz. Whether a *certiorari* lies to the courts of the Cinque Ports.

(b) C. Car. 252, 253. 264. 291. 1 R. Abr. 395. Style, 14. 2 Hale, 212. (c) 2 Lev. 86. 1 Siderfin, 336. 3 Keble, 154. (d) 1 R. Abr. 395. 2 Burrow, 849. (e) Vide C. Ellis. 910, 911. Palm. 54, 55. 56. 96. C. Jac. 531. 1 Siderfin, 532. Hardr. 475, 476. Sect. 24. It hath been adjudged, that such a *certiorari* lies to such courts to remove an (b) indictment of sodomy there found, or an (c) order made by the justices of peace at a sessions there holden. It is said indeed, by (d) Rolle, that the reason why such an indictment may be removed is, because the offence is made felony by a late statute, and therefore the courts of the Cinque Ports cannot hold plea of it without a new charter; by which it seems to be implied, that, in his opinion, indictments in such courts of crimes whereof they have jurisdiction, are not removable. But the other books above cited seem to speak generally of all indictments, and to lay it down as a rule, that the privilege of the court of the Cinque Ports, used time out of mind, that the king's writ doth not run there, is to be intended only of civil (e) causes between party and party.

As to the third particular, *viz.* Whether a *certiorari* lies to the courts of Wales.

Sect. 25. It seems to be settled, that such a *certiorari* lies to remove any indictment taken in Wales for a crime not capital, (*f*), either at the (*g*) grand sessions or at a (*h*) sessions of the peace: but it is (*i*) said, that it hath never been granted to remove an appeal from Wales; (*j*) neither doth it seem to be clearly settled, that it lies to remove an indictment of felony from thence, for such indictments are never (*k*) quashed, as indictments for inferior crimes are.

8 Modern, 146. Rex v. Griffith, where the court granted a *certiorari* to remove an indictment for a misdemeanour, 3 Term Rep. 638. (*g*) 1 R. Abr. 394. 2 Roll, 28, 29. C. Jac. 484. Popham, 144. 2 Keble, 471. Cowper, 751. [Note 2.] C. Car. 248. Ld. Raymond, 581. 1 Hale, 157. Strange, 704. (*h*) 1 Salkeld, 146. Vide 4 Burrow, 2457. It lies also to Berwick, and to other dominions of the Crown. 2 Burrow, 835. 856. 861. 1 Strange, 104. (*i*) C. Car. 248. 2 Keble, 797, 798. (*j*) 1 Modern, 64. 68. 2 Keble, 685. 724. C. Car. 331, 332. 1 R. Abr. 394. 1 Ventris, 93. 146. 1 Hale, 158. (*k*) Vide c. 25. s. 146.

Neither do I find it agreed, (*l*) in what manner the king's bench shall proceed on any indictment removed from Wales.

But it is said, that an indictment of felony so removed, may be tried in the next (*m*) English county, by force of (*n*) 26 Hen. 8. c. . But it seems (*o*) agreed, that the statute extends not to appeals.

s. 41, 42. Parry's Case, Cases in C. L. 101. (*o*) C. Car. 248. 2 Keb. 797. 1 Vent. 146. 2 Hale, 157. See B. 1. B. R. H. 165. Lord Raymond, 561. 580. 3 Bac. Abr. 351. 2 Burrow, 835 to 858. Douglas, 751.

As to the fourth particular, *viz.* Whether a *certiorari* lies to the courts of London.

Sect. 26. It seems to be admitted in the late (*p*) Reports, that a *certiorari* may be granted to remove any indictment from London or Middlesex; but it is (*q*) said, that he who prays it ought to give three days notice to the other side. Also it is said, (*r*) that by a *certiorari* to London, the tenor of the indictment only shall be removed by the city charters. And it seems (*s*) that anciently that city insisted on a privilege, that all indictments and proceedings of any cause, except felony, should be tried and determined there, and not elsewhere.

an indictment from Hicks's Hall for Bigamy the consent of the prosecutor must be had, Strange, 877. Cowp. 283.; or for forgery from the Old Bailey, Stra. 717. (*r*) 1 Keble, 252. 1 Sid. 135. 230. Vide c. 25. s. 97. (*s*) C. Car. 128. 265.

As to the SECOND POINT, *viz.* Where the court of king's bench uses a discretionary power in granting, denying, and filing a *certiorari*.

Sect. 27. It hath been (*t*) adjudged, that wherever a *certiorari* is by law grantable for an indictment, the court is bound of right to award it at the instance of the king, because every indictment is the suit of the king, and he has a prerogative of suing it in what court he pleases. But it seems to be agreed, that it is left

(*t*) Pas. 5 Geo. 1. Burrow, 2456. Strange, 609. 8 Modern, 331. 1 Ventris, 63. 1 Mod. 41. VOL. II. D D

to the discretion of the court either to grant or deny it at the prayer of the defendant. (1)

(u) 1 Salk. 144. And agreeably hereto, it is laid (u) down as a general rule, that the court will never grant it for the removal of an indictment before justices of gaol-delivery, without some special cause; (v) as where there is just reason to apprehend that the court below may be unreasonably prejudiced against the defendant; (x) or where there is so much difficulty in the case, that the judge below desires that it may be determined in the king's bench (y); or where the king himself gives a special direction that the cause shall be removed; or where the (z) prosecution appears to be for a matter not properly criminal.

(a) 1 Sid. 54. Sect. 28. It seems, (a) that the court will not ordinarily, at the prayer of the defendant, grant a *certiorari* for the removal of an indictment of perjury, or forgery, or other heinous misdemeanor; for such crimes deserve all possible discountenance, and the *certiorari* might delay, if not wholly discourage, their prosecution.

(b) 1 Salk. 145. Sect. 29. Also it is said, (b) that the court of king's bench will never grant a *certiorari* for a conviction of a *recusancy* upon a default at sessions; because by the (c) statute such convictions are to be removed into the exchequer, and from thence process is to be awarded upon them. But the court of king's bench cannot proceed upon them, and therefore will not suffer them to come thither, lest the statute should be evaded.

(*) It is said the party may waive the issue. Carthew, 6. Sect. 30. It seems from the Year Book of 16 Edw. 4. that it is a good objection against the granting a *certiorari*, that issue is joined in the court below, and a *venire* awarded for the trial of it. (*) For it appears by that (d) book, where a *certiorari* had been granted in such a case, that the court, being afterwards apprised of the matter, remanded the cause.

(e) 1 Salk. 149. Sect. 31. It seems (e) agreed, that a *certiorari* shall never be granted to remove an indictment or appeal after a conviction, unless for some special cause; as where the judge below is doubtful what judgment is proper to be given; for unless there be some such reason, the judge who tried the cause shall not be prevented from giving judgment in it; for it cannot be intended but that he is best acquainted with the circumstances of it, and consequently best able to judge what fine, or other punishment, is proper for it.

(f) 1 Sid. 296. Sect. 32. But it hath been adjudged, (f) that a *certiorari* for the removal of a presentment before justices in eyre of a matter which is inquirable and punishable by the forest law only, shall not be granted before, but only after conviction; for if it should be granted before, the offence would be dispunishable: but it may

(1) This absolute right to a *certiorari* relates only to cases where the crown itself, prosecuting by the attorney-general, is specially concerned, 1 Term Rep. 89. and where the matter is prosecuted by a private person, in the name of the crown, it issues unless sufficient cause is shewn against it. But on

an application for it by a defendant, there must be a special ground laid to induce the court to grant it. 4 Burrow, 2458. Strange, 583. 549. 1 Bar. K. B. 415. 2 Bar. K. B. 447. 177. Andrews, 27. 4 Term Rep. 161.

may be granted after conviction, in order to give the party, the right of whose freehold is concerned in it, an opportunity so far to (g) traverse it.

(g) Vide F. Assize, 42.
4 Inst. 294, 295.
1 Edw. 3. 48.
2 Keble, 81, 82.

B. Forcst, 3. 1 Siderfin, 296.

Sect. 33. The court has (h) refused to grant a *certiorari* to remove a recognizance before justices of oyer and terminer, &c. because the court below is most proper to judge, upon the whole circumstances of the case, which are equitably to be considered, whether it ought to be estreated or not.

(h) Rex v. Combs, Hil. 1 Geo. 1.

Sect. 34. There is a rule in the court of king's bench, that no order of commissioners of sewers ought to be filed without notice given to the parties concerned. Also it is every (i) day's practice of that court, before it will suffer the return of a *certiorari* for the removal of the order of such commissioners to be filed, to hear affidavits concerning the facts whereon they are grounded: and if the matter shall still appear doubtful, to direct the trial of feigned issues, and either to file the return, or supersede the *certiorari*, and grant a *procedendo*, as shall appear to be most reasonable, for the trial of such issues, and to give (k) costs against the prosecutor of the *certiorari*, if it appear to have been groundless.

(i) Vide 1 Salk. 145.
2 Keble. 157.
seems contrary.

(k) Vide 2 Keb. 500.

† But a *certiorari* to bring up an order for the removal of their clerk, is of common right, and not discretionary.

Strange, 609.
8 Mod. 331.
Fort. 374.

† Also the court of king's bench hath refused to grant a *certiorari* to remove the record and proceedings of a court-leet, in order to inquire into the property of an amercement where the fine has been estreated into the Dutchy Court of Lancaster.

Rex v. Ritson, 2 Term Rep. 184.

† Also the court will not grant a *certiorari* to a defendant after he has appealed to the sessions pending such appeal.

Rex v. Sparrow, 2 Term Rep. 196. *notis.*

† Also the court will not grant a *certiorari* to remove the assessments of the land tax.

Rex v. King, 2 Term Rep. 234.

† Also the court will not grant a *certiorari* to remove a poor rate.

Rex v. King, 2 Term Rep. 235.

As to the THIRD POINT, *viz.* What restraints have been put by the statute upon the granting a *certiorari*.

Sect. 35. By 1 and 2 Ph. and Mary, c. 13. s. 7. it is enacted, "That no writs of *habeas corpus*, or *certiorari*, shall be granted to remove any prisoner out of any gaol, or to remove any recognizance, except the same writs be signed (l) with the proper hands of the chief justice, or, in his absence, of one of the justices of the court out of which the same writ shall be awarded or made; upon pain that he that writeth any such writs, not being signed as is aforesaid, to forfeit for every such writ five pounds."

2 Ld. Raymoud, 1379.
11 Mod. 174.
12 Mod. 2, 3.
(l) Vide Salk. 150.
2 Strange, 895.

Sect. 36. By 5 and 6 Will. and Mary, c. 11. also it is enacted, "That in Term-time, no writ of *certiorari* whatsoever, at the prosecution of any party indicted, be granted out of the king's bench to remove any indictment or presentment from any general quarter-sessions, before trial, but upon motion of

Burrow, 431.

"counsel and by rule of court made in open court." But it is provided, "That in vacation such writ may be granted by any justices of the said court, whose names shall be indorsed thereon, and also the name of the person at whose instance it is granted."

As to the FOURTH POINT, *viz.* How the *fiat* for a *certiorari* is to be signed.

(m) 1 Salk. 150.
Holt, 133.

Sect. 37. It is said, (m) that if a *certiorari* be taken out in vacation, and tested of the precedent term, the *fiat* for it must be signed by some judge of the court, some time before the essoyn-day of the subsequent term, otherwise it is irregular, and the court upon motion will order a *procedendo*. But it is said, that there is no need of any judge to sign the writ of *certiorari* itself, but only in such cases wherein it is required by statute.

As to the FIFTH POINT, *viz.* To whom the writ of *certiorari* is to be granted.

(n) 3 Keb. 13.
4 H. 6. 15, 16.
S. P. C. 64.
Hobart, 135.
(o) Dalt. c. 134.
Style, 371.
2 Levinz, 223.
Rastal, 110.
(p) See the cases cited to the other parts of this section.
(q) Dyer, 163.
(r) Reg. 74. 78.
Rastal, 55. 263.
(s) Reg. Jud. 76.
Sup. c. 9. s. 42.
(t) 2 Hale, 211.
C. Car. 252, 253. 264.

Sect. 38. It seems, that notwithstanding (n) regularly it ought to be directed to the judge of the inferior court, yet in some cases it may be directed to the proper (o) officer known to have the custody of the record to be removed, and in some other cases to (p) others, as shall be most agreeable to the usual course of approved precedents, which (q) seems to be the best guide whereby to judge of this matter. And accordingly it seems, that for an indictment or confession of an approver before a coroner, it shall be directed to the coroner alone; (r) and for an appeal, both (s) to the sheriff and coroner; and for an indictment in the Cinque Ports, to the (t) mayor and jurats; and for an indictment at an assize in a county palatine, to the chancellor of such (u) county, who shall send for it to the justices of assize.

(u) 1 Lev. 223. 3 Keble, 279.

(x) 2 Keb. 750.
8 H. 4. 3. 5.
C. Jac. 669.
21 H. 7. 1.
Strange, 470.
(y) Dyer, 163.
Rastal, 439.
2 Inst. 424.
2 R. Abr. 629.
(z) B. Certio. 9.
Indictment, 23.
43 Assize, 40.
(a) B. Rec. 81.

Sect. 39. If the person who ought to certify a record, as a justice of peace, (v) &c. who hath taken a recognizance, &c. or a (y) judge of *nisi prius*, who hath taken a verdict, or a (r) coroner, who hath taken an inquest, &c. happen to die, having such a record in his custody, it seems, that a *certiorari* may be directed to his executor or administrator to certify it. (a) Also it hath been adjudged, that it may be directed to a justice of assize to certify a record of assize taken before his companion in his absence.

11 H. 7. 5.

Sect. 40. All the precedents I am able to find of *certioraris* for the removal either of (b) indictments or (c) recognizances from sessions, are directed either to the justices of peace for the county generally, or to some of them in particular by name, and not to the *custos rotulorum*; and according to (d) Lambard, they are never directed to him. Yet it is taken for granted in the (e) Year Book of Henry the Seventh, that after a recognizance for the peace is brought in to the *custos rotulorum*, it shall be certified by him. But surely, if the *certiorari* be directed generally to the justices of the county or any one of them, it may be as well returned by any of them as by the *custos rotulorum*. And I question whether

(b) 1 Reg. Jud.
70. 77.
Rastal, 263.
(c) Reg. Orig.
90.
F. N. B. 81.
(d) Lamb, b. 4.
c. 7.
(e) 2 H. 7. 1.

whether it can be well (*f*) returned by him, unless he do it as a justice of peace, naming himself such? But if there are sufficient precedents to warrant the directing the *certiorari* to him as *custos rotulorum*, there can be no doubt but that a return by him as such will be good. (*f*) Hob. 135.

† And it has been adjudged, that a third person cannot object to the misdirection of a *certiorari* to remove a cause from an inferior court, if the proper officer in whose keeping the record was, waive the objection and return the record upon such writ. Daniel v. Phillips, 4 Term Rep. 499.

As to the SIXTH POINT, *viz.* Where a record may be removed into the court of king's bench without any writ of *certiorari*.

Sect. 41. It seems agreed, that if (*g*) a justice of peace, or other judge of record, having taken a recognizance, or inquisition, or recorded a riot, or done any other executory matter, within his jurisdiction, have still continued in the same commission, &c. without any interruption, the court of king's bench shall receive such record from his hands, without any writ of *certiorari*. Also it seems to be (*h*) agreed, that upon the death of both the justices of assize, the clerk of the assize may, without any *certiorari*, bring in the records of the verdicts of *nisi prius*: but that the (*i*) executors or administrators of a judge can in no case bring in a record without a writ to authorize them to do it. Also it seems to be (*k*) agreed, that no record which is executed as by acquittal, &c. can be brought into a higher court without a writ. And it seems to be the stronger (*l*) opinion, that neither a justice who is out of commission at the time, or one who has been out of commission, but is afterwards restored, can certify any record without a writ of *certiorari*.

(*g*) Dalt. c. 134.
Lamb. b. 4. c. 7.
8 Ed. 4. 18.
B. Record, 17.
64.
8 H. 4. 4. 5.
Crom. 132, 133.
(*h*) Dyer, 163.
2 Inst. 424.
See March, 112.
113.
(*i*) 1 Dyer, 163.
Rastal, 439.
8 H. 4. 4.
(*k*) 8 Ed. 4. 18.
Lamb. b. 4. c.
7. f. 517.
Cromp. 133.
(*l*) Dalt. c. 134.
8 H. 4. 4. 5.
B. Gar. d' At-
torney, 9.
B. Record, 17.
Certiorari, pl. 9.

64. Dyer, 163. Rastal, 438. Brook, tit.

† As to the SEVENTH POINT, *viz.* What is to be done before the allowance of a *certiorari*.

I shall consider,

† 1. What is to be done by a defendant before the allowance of a *certiorari* to remove an indictment.

† 2. What is to be done before the removal of a judgment or order.

As to the first particular, *viz.* What is to be done by a defendant before the removal of an indictment.

Sect. 42. By 21 Jac. 1. c. 8. s. 7, 8. it is enacted, " That all writs of *certiorari* for the removal of any indictment of riot, forcible entry, or of assault and battery, at any quarter-sessions of the peace, or otherwise, shall be delivered at some quarter-sessions of the peace in open court; and that the party indicted shall, before the allowance thereof, become bound to the prosecutor in 10*l.* with sufficient sureties, as the justices of peace, at their quarter-sessions, shall think fit, with condition to pay unto such prosecutor, within one month after conviction, such reasonable costs and damages as the said justices of peace of such counties where such indictments shall be found, in the said

A *feme covert* is not within this statute to find sureties, 2 Hale, 213.

“ said sessions of the peace, shall assess or allow ; and in default thereof, it shall be lawful for the said justice to proceed to trial of such indictments, any such writs of *certiorari* notwithstanding.”

(m) 1 Kebble, 225. 727.
Vide inf. s. 61.

It is observable, that these statutes do not (m) extend to all indictments at sessions in general, but only to those particular ones therein mentioned.

(n) Vide 1 Keb. 33.
6 Mod. 246.
2 Salkeld, 564.
* Farresly, 10.

Sect. 43. But this defect was in a great measure (n) supplied by the rules of the court of king's bench, which, upon the removal of an indictment from London or Middlesex, required a recognizance from the defendant to carry down the record to trial the same term on which the *certiorari* was returnable, or the sittings after ; and on the removal of an indictment from other counties (o), required such recognizance for a trial at the next assizes.

It is said this act relates only to quarter-sessions of the peace, not to indictments for perjury found at Hicks's hall, which is before the justices as justices of oyer and terminer, Burr. 1462.

For the sessions there sit in both capacities, and draw up their orders with one title or with the other, according to the degree of the offence, and the *certiorari* are directed accordingly, Burr. 11. 10 Mod. 193. 205. 278.

(p) Viz. By force of 8 and 9 Guil. 3. 33.
(q) Viz. By 8 and 9 Guil. 3. 33.

Sect. 44. And agreeably hereto, it is enacted by 5 and 6 Will. & Mary, c. 11. and 8 & 9 Will. 3. c. 33. “ That all the parties indicted at a general or quarter sessions of the peace, prosecuting *certiorari*, before the allowance thereof, shall find two sufficient manucaptors who shall enter into a recognizance in the sum of 20*l*. before one or more justices of the peace of the county or place, (or (p) else before one of the judges of the king's bench, in which case such judge shall make mention of it under his hand, on the back of the writ,) and the recognizance shall be with condition, at the return of such writ to appear and plead to the indictment or presentment in the court of king's bench, and at his own costs to procure the issue that shall be joined upon the said indictment or presentment, or any plea relating thereto, to be tried at the next assizes for the county wherein the indictment was found after such *certiorari* shall be returnable, if not in London, Westminster, or Middlesex ; and if there, then, to cause it to be tried the next term after wherein such *certiorari* shall be granted, or at the sitting after the said term, if the court of king's bench shall not appoint any time for the trial thereof ; and if any other time shall be appointed by the Court, and then at such other time, and to give due notice of such trial to the prosecutor, or his clerk, in court ; and (q) also, that the party or parties prosecuting such *certiorari* shall appear from day to day in the said court of king's bench, and not depart until he or they shall be discharged by the said court : And such recognizances, *certioraris*, and indictments, shall be filed in the king's bench, and the name of the prosecutor (if he be the party grieved or injured) or some public officer, indorsed on the back of the indictment ; and if the person prosecuting such *certiorari*, being the defendant, shall not, before allowance thereof, procure such manucaptors to be found as aforesaid, the justices of the peace shall and may proceed to trial of the indictment notwithstanding such *certiorari*.”

Sect. 45. And it is farther enacted by the said statute of 5 and 6 Will. & Mary, c. 11. “ That if the defendant prosecuting such *certiorari*, be convicted, the king's bench shall give reasonable

“sonable costs to the prosecutor, if he be the party grieved or injured, or be a civil officer who shall prosecute on account of any fact that concerned him as officer to prosecute or present, (r) which costs shall be taxed according to the course of the said court; and the prosecutor, for the recovery of such costs, shall, within ten days after demand (s) made of the defendant, and refusal of payment on oath, have an attachment granted against the defendant by the said court for such his contempt; and the said recognizance shall not be discharged till the costs so taxed shall be paid.”

(r) 1 Wils. 139.
Burrow, 54.
(s) Vide 1 Term
Rep. p. 104.

Sect. 46. And the like in effect is enacted by the said statute of 5 & 6 Will. and Mary, c. 11. sect. 5. concerning the removal of indictments by *certiorari* within the counties palatine of Chester, Lancaster and Durham.

In the construction of these statutes, the following points seem most remarkable.

Sect. 47. FIRST, That notwithstanding, by the express words, justices of peace may proceed to trial of the indictments, notwithstanding the *certiorari*, if a proper recognizance be not given, yet they will be in contempt to the Court that awarded the *certiorari*, if they make no (t) return to it; for all writs must be obeyed, unless good cause be shewn to the contrary; and the proper way of shewing is to return it.

(t) 1 Keb. 225.
231. 598. 903.
1 Sid. 70.

Sect. 48. SECONDLY, That it appears from the manifest purport of these statutes, that they extend only to *certioraris* procured by persons indicted; from whence it follows, that those which are procured by the prosecutor of an indictment, remain as they were at (u) common law.

(u) 6 Mod. 42.
246.

Sect. 49. THIRDLY, That (x) these statutes, being in the affirmative, as to the taking of recognizances, do not take away the power which the justices of the king's bench have by the common law of taking recognizances upon their granting *certioraris*; from whence it follows, that if any such justice, granting a *certiorari*, shall take a recognizance variant from that prescribed by the act, either as to the sum or condition, &c. such recognizance will have the same force as it would have had, if these statutes had not been made; but it is said, that the *certiorari*, if procured by the defendant, will not in such case be a *supersedeas* to the proceedings below, as it would have been at the common law; for the statutes seem to be express, that the sessions may proceed notwithstanding any *certiorari* procured by a defendant, whereon such a recognizance is not given as is expressly prescribed.

(x) 2 Salk. 564.
Far. 10. 120.
Ld. Raym. 756.
Salk. 600. 659.

Sect. 50. FOURTHLY, That if the persons offering to be sureties appear to be worth twenty pounds, the justices (y) cannot refuse them.

(y) March, 27.

Sect. 51. FIFTHLY, That if divers be indicted (z) in the same indictment, and some of them find sureties, and others not, the indictment ought to be removed as to those who find sureties (because

(z) March, 27.

(a) 1 Keb. 231. (because they shall not be prejudiced by the default of others).
 Vide 6 Ed. 4, 5. And, as (a) some say, it shall be removed as to the others also.
 March, 111.

(b) 1 Salk. 55. *Sect. 52. SIXTHLY, (d)* That the master of the crown-office,
 2 Ld. Ray. 85. in taxing the costs, ought only to consider those which are sub-
 Rex v. Wallace, sequent to the *certiorari*.
 Mich. 14 Geo. 3.

Sect. 53. SEVENTHLY, That the prosecutor, by accepting the costs so taxed, is not restrained from aggravating the fine to be set on the defendant, because he has a right to such costs by the express words of the statutes; and therefore the defendant can claim no indulgence from having paid them:—but in other cases, after a prosecutor has accepted costs from a defendant, he cannot by the rules of the court, aggravate his fine; because in such cases, having no right to demand costs, if he take them at all, he must take them by way of satisfaction of the wrong; after which it is unreasonable in him to harass the defendant. And this I take to be a common practice; though in (c) Salkeld's Reports there seems to be a note to the contrary.

† EIGHTHLY, That the clause in the act respecting the payment of costs does not extend to a prosecutor, even when bound over by the magistrate to prosecute, unless he be either a civil officer, or a party injured. And it is immaterial, whether the name be on the back of the indictment or not, provided it be proved by affidavit that the prosecutor is in fact a party injured or a civil officer.

† NINTHLY, That if the prosecutor has received a third part of the fine, and then applies for his costs under the recognizance, the court will order what he has received to be deducted from the amount of the taxation.

† TENTHLY, That the payment of a fine does not discharge the defendant's recognizance for the costs.

† ELEVENTHLY, That on taxation, costs become a vested debt, and the personal representatives of the person to whom they were due may proceed to recover them.

† TWELFTHLY, That the court will not order the recognizance of a defendant to stand as a security of the costs of the prosecutor, if such recognizance be as at common law, and not upon the statute. But if the defendant forfeit his recognizance under the statute, such recognizance shall stand as a security to the prosecutor for his costs (if taxed) for the defendant's not going on to trial pursuant to the condition, notwithstanding he was afterwards acquitted, and the prosecutor had taken him in execution for the amount of them.

Sect. 54. THIRTEENTHLY, (d) That notwithstanding the condition of the recognizance seems to be express, that the defendant shall procure a trial at the next assizes, &c. yet it shall not be forfeited, unless the prosecutor of the indictment give rules according to the course of the court.

Sect. 55. FOURTEENTHLY, That after such (e) recognizance is forfeited by the defendant's not procuring a trial according to the purport

Sayer's Law of
 Costs, 268.
 2 Ld. Ray. 854.
 Strange, 1165.
 10 Mod. 193.

(c) 1 Salk. 55.

1 Wils. 139.
 1 Burr. 54. 431.

4 Burr. 2126.

Rex v. Osbourn,
 S. Law Costs,
 67.

Rex v. Cham-
 berlyne, 111.
 26 Geo. 3.

1 Burr. 11.
 Stra. 1165.
 Burr. 1463.

(d) 1 Salk. 370.
 193.
 Strange, 946.

(e) 1 Salk. 380.
 Rex v. Somers,
 Mich. 6 Geo. 1.
 Sed vide Rex v.
 Gale, 1 Geo. 3.

purport of the condition, the court will not hear any motion to quash the indictment, or *certiorari*.

† As to the second particular, *viz.* What is to be done before the removal of a judgment or order.

† Sect. 56. By 5 Geo. 2. c. 10. it is recited, “Whereas in many cases his Majesty’s justices of the peace by law are empowered to give or make judgments or orders; and divers writs of *certiorari* have been procured to remove such judgments or orders into his Majesty’s court of king’s bench at Westminster, in hopes thereby to discourage and weary out the parties concerned in such judgments or orders by great delays and expenses;” and enacted, “That no *certiorari* shall be allowed to remove any such judgment or order, unless the party or parties prosecuting such *certiorari*, before the allowance thereof, shall enter into a recognizance, with sufficient sureties, before one or more justices of the peace of the county or places, or before the justices at their general quarter-sessions, or general sessions, where such judgment or order shall have been given or made, or before any one of his Majesty’s justices of the said court of king’s bench, in the sum of fifty pounds, with condition to prosecute the same at his or their own costs and charges with effect, without any wilful or affected delay, and to pay the party or parties in whose favour and for whose benefit such judgment or order was given or made, within one month after the said order or judgment shall be confirmed, their full costs and charges, to be taxed according to the course of the court where such judgments or orders shall be confirmed; and in case the parties or party prosecuting such *certiorari* shall not enter into such recognizance, or shall not perform the conditions aforesaid, it shall and may be lawful for the said justices to proceed and make such further order or orders for the benefit of the party or parties for whom such judgment shall be given, in such manner as if no *certiorari* had been granted.”

How the *certiorari* shall issue to remove judgments and orders, &c.

† And by 5 Geo. 2. c. 19. s. 3. “That the recognizance shall be certified to the king’s bench, and there filed with the *certiorari*, and order or judgment thereby removed; and if the said order or judgment shall be confirmed by the said court, the persons intitled to such costs for the recovery thereof, within ten days after demand made of the person or persons who ought to pay the said costs, upon oath made of making such demand and refusal, shall have an attachment for contempt, and the recognizance shall not be discharged until the costs shall be paid, and the order so confirmed complied with and obeyed.”

How recognizances shall be certified, and costs recovered.

† And for the better preventing vexatious delays and expense, occasioned by the suing forth writs of *certiorari* for the removal of convictions, judgments, orders, and other proceedings before justices of the peace, it is further enacted by 13 Geo. 2. c. 18. sect. 5. “That no writ of *certiorari* shall be granted, issued forth, or allowed to remove any conviction, judgment, order, or other proceeding had or made by or before any justice or justices of the peace of any county, city, borough, town corporate, or liberty, or the respective general or quarter sessions

For what proceedings are not removeable. Strange, 391.

“ sions thereof, unless such *certiorari* be moved or applied for
 “ within six calendar months next after such conviction, judg-
 “ ment, order or other proceedings shall be so had or made; and
 “ unless it be duly proved upon oath, that the said party or par-
 “ ties suing forth the same, hath or have given six days notice
 “ thereof in writing to the justice or justices, or to two of them
 “ (if so many there be), by and before whom such conviction,
 “ judgment, order or other proceedings shall be so had or made,
 “ to the end that such justice or justices, or the parties therein
 “ concerned, may shew cause, if he or they shall think fit, against
 “ the issuing or granting such *certiorari*.”

In the construction of these statutes the following points seem most remarkable.

Rex v. Howlet,
1 Wils. 35.
Rex v. Boughey,
4 Term Rep.
281.
† FIRST, That a *certiorari* to remove a conviction must, by this latter act, be applied for within six months from the date of such conviction.

Rex v. Boughey,
4 Term Rep.
281.
† SECONDLY, That the party prosecuting a *certiorari* to remove a conviction, must himself enter into a recognizance with two sureties in fifty pounds each to prosecute with effect, &c.

Rex v. Madley,
2 Stra. 1198.
† THIRDLY, That if any material part of an order of sessions be quashed, although the residue be affirmed by the king's bench upon its removal thither by *certiorari*, no costs are payable under 5 Geo. 2. c. 19.

Rex v. Edgworth, 4 Term Rep. 218.
† FOURTHLY, That where a sessions case, removed into the court of king's bench by *certiorari*, is sent down to be restated, and upon its being returned amended, the parish removing it abandon the prosecution, they are not liable to costs under 5 Geo. 2. c. 19.; but that if they dispute the amended order, they shall pay costs.

Rex v. Jenkinson, 1 Term Rep. 82.
† FIFTHLY, That where there is no recognizance entered into for the payment of costs upon removing summary proceedings by *certiorari*, the court are not authorised to grant them by 13 Geo. 2. c. 18.; but that it is discretionary in the court whether they will grant a *certiorari* or not, and that the court will oblige a party applying in this case for such writ to enter into a recognizance to pay costs.

Rex v. Bass,
5 Term Rep.
251.
† SIXTHLY, That if on application for this writ to remove a conviction, the court see that the justices have drawn a proper conclusion, they will not grant a *certiorari*, though the conclusion was drawn from presumptive evidence.

Rex v. Liston,
5 Term Rep.
338.
† SEVENTHLY, That the court will not take notice of any fault contained in the *certiorari* to influence their judgment respecting the conviction.

As to the EIGHTH POINT, *viz.* How far a *certiorari* is a *super-sedeas* to the court below.

(f) C. Car. 261.
1 Salk. 148.
Yelverton, 32.
March, 27.
Sect. 57. It is (f) agreed by all the books, that after it is allowed by such court, it makes all its subsequent proceedings on the record that is removed by it erroneous.

Also

Also it seems to be generally (g) agreed, that a *certiorari* for the removal of an indictment of forcible entry found at the sessions of the peace, being delivered to any one justice of peace of the same place, before the statute of 21 Jac. 1. set forth more at large, sect. 45. which requires, "that every such *certiorari* shall be delivered at some quarter-sessions in open court," did (by such delivery without more) so far supersede the power of the sessions, that all its subsequent proceedings thereon, and even an execution of a prior award on the same indictment, would have been erroneous. And it seems to be generally (h) agreed, that any one such justice to whom such *certiorari* should be delivered, might and ought thereupon immediately to have awarded a *superseas* to the sheriff, in order to have stopped the execution of any prior award of such court upon such indictment.

Sect. 58. It seems to be the better (i) opinion, that a *superseas* on such a *certiorari*, being delivered to the sheriff before he hath begun to put a process in execution, will make his subsequent execution of it wholly void; because it is a ministerial act, and not a judicial one. But if such *superseas* be not delivered to the sheriff till after he have in part executed such award, it (k) seems, that he may afterwards be authorised to go through with it by a writ of *venditioni exponas*, in the same manner as he may in the like case after a writ of error. But I (l) question, whether he can lawfully proceed after such *superseas* actually delivered to him, without the writ of *venditioni exponas*.

Sect. 59. It seems to be the stronger opinion, that a *certiorari*, being once delivered, makes all subsequent proceedings on the record that ought to be removed by it (m) erroneous, by force of these words "*coram nobis terminari volumus, et non alibi*," whether such proceedings are before or after its return, and notwithstanding the party who prosecuted it never make any other suit to have the record certified, but only by causing the *certiorari* to be delivered. And in this respect a *certiorari* hath a stronger force than a writ of error; for that (n) becomes of no effect, if the party who prosecuted it neglect to get the record certified in a reasonable time.

And it seems to be holden in some (o) books, that the very issuing of a *certiorari* is of itself a *superseas* to the inferior court, whether the *certiorari* be ever delivered or not; in the same manner as an appearance in the court above, and a *superseas* purchased there, will avoid (p) an outlawry pronounced after, though such *superseas* were not delivered to the sheriff before the *quinto exactus*; but the contrary hereto, in relation to a *certiorari*, seems more agreeable to the general tenor of the (q) books and the reason of the thing.

And it hath been (r) adjudged, that if a *certiorari* for the removal of an indictment before justices of peace be not delivered before the jury be sworn for the trial of it, the justices may proceed.

Also it hath been (s) holden, that a *certiorari* is of no effect, unless

(g) C. Eliz. 915.
2 Keble, 306.
Moor, 677.
1 Salkeld, 151.
Id. Raym.
610. 1515.
(h) C. Eliz. 915.
Moor, 677.
Qu. F. N. B.
237.
Dalton, c. 134.

(i) C. Eliz.
915, 916.
Moor, 677.
2 Hale, 215.
(k) Dyer, 98.
Yelverton, 6.
C. Eliz. 597.
1 R. Abr. 894.
2 R. Abr. 491.
3 Keble, 169.
174. 309.
(l) See the
books next
above cited,
and Moor, 542.
1 Salkeld, 147.

(m) Yelver. 32.
Dyer, 245.
6 H. 7. 15, 16.
B. Record, 8.
Dalt. c. 134.
Lamb. f. 516.
Crompt. 132.
2 Hale, 215.
(n) Dyer, 245.
1 Keble, 54.
107. 118.
1 Siderfin, 268.
2 R. Abr. 491.

(o) Moor, 73.
Keble, 93.
(p) Dyer, 222.
Moor, 73.
1 Inst. 128.
(q) C. Jac. 282.
Sup. c. 5. s. 8,
9, 10, 11.
C. Eliz. 152. 915.
C. Jac. 43.
Yel. 52. 57. 121.
C. Car. 79.
2 Jones, 209.

(r) 1 Salk. 144.
150.

(s) 1 Keb. 944.

(t) Sup. s. 45 unless it be delivered before its return is expired. And it is certain, that by force of the statute it cannot at this time be any (t) *certiorari* removes all *supersedeas* to the proceedings on an indictment at sessions, without a proper recognizance, &c. to 62. A *certiorari* removes all things done between the *teste* and return, *Ld. Raym.* 835. 1305.

(u) 2 R. A. 492. *Sect.* 60. It hath been (u) holden, that a *certiorari* for the removal of a recognizance for the good behaviour, or for an appearance at sessions, will supersede its obligation. But this would be highly inconvenient; and the contrary opinion seems to be supported by the better (x) authority.

(x) C. Jac. 282. *Yelver.* 207. 1 *Bulst.* 155.

(y) 16 Ed. 4. 5. *Sect.* 61. It (y) seems, that if an indictment be removed by *certiorari* after issue joined, and afterwards remanded, the inferior court shall proceed to trial, in the same manner as it would have done if no *certiorari* had been granted.

(z) *Raym.* 186. *Sect.* 62. I shall take it for (z) granted, that inferior courts Farresly, 38. proceeding after a *certiorari* delivered, where by law they ought 1 *Vent.* 66. not, are punishable for a contempt; as hath been more fully 1 *Salk.* 144. 148. shewn, chap. 22. sect 28. *Yelverton*, 32.

(a) Agreed by *Sect.* 63. Also it seems, that by the common law if a *certiorari* the court of be once filed, the proceeding below can (a) never be revived by king's bench in the case of the any *procedendo* (†). *King v. Whitlow*, *Hil.* 6 *Geo.* 1.

As to the NINTH POINT, *viz.* In what manner a *certiorari* is to be returned.

(b) *Lamb.* b. 2. *Sect.* 64. I shall refer the reader for the form in which it is to c. 2. 107, 108. be done, to (b) *Lambard* and (c) *Dalton*, and shall farther take (c) *Dalt.* c. 73. notice only of these following particulars. 134. 1 *Burn*, tit. "Certiorari." *Carthew*, 223.

(d) C. Eliz. 821. *Sect.* 65. FIRST, That every such return ought to be under the seal (d) of the inferior court, or of the justice or justices to whom (e) 1 *Lev.* 311. it is directed; and if such court have no proper seal, it seems, 1 *Siderfin*, 70. (e) that the return may be well made under any other. *Salkeld*, 479. *Showers*, 336. A return was held bad because it was upon paper instead of parchment, 1 *Barnard*, 113.

(f) 2 *Salk.* 479. *Sect.* 66. SECONDLY, That every such return must be made by the very same person to whom the *certiorari* is directed; for if it be directed to "the justices of the peace" of such a place, and the (f) clerk of the peace only return it; or to "the constable," (g) 1 R. Abr. or to "the recorder of B." and the (g) deputy constable, or deputy recorder return it, without shewing in the return that the principal had power to make a deputy; or "to the steward of (h) 2 *Keb.* 385. "St. Paul's," and the steward of the church of St. (h) Peter and (i) 1 *Sid.* 64. St. Paul return it, nothing is removed. Yet it is (i) certain, that (j) 1 *Levinz.* 50. if it be directed "to the justice of Chester," it may be returned (j) 2 *Salkeld*, 452. by A. B. chief justice; for the same officer is known to be meant (k) 1 *Keb.* 165. 187. in

(†) The *certiorari* may be taken off the file if it was improperly obtained, 1 *Burr.* 488. 4 *Burr.* 2459. 2522. on motion for that purpose previous to a motion for *procedendo*, 4 *Burr.* 2456. If the

defendant is convicted on confession, and the prosecutor brings a *certiorari*, the defendant shall have a *procedendo*, 2 *Burrow*, 749.

in the writ and return, and his description in both is in substance the same. Also it is (k) said, that if a writ of error be directed to several justices, and returned by part of them only; yet if it (l) truly recite the record, it so far removes it, that a new writ of error lies *de recordo quod coram nobis residet*, &c. And (m) *quare* how the court shall proceed upon the like mis-return of a *certiorari*.

(k) Yelv. 212.
C. Jac. 254.
1 Sid. 349.
1 Keble, 941.
2 Keble, 385.
1 R. Abr. 753.
(l) Yelv. 6, 7.
28 H. 6. 12.
1 R. Abr. 753.
(m) F. N. B. 71. Holt, 157. A *certiorari* to remove an order of two justices may be directed to the sessions, and returned by them. Strange, 470.

Sect. 67. THIRDLY, That (n) regularly a recognizance taken by a justice of peace, whether it still actually continue in the hands of such justice, or (o) have been sent by him to the clerk of the peace, ought to be certified on a *certiorari* for the removal of it by such justice only, until it be made a record of the sessions, (p) after which it shall be certified in the same manner as the other records thereof shall be.

(n) 21 H. 7. 21.
C. Jac. 669.
2 H. 7. 1.
Sup. sect. 43.
(o) Reg. v. Randal, 13 Ann.
(p) Sup. sec. 43.
Reg. Origin, 90.
151. 283, 284.
&c. F. N. B. 81. 2 H. 7. B. Peacc, 11. Dalton, c. 70.

Sect. 68. FOURTHLY, That it is (q) advisable, that a return to a *certiorari* directed to justices of peace for the removal of an indictment taken before them, have the clause *necon ad diversas felonias*, &c. as well in the (r) description of the justices who make the certificate, as of those before whom the indictment is said to be taken in caption; which matter hath been already considered, ch. 8. sect. 33. and ch. 25. sect. 121, 122, 123.

(q) Crompt. 131.
123.
Lamb. b. 4. c. 7.
f. 516, 517.
Dalt. c. 134.
(r) 22 Edw. 4.
12. b. 13.
12 H. 7. 25.
3 R. 3. 9.
B. Indict. 32.50.

Sect. 69. FIFTHLY, (s) That the person to whom a *certiorari* is directed may make what return to it he pleases; and the court will not stop the filing of it on affidavits of its falsity, except only where the public good requires it, as in the case of the (t) commissioners of sewers, or for some other special reason: but regularly the (u) only remedy against such a false return is an action on the case at the suit of the party injured by it, and information, &c. at the suit of the king.

(s) 6 Mod. 90.
Reg. v. Norton,
Pas. 11 Annæ.

(t) Sup. s. 34.

(u) 6 Mod. 90.
Strange, 63.

Sect. 70. SIXTHLY, (x) That whatsoever matters are put into the return to a *certiorari*, by way of explanation or otherwise, besides those which are expressly ordered to be certified, are put in without any warrant or authority, and consequently shall be no more regarded by the court above, than if they had been wholly omitted.

(x) 2 Salk. 492,
493.

Sect. 71. SEVENTHLY, That (y) generally the return to a *certiorari* ought to certify the record itself, or the tenor of it, or the (z) tenor of the tenor, (a) according as the writ requires. And agreeably hereto it hath been (b) adjudged, that if, on a *certiorari* to return an order of justices of peace, the tenor of such order be certified, the return is naught. Yet a return of the tenor of an indictment from London, on a *certiorari* to remove the indictment itself, is good by the city charter, as hath been already shewn, sect. 26.

(y) Reg. Orig.
151. 169.
F. N. B. 245.
(z) F. N. B. 245.
3 Keble, 13.
(a) F. N. B. 245.
Crompt. 131.
Dalton, c. 134.
Lamb. b. 4.
c. 3. f. 515.
(b) 1 Salk. 147.
2 Salk. 492, 493.

Also, it (c) seems to have been generally holden, that wherever the

(c) 3 Keble, 13.
Vide 2 Burrow,
1034.
Dyer, 187, 1 Keble, 107.

the purport of a *certiorari* is not to proceed upon the record to be removed, but only to try an issue of *nul tiel record*, it is sufficient to certify the tenor of the record, whether the *certiorari* require a certificate of the record itself, or of the tenor of it only.

(d) 1 R. Abr.
894, 395.
Hobart, 135.

However, I take it to be clear, that if the court which awards such a *certiorari* have no jurisdiction to proceed on the record thereby ordered to be removed; as where the court of (d) common pleas award a *certiorari* for the removal of an indictment on the issue of *nul tiel record*, concerning such indictment, the court below ought only to certify the tenor of it, lest there should be a failure of justice.

As to the TENTH POINT, viz. Where a record is removed by *certiorari*.

(e) Vide sup.
sec. 41, 42, 43.
(f) Vide sup.
s. 69, &c.

Sect. 72. Having premised that nothing can be removed by it where it is improperly (e) directed, or (f) returned, (for which I shall refer the reader to the foregoing parts of this chapter,) I shall in this place observe only the following particulars:

(g) 1 R. 3, 4.
B. Record, 9.
1 Mod. 112.
3 Keble, 508.
Con. Noy, 51.
1 R. Abr. 749.
(h) 1 R. 3, 4.
B. Record, 9.
(i) 1 R. 3, 4.
Dyer, 222.
1 Ventris, 63.
B. Record, 9.
1 Mod. 41.
1 Salkeld, 149.
Farresly, 138.
Lamb. b. 4. c. 7.
f. 517.
Crompton, 132.
Dalton, c. 134.
1 Mod. 112.
Yelver. 32.
Con. 1 Sid. 317.
2 Keble, 141, 142.
Noy, 54.
1 R. Abr. 749.
(k) 1 R. Abr. 395.
Ld. Raym. 833.
1305.
Vide 11 Mod. 110. 236.
A verdict cannot be removed from sessions before judgment, Strange, 765. 819.

Sect. 73. FIRST, That it seems to be settled at this day, that as a writ of (g) error may remove a judgment given, and a (h) *recordare* may remove a plaint entered, after its *teste* and before its return, so likewise a (i) *certiorari* may remove a record that shall come within its description before the time of its return, though there were no such record *in esse* at the time of its *teste*, (k) nor at the time when it was first delivered to the court below.

(l) 3 H. 6. 30.
F. N. B. 71.
F. Record. 2.

Sect. 74. SECONDLY. That as a *recordare* will remove a plaint that was (l) discontinued below, because the court above will proceed only on the plaint, and all the other proceedings thereon below are to no purpose, there seems to be the like reason that a *certiorari* also may remove an indictment which was discontinued below.

A *certiorari* to remove an indictment, will not remove a conviction.
Lord Raymond, 971.

Sect. 75. THIRDLY, That as a writ of error can remove no record which materially varies from the description set forth in such writ, so neither can a *certiorari*, as in the following instances.

(m) C. Jac. 254.
255.
Yelverton, 42.
Plowden, 394.
(n) B. Err. 13.
28 H. 6. 11.
1 Keble, 129.
282. 102.
(o) 1 Sid. 448.
Parallel case,
1 R. Abr. 753.
(p) 1 Roll. Abr.
754.
Dyer, 105.
Yelverton, 212.
Lord Raymond, 1203.

Sect. 76. I. Where the writ describes an indictment or other record taken before A. B. and eight others, and that certified appears to have been taken before (m) A. B. and seven others only, or (n) before him and the other eight mentioned, and others also besides them; or where the writ describes a record (o) *coram A. et B. et sociis suis*; and the record certified appears to have been taken *coram C. D. et sociis suis*; or (p) where the writ calls the justices, before whom the record is taken *justiciarios nostros*, and in the record certified they appear to have taken it as justices of a former king.

Sect.

Sect. 77. II. Where the writ describes an indictment for stealing (q) two horses, and that certified is for stealing one horse only. (q) 2 Assize, 3. S. P. C. 70. B. Variance, 62. Lamb. b. 4. c. 7. f. 513. B. Cor. 69. Crompton, 132. 1 Bulst. 155.

Sect. 78. III. (r) Where the writ describes an order concerning foreign salt, and that certified is concerning salt in general. (r) 1 Salk. 145. Farresly, 97.

Sect. 79. IV. (s) Where the writ describes an order concerning the town of Needham-Market, or concerning the manor of Ansly, (t) and an order concerning the town of Needham, or the manor of Anesley, is returned, without shewing in the return that they are both the same town. (s) 2 Salk. 452. C. Eliz. 882. (t) 12 Assize, 2. B. Variance, 66.

Sect. 80. V. Where the writ mentions only (u) orders against A. B. and C. or indictments wherein A. B. and C. are indicted, and those certified are against A. only, or against A. and B. only. Yet (v) it is taken for granted in many books, neither do I find it any where denied, that *certiorari* for the removal of all indictments against A. may remove one wherein the said A. is indicted, together with twenty others, so far as it concerns him; because in judgment of law it is a several indictment as to every one of the persons indicted. But I do not find it (y) agreed, whether, in such a case, the indictment shall be removed so far as it concerns the other twenty? (u) 1 Salk. 146. 151. Reg. v. Hotspurt, Hil. 12 Ann. Con. 1 R. Abr. 395. (v) 6 Ed. 4. 5. Lucas, 205. B. Record, 57. Lamb. b. 4. c. 7. f. 517. Crompton, 132. Dalton, c. 131. March, 112. (y) Ass. 6 Ed.

4. 5. B. Record, 57. Lamb. b. 4. c. 7. f. 517. Crompton, 132. Dalton, c. 131. Denicd, March, 112. 1 Kcble, 231. 10 Modern, 205. Lord Raymond, 609. 1203.

Sect. 81. VI. Where there is a (z) material variance between the writ and the records certified, in the names or additions of the parties; as where the writ gives the defendant the surname of (a) Giggure, and the record certified that of Gigger; or where the writ commands the removal of all convictions against (b) Henry, coachman, *quocunque nomine censeatur*, and those certified are against Henry Munton, coachman; or where the writ calls the defendant John (c) of Stiles, and the record is John Stiles; or where the one calls him (d) knight and baronet, and the other baronet only; or the one (e) Garret Malines, and the other Gerard Malnes; or the one J. S. (f) *nuper de B.* and the other J. S. *nuper de C.*; or the one J. S. of B. sadler, (g) and the other J. S. of B. salter. (z) Vide 1 R. Abr. 751. (a) Salk. 264. (b) Ad. Mich. 3 Geo. 1. (c) 26 Assize, 31. (d) C. Jac. 633. (e) C. Jac. 477. 2 R. Abr. 329. Such a variance between a protection and the writ adjudged fatal. (f) Adj. in a writ of error, Ainsworth and Wilson, Hil.

5 Geo. 1. Par. Case, 1. To a *certiorari* on a writ of error diminution may be certified, 8 Mod. 31. Sidehm, 193. (g) Dyer, 173. 1 R. Abr. 753.

Yet if the variance be only in the spelling, and the words have the very same sound either way as (h) Bird and Burd, (i) Shelbury and Shelbery, it seems that it will not be material; because it appears not by any record of the court but that the name in the *certiorari* may be the true name, and the record certified describing one by a name of the same sound, shall be intended to mean the same person. (h) C. Eliz. 172. Col. 25 Edw. 3. 43. (i) Vide C. Eliz. 172. 1 R. Abr. 797. 2 R. Abr. 329.

Also, if a *certiorari* name the party without any addition, and the record certified name him with an addition; yet it seems that it may be probably argued, that the record may be well removed by such writ, in the same manner as it may be by a writ of (k) error which has the like variance. But if a writ of error describe a person with an addition which is omitted in the record certified, it

(k) 1 Sid. 193. 9 H. 6. 1. Dyer, 25.

it hath been (*l*) lately adjudged, contrary to the opinion of Sir Edward Coke's (*m*) Third Report to the contrary (which seems to be rather contradicted than supported by the (*n*) authorities cited to maintain it), that it cannot remove the record; and the reason seems to be the same in respect of a *certiorari*. (1)

(*l*) *Shute v. Car*, 2 R. 3. 9. 3 Assize, 3. 9 H. 6. 1. 1 R. Abr. 328. 329. (*m*) 3 Co. 2. 1 R. Abr. 752. (*n*) 9 H. 6. 1. 7 Assize, 5. 26 Assize, 31.

As to the ELEVENTH POINT, *viz.* What is to be done by the court above, where the record mentioned in a *certiorari* is not removed by it.

Sect. 82. It is (*o*) said, that such court cannot in such case proceed upon the record; because in judgment of law it still remains in the court below, but will either (*p*) quash the writ, and (*q*) award a new one, or suffer the court below to proceed in the cause, and take such (*r*) order in relation to the defendant's appearance, either in the one court or the other, to answer the farther prosecution of the cause against him, as shall in discretion appear to be most proper.

(*o*) 12 H. 7. 25. 2 R. 3. 9. 3 Assize, 3. Vide 1 Sid. 193. (*q*) *Keble*, 142. (*p*) 1 *Keble*, 102. 1 *Salkeld*, 147. (*q*) *Stra.* 1227. 3 Assize, 3. (*r*) 12 H. 7. 25. 3 Assize, 3. 2 R. 3. 9. 20. B. Indict. 50. B. Cor. 69. 2 *Keble*, 142. Lamb. b. 4. c. 7. f. 518. Sup. c. 25. sect. 11. 2 *Hale*, c. 198. *Carthew*, 223. 2 *Bar. K. B.* 413.

And now I shall consider what process is to be awarded after the removal of a record by *certiorari* into a superior court.

Sect. 83. As to which I take it to be agreed, that, after such removal, if the defendant do not appear in the court of king's bench, the same (*s*) kind of process lies against him as if the cause had been originally commenced there.

(*s*) *S. P. C.* 70. Summary, 211. *Carthew*, 223.

Also I take it to be (*t*) agreed, that seeing by such removal the cause is wholly put without day, there is no way to non-suit the plaintiff, before he hath appeared in the court of king's bench, but by taking out a *scire facias* to warn him to prosecute his appeal in that court. Whereupon if the sheriff return a *scire feci*, he shall be nonsuit; and if the sheriff return a *nihil*, a *scire facias sicut alias* shall be awarded; whereupon if the sheriff return a second *nihil*, I do not find it (*u*) agreed what ought farther to be done (*v*).

(*t*) *S. P. C.* 70. 48 Ed. 3. 22. 48 Assize, 3. 1 *Salkeld*, 61, 62. 6 Mod. 246. B. Appeal, 15. 140. F. Cor. 105. (*u*) Vide *S. P. C.* 70. 72. 48 Ed. 3. 22. 48 Assize, 3. B. Appeal, 15. 140. F. Corone, 105. (*v*) We should suppose a nonsuit. Bac. Ab. 359, notes.

As to the SEVENTH GENERAL POINT, *viz.* Where the process on an appeal, indictment, or information, shall be said to be discontinued, or miscontinued, or put without day.

Sect. 84. Having premised, that it seems to be agreed, that every suit, whether civil or criminal, and also every process in such suit against jurors ought to be properly continued from day to day, from its commencement to its conclusion, without any the least gap or chasm; and that the suffering any such gap or chasm, is properly (*y*) called a discontinuance; and the continuing of the suit

(*y*) *E. Judg.* 12. Finch, 431. Co. Lit. 325. B. Amend. 17. F. Pro. 124. 127. 1 H. 7. 2. 22 Edw. 3. 2. 22 Ed. 4. 3. 12 H. 4. 3.

(1) If the writ name more defendants than are in the record, it is variance, *Strange*, 116. But it need not describe whether the offence be laid *contra formam statuti*, *Strange*, 845. Vide also 2 *Hale*, 214.

A *certiorari* to remove a conviction on indictment must give the defendant a day in court, *Lord Raymond*, 971. *Strange*, 116. 845.

suit by (y) improper process, as by a *capias* instead of a *dis-tringas*, or by giving the parties an (z) illegal day, is properly called a miscontinuance;

Finch, 431. Coke Lit. 325. B. Dis. de Pro. 11. 23. 50. 57. 61. 12 H. 4. 18. F. Amend. 12. (z) B. Dis. de Pro. 23. 21 H. 7. 16. (y) 21 H. 7. 16. 8 H. 6. 20. 12 H. 4. 3. 10 H. 7. 21. Keilway, 36. Con. 40 E. 3. 16.

I shall for the more distinct understanding of the learning of this kind, endeavour more particularly to shew,

1. In what particular instances process is generally said to be discontinued :

2. Where to be discontinued :

3. Where to be put without day.

PROCESS is generally said to be discontinued in the following instances :

Sect. 85. FIRST, Where the second is not tested on the very same (b) day on which the first is returnable; as where a *venire facias* is returnable on the twenty-third of January, and the *dis-tringas* is tested on the twenty-fourth or any other subsequent day.

Sect. 86. SECONDLY, Where there is a term intervening between the teste and return of a (c) *capias*; for the law will not suffer any such *capias*, lest thereby the defendant should be imprisoned an unreasonable time; but an original may be continued by any (d) other process, except a *capias*, though it have a term or more intervening between its teste and return. (e) Neither is it any objection to an *exigent*, that it is not made returnable on the next term after its teste, because it must allow time enough for five county courts to be holden between its teste and its return.

Sect. 87. THIRDLY, (f) Where, after issue or demurrer, the court give the parties a day to a distant term, without making any continuance to that immediately following.

Sect. 88. FOURTHLY, Where the term to which the suit is continued is adjourned, and the suit is (g) not adjourned accordingly.

Sect. 89. FIFTHLY, Where any of the parties are described in any continuance of the suit, whether on the Roll, (h) or by (i) process, by a name or addition variant from those in the original, &c. though (k) only in one letter.

69. 77. Discon. 7. 12. 17. 40. 42. Err. 15. B. Discon. de Pro. 46. Amend. 50. 39 Edw. 3. 31. 40 Edw. 3. 31. 34. 8 H. 5. 2. 7 H. 6. 27. 9 H. 6. 39. (k) Qu. 4 H. 6. 6. B. Amend. 45. F. Amend. 21. (g) 1 Dan. Abr. 243. 4 Edw. 4. 40. F. Dis. 27. (h) F. Dis. 1. B. Amend. 22. 4 H. 6. 6. 40 E. 3. 18. (i) F. Amend. 13. 17. 21. 27. (j) 21 Ed. 4. 20. B. Dis. de Pro. 53. Continu. 82. (m) Qu. 22 H. 6. 3. 4. F. Dis. 11. Vide 7 H. 6. 27.

Sect. 90. SIXTHLY, Where after issue joined, the process is (l) not continued from time to time against the jurors, returnable on the same days to which the suit is continued on the roll against the parties.

Sect. 91. SEVENTHLY, Where (m) a joint *venire* is first awarded

for the trial of all the defendants together, and afterwards several *venires* for the trial of each of them.

(*n*) F. Dis. 14. Sect. 92. EIGHTHLY, Where (*n*) a *venire* omits part of the issue or issues to be tried.

35.
2 H. 5. 3.

Vide B. Dis. de Pro. 63. Qu. C. Eliz. 622.

(*o*) F. Dis. 10. Sect. 93. NINTHLY, (*o*) Where a *venire* omits any of the parties.

35.
1 Roll. 22.

3 Bulstrode, 311. Winch. 73. B. Amend. 50. 39 E. 3. 21.

(*p*) F. Reple. 4. Sect. 94. TENTHLY, Where a juror is named in the *habeas corpora* by a name (*p*) different from that in the panel returned on the *venire*; or where a juror returned on such a panel is wholly omitted on the *habeas corpora*. But in these cases, if the juror so misnamed, or (*q*) omitted, be not sworn at the trial of the cause, it is (*r*) questionable, Whether there be any discontinuance at all?

Amend. 26.
4 H. 6. 7, 8.
19 H. 6. 39.
9 Ed. 4. 13.
27 H. 6. 5.
B. Dis. 47.
1 Dan. Abr.
330, 331.

5 Coke, 42. (*q*) F. Amend. 57. 37 H. 6. 12. B. Amend. 51. (*r*) 1 Siderfin, 66. 1 Keble, 182. 191. 198. 215. 6 Modern, 285. F. Dis. 4. seem to make it no discontinuance. But 19 H. 6. 39. 34 H. 6. 20. 27 H. 6. 5. F. Enquest. 18. 5 Coke, 6. 37. F. Dis. 37. 38. B. Amend. 10. 37. 92. are to the contrary. Vide Cro. Eliz. 586.

(*s*) F. Err. 16. Sect. 95. ELEVENTHLY, Where a *venire* or *distringas* are issued without any (*s*) award on the roll to warrant them.

7 H. 6. 28.

(*t*) Vide sup. c. 5. sect. 5, 6, 7, 8, 9, 10, 11, 12. Rastal, 77. Sect. 96. It (*t*) seems, that before the making of the statutes of 11 Hen. 6. c. 6. and 1 Edw. 6. c. 7. all pleas and processes before justices of assize, gaol-delivery, oyer and terminer, or peace, or other the king's commissioners, were discontinued by the making a new commission or association, or by altering the names of the justices or commissioners; but this mischief is fully remedied by those statutes.

(*u*) Vide B. Dis. de Pro. 52. 15 Ed. 4. 5. Sup. sect. 66. Sect. 97. If an (*u*) indictment be removed by *certiorari*, after issue joined, and process awarded for the trial; *quære*, If it shall be discontinued, if not remanded before the return of such process?

As to the SECOND POINT, *viz.* Where process is generally said to be discontinued.

Sect. 98. It seems, that wherever an error in process doth not amount to a discontinuance, it is generally called a miscontinuance. And this seems agreeable to the proper notion of the word; for as a cause may then properly be said to be discontinued, when there is either nothing at all done to continue it, or nothing but what is as to this purpose merely void in law, so it seems to be properly said to be discontinued, where it is continued amiss, or by an (*x*) erroneous and not void continuance. And agreeably hereto, the books which speak of errors in process seem generally to include them all, without (*y*) exception, under the general heads of miscontinuance and discontinuance. And this, as I apprehend, was also the opinion of the greater part of the court of king's bench in the late case of (*z*) Widdrington v. Charlton.

(*x*) Finch, 431.

Sup. sect. 89.

21 H. 7. 16.

39 Ed. 3. 20.

(*y*) 21 H. 7. 16.

B. Dis. de Pro.

11. 47. 50. 57.

Amend. 17.

C. Jac. 283, 284.

2 Bulst. 142,

143.

(*z*) Trin. 11

Annæ.

10 Modern, 86.

As to the THIRD POINT, *viz.* Where process shall be said to be put without day.

Sect.

Sect. 99. It seems (a) agreed, that by the common law all proceedings upon any indictment, information, or popular action, whereon no judgment had been given, were wholly determined by the demise of the king, and that nothing remained but the indictment or information, original writ, or bill, which were put without day till re-continued by re-attachment to bring in the defendants to plead *de novo*. But this is fully (b) provided for by 4 and 5 Will. 3. c. 18. and 1 Ann. c. 8. by which it is enacted, "That such process, &c. shall continue in the same force after the king's demise, as it would have had if he had lived."

Sect. 100. As for appeals, (c) I do not find it any where said, that the pleas, and other proceedings therein, being put without day by the demise of the king, might not be revived by a special re-attachment, in the same manner as in any other action: however, it is certain at this day, that by force of 1 Edward 6. c. 7. and 1 Ann. c. 8. "neither the writ nor bill, nor any plea, nor proceedings therein, shall be any way discontinued or put without day by such demise."

Sect. 101. It seems to be holden by (d) some, that all causes, whether civil or criminal, are discontinued, and by (e) others, who seem to speak more accurately, that they are put without day, by the justices, before whom they were depending, not coming on the day to which they are continued, whether such absence were occasioned by (f) death, or any other cause. But it seems to be agreed by all, that a cause so discontinued, or put without day, cannot be revived without a re-summons or re-attachment; which if they are (g) special, may revive the whole proceedings; but if general, the original record only. Nor do I find that any statute hath remedied this mischief, except in the case of assizes, and *juris utrum*, which are provided for by 1 Edw. 6. c. 7. (1)

B. Dis. de Pro. 2. (f) B. Reattachment, 18. 4 H. 7. 7. F. N. B. 111. 287. 188. (g) 7 Coke, 20.

As to the EIGHTH GENERAL POINT, *viz.* How far errors in process are fatal.

Sect. 102. It seems to be generally taken (h) as an undoubted principle, (h) 1 Bulst. 113. Yelver. 201. C. Jac. 283.

8 H. 6. 29. 21 H. 6. 16. 12 H. 4. 17. 34 H. 6. 20. 18 H. 6. 15. Coke Lit. 325. B. Dis. de Pro. 4. 11. 47. Amend. 17. F. Pro. 127. Dis. 40. Amend. 27. 33 Ed. 3. 22. 19 H. 6. 39. Vide B. Err. 3. Replead. 2. and Disc. 1. where the contrary opinion is said to have been holden: but this seems not to be warranted by the case at large in the Year Book.

(1) But now when the judges are prevented from reaching the assize town on the commission day, by unavoidable accident or press of business at a former town, by st. 3 Geo. 4. c. 10. it is enacted, "That whenever it shall so happen that such commissions (i.e. commissions whereby the judges go the circuits,) shall not be opened and read in the presence of one of the quorum commissioners, (one of the judges, or a serjeant) at any place specified for holding the assizes, on the very day appointed for such purpose, it shall and may be lawful to open and read the same, in the presence of one of the quorum commissioners, therein named, on the following day, or if such following day shall be a Sunday, or any other day of public rest, then on the succeeding day; and such opening and reading thereof shall be as effectual, to all intents and purposes, as if the same had been opened and read in the presence of one of the quorum commissioners on the very day appointed for that purpose, and shall be deemed and taken to be an opening and reading thereof on the day for that purpose appointed; and all records and other proceedings under or relating to any commission which may be opened and read by virtue of this act, shall and may be drawn up, entered, and made out under the same date, and in the same form, in all respects, as if such commission had been opened and read on the day originally appointed for that purpose."—By the second section the judge is to certify to the lord chancellor the cause of the delay.

(i) Vide sup. c. 23. a. 143.
 (k) S. P. C. 169.
 (l) 5 Coke, 45.
 Corone, 444.
 Coke Lit. 325.
 Salkeld, 59.
 1 Siderfin, 260.
 1 R. Abr. 779, 780.
 Yelverton, 158.
 C. Eliz. 582.
 C. Jac. 311.
 See the books cited to the other parts of this section.

In 1 R. Abr.

380. notice is taken of three resolutions, that a *capias*, where it lies not, is not aided by an appearance and pleading over, and of a subsequent one contradicting them. (m) B. Restitution, 8. (n) F. Cor. 68. But in another part of his book he abridges this case, without taking any exception to it. F. Damage, 50. (o) Also it is cited in Yelverton, 204. C. Jac. 284. 1 Bulst. 142. for the proof of the contrary opinion.

(p) 40 Ed. 3. 31.

47 Ed. 3. 14.

18 H. 6. 15.

3 H. 6. 9.

F. Replevin, 1.

Amend. 14.

Process, 154.

Error, 82.

B. Dis. de Pro.

50. 57.

Def. and Ap-

pearance, 11.

1 R. Abr. 779.

3 Mod. 265.

But the Year

Book of 8 H. 6.

29. from which

the above cited

authority in

Brook, Discontinuance, 50. is taken, seems rather to contradict than warrant it. (q) 8 H. 6. 29.

12 H. 6. 18.

18 H. 6. 15.

47 E. 3. 14.

B. Dis. de Pro. 11. 50. 57.

F. Pro. 127.

Dis. 17.

(r) 21 H. 7. 16.

F. Error, 47.

46 E. 3. 30.

B. Error, 28.

Resp. 12.

F. Judg. 4.

18 H. 7. 21.

Yelverton, 158.

1 Siderfin, 100. 260. and see the other books under cited.

(s) F. Dis. 36.

9 H. 5. 3.

1 R. Abr. 779.

46 Ed. 3. 30.

B. F. Judg. 4.

(t) 10 H. 7. 21.

12 H. 4. 18.

B. Err. 109.

Pro. 173.

Jour. 36. 54.

21 H. 7. 16.

8 H. 6. 29.

F. Pro. 7.

(u) 1 Siderfin, 406.

(x) 38 E. 3. 20.

29 E. 3. 31.

F. Dis. 39.

(y) 21 H. 7. 16.

Con. 40 E. 3. 31.

F. Amendment, 14.

(z) Cro. Eliz. 482.

(a) B. Jour. 36. 54.

Dis. 23.

Error, 169.

Amend. 60.

F. Jour. 37. 38.

12 E. 4. 11.

9 E. 4. 18.

2 H. 7. 11.

(b) F. Dis. 51.

3 H. 4. 10.

(c) Widrington

v. Charlton,

T. 11 Ann.

10 Mod. 86.

1 Salk. 59.

principle, that a discontinuance, by suffering a total chasm in the proceedings, whether on the Roll or in the process, by not giving a fresh continuance *instantly* upon the determination of the precedent, shall never be aided by an appearance and pleading over. And the Year Book (i) of 9 Hen. 5. 2. pl. 7. seems to have an opinion, that the misreturn of a sheriff, as where he returns a *cepi* on the award of an *exigent*, is not saved by the defendant's pleading over; but this is (k) questioned by Staundforde, and seems contrary to the general tenor of the other (l) books, and contradicted both by (m) Brook and (n) Fitzherbert, in their abridgment of this very case; and in all probability the book is misprinted; for, as it stands at present, it is hardly sense, or reconcilable with (o) itself.

But if a defendant appearing on erroneous process, expressly except to it before he have pleaded over, there have been many (p) authorities, that he ought to be discharged, and the (q) new process shall issue where the defect first happened. But there is a greater (r) number of authorities to the contrary; by which it appears, that if the original be good, and the defendant present in court, he shall be compelled to answer it, let the process whereon he came in, or the execution of it, be never so erroneous or defective, so that it never were discontinued; for the end of process is to compel an appearance; and that end being served, and a legal charge appearing against the defendant no way discontinued, the law will not so far regard a slip in the process, as to let the defendant out of court in order only to have him brought in again in better form.

And therefore where a defendant hath excepted to the process whereon he hath appeared, that he was (s) never served with it, or that (t) no such process lies in the case, or that it bore (u) teste before the original, or that it was not awarded into the (x) proper county, or that it was (y) not returnable at a proper day, or that it was (z) directed to one who was no officer, or that it had not so many days as it ought (a) between its teste and return, or for any (b) other such like defect, yet he hath been compelled to answer the original.

And agreeably hereto it was lately (c) resolved, upon great deliberation by the court of king's bench, against the opinion of MR. JUSTICE POWELL, that the defendant in an appeal of death, coming in upon an *exigent*, which was erroneous for want of the words "*de morte viri, &c.*" had salved the error by his appearance,

ance, notwithstanding he had done all he could to take advantage of it, by craving oyer of the process, and then demurring.

And NOTE, That in all the Year Books (*d*) above cited to this point, except (*e*) one, it is said generally, that such errors are salved by an appearance, without any mention of any amendment; but in that one it is said, that they shall be amended.

(*d*) Vide 40 E. 3. 31.
F. Amend. 14.
59.
(*e*) 2 Hen. 7. 11.

Sect. 103. Also it seems, that wherever process is awarded (*f*) *instantur* from time to time, without any the least break or chasm, and the parties (*g*) have always a day upon the Roll, all other kinds of errors whatsoever that come under the name of discontinuances, are (*h*) salved by an appearance; for there are (*i*) cases by which it appears, that defendants appearing, and taking exceptions to such errors, have been compelled to answer to the original, which they would not have been, if such original had not been taken to have been discontinued by such errors, as they certainly are by an error, in suffering a total chasm in the continuance. And if the original be not discontinued by such errors, why should they not be as much salved by an appearance as any of the other errors above-mentioned? For would it not be altogether as trifling in this, as in any other case, to dismiss a person only in order to send for him again? And in criminal cases this could not but be of the utmost ill consequence, by giving the defendant, who is actually in the power of the court, an opportunity of escaping.

(*f*) Vide 1 Bulst. 141, 142, 143.
Yelverton, 204.
6 Mod. 281 to 286.
1 Salkeld, 51.
C. Jac. 284.
(*g*) 1 R. Abr. 779.
12 H. 4. 18.
21 H. 7. 16.
38 Edw. 3. 20.
12 H. 4. 3.
B. Dis. de Pro. 11.
F. Dis. 39.
(*h*) C. Jac. 311.
(*i*) 38 E. 3. 22.
F. Dis. 40.
19 H. 6. 39.
Amendment, 27.
B. Replead. 2.
Dis. de Pro. 1.
Error, 3. 3 H. 6. 9.

Sect. 104. But it seems agreed by the (*k*) books, that any other discontinuance in the process against jurors, shall have the same effect as a discontinuance in suffering a chasm in the process. But it seems that no such (*l*) discontinuance, whether in the process or on the Roll, shall in any case discontinue or abate the original suit. But if it appear before trial, the court shall cause (*m*) new process to be awarded where the first fault happened; and if after trial, a new (*n*) *venire* to have the whole (*o*) issue tried over again; because the first *venire* was executed, and the whole trial unwarranted. But (*p*) if judgment be given on a verdict by jurors appearing on a process any way erroneous, it will be totally erroneous; because the trial was wholly unwarranted, and consequently the issue mis-tried.

F. Amend. 26. 57. Enquest, 18. 29 Ed. 3. 31. B. Amendment, 10. Dis. 30.
(*n*) 6 Mod. 286, 287. F. Dis. 24. 38. 22 H. 6. 3. 4. (*o*) 2 H. 5. 3. F. Dis. 35. Vide 9 H. 4. 7.
B. Enquest, 98. (*p*) F. Judg. 12. Error, 16. 22 E. 3. 2. 7 H. 6. 28. 29 E. 3. 31.

Sect. 105. Also, as I apprehend, any other error in the process against the jurors who actually try a cause will make a (*q*) mis-trial as much as those which are called discontinuances; as where such process of this kind is awarded which is not (*r*) proper in the case, or where it is directed to a (*s*) wrong officer, or has a (*t*) wrong *visne*, or (*u*) mis-recites the former process, or is (*x*) mis-returned, or (*y*) not returned at all, &c. For if errors of this kind have such effect even in civil actions, where they are not within some of the statutes of amendments or jeofails, as it seems to

(*q*) Vide 1 Dan. Abr. 334, 335.
352. 357. 455, 456.
F. Error, 16.
(*r*) 7 H. 6. 28.
(*s*) 1 Brow. 134.
C. Eliz. 374.
586.
Moor, 356.
Yelverton, 15.
5 Coke, 36.
be (*t*) C. Eliz. 466.
Vide sup. c. 23.
(*x*) C. Jac. 467.

s. 92. 2 D. Abr. 455, 456. 21 Jac. c. 13. 16 & 17 Car. 2. c. 8. (*u*) C. Jac. 89. (*y*) Vide 21 Jac. c. 13. 1 Dan. Abr. 340, 341. 6 Coke, 163.

(z) 6 Modern, 283.
 1 Salkeld, 51.
 (a) L. quint. E. 4. 140.
 B. Amendment, 10. 17. 66. 92.
 Dis. de Pro. 4. 47.
 F. Amendment, 69. 75.
 29 Edw. 3. 32.
 (b) 21 Il. 7. 40.

be admitted that they have, it plainly follows, that they must always have it in criminal proceedings, since (z) no such proceedings are within the benefit of any of those statutes. But if an error of this kind, owing wholly to the misprision of the clerk, be discovered before trial, and the amendment of it will set the whole matter right, perhaps it may be (a) amended by the common law. And it hath been (b) holden clearly, that even a discontinuance of process may be amended by consent of the parties.

F. Amendment, 78.

(c) 10 Hen. 7. 21.
 12 H. 4. 18.
 19 H. 6. 29.
 3 H. 4. 10.
 S. P. C. 184.
 B. Att. 82. 81.
 Exigent, 20.
 Summary, 271.
 F. Amendment, 27.
 F. Dis. 40. 51.
 F. Error, 82.
 But 8 Hen. 5. 2.
 43 Edw. 3. 17, 18. 34.

Sect. 106. Howsoever an error may be so far salved by the party's appearance, that he shall be as much compellable to answer the original, as if there had been no such error: yet if he were subject to any disadvantage in respect of having such process awarded against him; as to the loss of his goods upon an *exigent*, or to the forfeiture of the privilege of appearance by attorney upon a *pluries*; he (c) shall wholly avoid such disadvantage when such award, which should have caused it, appears to be any way erroneous, whether in respect of a discontinuance or miscontinuance, or otherwise.

F. Amendment, 77. B. Appeal, 7. seem contrary.

(d) 3 Hen. 7. 8.
 9.
 F. Replead. 1.
 F. Error, 47.
 Dis. de Pro. 17.
 1 Siderfin, 100.
 260.
 B. Restitution, 8.
 B. Amendment, 60.
 9 Edw. 4. 18.
 (e) 3 Hen. 7. pl. 10.
 F. Chart. 25.
 F. Discout. 51.

Sect. 107. Also, for the like reason, it seems to be (d) agreed, that if a man be outlawed, or be condemned by default for not appearing to process, which is any way erroneous, he may take advantage of the error in avoidance of such outlawry, or other condemnation; for no one shall be condemned barely for not appearing, where that which should have compelled him to appear is defective. But it (e) seems, that a defect in process in an outlawry may be salved by the defendant's purchasing a pardon, and shewing it to the court; for that supposes that there was such an outlawry against him as needed a pardon, which if it were erroneous, it would not do.

Sect. 108. How far a discontinuance of one appeal will be a bar to another, hath been already considered, chap. 23. sect. 132.

Of Process of Outlawry.

And now I am in the second place particularly to consider the nature of process on a criminal accusation, with a particular regard to process of Outlawry only.

For the better understanding thereof, I shall consider the following points:

1. Whether process of outlawry lies in all criminal cases.
2. In what manner it is to be awarded in general.
3. What is particularly required in the award of it against the Principal and Accessary.

As to the FIRST POINT, *viz.* Whether process of outlawry lies in all criminal cases.

. Sect.

Sect. 109. I take it to be certain, that it lies in all appeals, (*f*) whether of felony or *mayhem*; in all indictments of treason or felony; on all (*g*) returns of a rescous; and also in all indictments of (*h*) trespass *vi et armis*.

Con. F. Pro. 56. 213. 29 E. 3. 18. (*h*) 22 Ed. 4. 11. Finch, 355. B. Exigent, 51. 35 H. 6. 6. 2 Hale, 194.

Also it seems probable, that it lies on an indictment of (*i*) conspiracy, or (*k*) deceit, or any other crime of a higher nature than a trespass with force and arms, but (*l*) not on any indictment for a crime of an inferior nature. (*l*)

22 H. 6. 7. (*k*) 35 H. 6. 6. (*l*) Vide 22 E. 4. 11. 35 H. 6. 6. Con. 3 H. 6. 9. Thel. b. 1. c. 15. Dyer, 213. 214. See also 4 Burr. 2558.

Sect. 110. It seems (*m*) agreed, that process of outlawry does not lie on any action on a statute, unless it be given by such statute, either expressly, as in the case of a (*n*) *premunire*, and many other cases; or impliedly, as where a recovery is given by an action wherein such process lay before. And agreeably hereto it hath been adjudged, that it lies not in an action on the statutes of (*o*) liveries, or of (*p*) maintenance, nor in (*q*) *decies tantum*, and that it lay not in a writ of (*r*) entry on 5 Rich. 2. c. 7. until it was given by 23 Hen. 8. c. 14. but that it lies on a writ of trespass for a (*s*) forcible entry on 8 Hen. 6. c. 9. because the statute expressly gives a recovery by such writ, and such process lies in it by the common law. It seems to be holden in the (*t*) Year-book of Henry the Sixth, that it lies on all indictments on statutes; but the contrary is adjudged in (*u*) 22 Edw. 4. as to the statutes against forestalling; and it is there laid down as a general rule, that it lies not on an indictment any more than in an action on a statute, unless it be expressly or impliedly given by such statute. 37 H. 6. 23. 1 Keble, 563. (*t*) 8 H. 6. 9. F. Pro. 81. (*u*) 22 E. 4. 11. B. Exigent, 51. 35 H. 6. 6. 37 H. 6. 23. 2 Hale, 194. Ld. Raym. 387.

As to the SECOND POINT, *viz.* In what manner process of outlawry is to be awarded in general, I shall observe the following particulars.

Sect. 111. FIRST, That it seems to be agreed, (*x*) that in every indictment or appeal for any crime under the degree of capital, there must be three *capias*'s to the sheriff of the same county wherein the prosecution is commenced, before the *exigent* shall be awarded, unless it be after (*y*) judgment; in which case one *capias* is sufficient.—And (*z*) *quare*, If three *capias*'s be not still necessary in an appeal of rape, as they were at the common law, notwithstanding it be made (*a*) felony by statute?

F. Exigent, 7. 27. Finch, 476. (*z*) 16 Assize, 1. 3. F. Exigent, 10. F. Corone, 173. B. Pro. 148. Exigent, 67. (*a*) Ch. 23. s. 59, &c.

Sect. 112. SECONDLY, It seems to be (*b*) agreed, that one *capias*, before the award of the *exigent*, hath always been sufficient in an indictment or appeal of death, or high treason. But it

(1) It has been determined, that outlawry lies on an information filed *ex officio* by the Attorney-General for publishing a libel. Wilkes' Case, 4 Burr. 2527. 2555.

(c) F. Cor. 184. it seems (c) doubtful whether two *capias's* were not required by the common law in all indictments and appeals of any other felony.
 234.
 22 Assize, 97.
 Con. 8 H. 5, 6.
 F. Exigent, 3. Cro. Car. 31. 2 Inst. 665. 6 Modern, 85.

Two *capias's* shall issue on an indictment of felony found at sessions before the *exigent* shall be awarded.

Sect. 113. However it is certain, that they are required in all indictments of any other felony, by 25 Edw. 3. st. 5. c. 14. by which it is recorded, "That if after any man be indicted of felony before the justices in their sessions, to hear and determine, it shall be commanded to the sheriff to attach his body by writ or precept, which is called a *capias*; and if the sheriff return in the same writ or precept that the body is not found, another writ or precept of *capias* shall be incontinently made, returnable at three weeks after. And in the same writ or precept it shall be comprised, that the sheriff shall cause to be seized his chattels, and to safely keep them till the day of the writ or precept returned. And if the sheriff return, that the body is not found, and the indicted cometh not, the *exigent* shall be awarded, and the chattels shall be forfeit, as the law of the crown ordaineth. But if he come and yield himself, or be taken by the sheriff, or by other minister, before the return of the second *capias*, then the goods and chattels shall be saved."

(d) S. P. C. 67. *Sect. 114.* It seems to have been the general (d) opinion, that this statute extends to appeals as well as indictments, though it mention only the latter; but that it extends not to any indictment or appeal of death, though it speak of felony in general.
 Summary, 209.
 A presentment is the same as an indictment, upon which process of outlawry lies. 1 Leonard, 100.

Rex v. Yendall, 4 Term Rep. 358. 2 Hale, 195. † *Sect. 115.* But it has been held, that this statute does not apply to a court of *oyer* and *terminer* and gaol delivery, but to justices of the peace in their general and quarter sessions only.

Rex v. Yendall, 4 Term Rep. 357. Rex v. Morley, For. 280. 3 Keb. 125. † *Sect. 116.* It seems also that an *alias capias* issued in pursuance of the above statute is good, although it do not contain a command to the sheriff to seize the goods of the defendant.

(e) F. Exig. 3. 28. 30. *Sect. 117.* THIRDLY, (e) That after the sheriff hath returned a *cepi*, if he have not the body at the day, the court will not award an *exigent* on the suggestion of an escape, unless the sheriff will return one.
 F. Pro. 226.
 8 Hen. 5, 6.
 1 Hen. 5, 6.
 S. P. C. 70.
 F. Exigent, 25. 30 Assize, 23.

Sect. 118. FOURTHLY, That if there be several appellees, some of which appear, and others make default, those who appear and plead a plea in abatement of the writ, or any such plea in bar as goes to the whole, the suit (f) shall be continued against those who make default by *capias* only, and no *exigent* shall issue till such a plea or pleas shall be determined.
 (f) Sum. 210.
 S.

(g) F. Exig. 26. *Sect. 119.* FIFTHLY, That an *exigent* shall (g) never be awarded to the sheriff of any other county than that wherein the offence is
 Default, 10. 97.
 22 E. 3. 11.
 30 H. 6. 2.
 11 H. 4. 72.

is laid; and that by the (h) common law (i) there was no necessity of a *capias* to the sheriff of any other county.

6 H. 6. c. 1. and 8 H. 6. c. 10. (i) Vide F. Pro. 1. 3. 34. 155. 164. 22 E. 3. 11. 47 Edw. 3. 4. Dyer, 295. 30 H. 6. 2. 11 H. 4. 72.

(h) F. Process, 4. 34.

See Preamble,

But the law relating to this matter having been altered by several statutes, I shall set forth statutes in particular, and endeavour to shew how they are to be understood.

Sect. 120. By 6 Hen. 6. c. 1. it is recited, That divers of the king's subjects by false practices, covin, and conspiracy of certain evil persons, had been indicted in the king's bench of divers felonies and treasons, by suspected jurors hired and procured to the same by confederacy and covin of the said conspirators; by force of which indictments a *capias* is awarded to the sheriffs of the county where the said bench is, returnable within two or four days, at which day if the party so indicted come not, an *exigent* is awarded, whereby the goods and chattels of such persons indicted be forfeit to the king; and therefore, to provide a remedy it is ordained, "That before any *exigent* be awarded against such persons indicted in the king's bench of treason or felony, writs of *capias* shall be directed as well to the sheriff or sheriffs of the county wherein they be indicted, as to the sheriff or sheriffs of the county whereof they be named in the indictments; the same *capias* having the space of six weeks at the least, or longer time, by the discretion of the said justices, if the case require it, before the return of the same; which writs so returned, the justices shall proceed in the manner as they had done before the statute: and if any *exigent* be awarded or any outlawry pronounced against such persons indicted before the return of the said writs, the same *exigent*, so awarded, with the outlawry thereon pronounced, shall be void, and holden for none."

On indictments of felony or treason found in the king's bench, two *capias* shall issue before the *exigent* is awarded.

2 Hale, 195.

Sect. 121. By 8 Hen. 6. c. 10. it is recited, That divers persons for their private revenge, and not of right, maliciously by subtle imagination had caused and procured many people falsely to be indicted and appealed of several treasons, felonies, and trespasses, before justices of the peace and other commissioners, and justices and others having power to take indictments or appeals, in divers foreign counties, liberties, and franchises of England, in which the said liege people be not nor at any time were conversant nor dwelling; by force of which indictments and appeals, and the processes upon them made in the said counties, franchises, and liberties so indicted, the said people have been and daily be put in *exigent* and after outlawed, and thereupon their goods and chattels, lands and tenements forfeit, and they in great jeopardy of their lives, whereas the said persons so indicted, appealed, or put in *exigent*, or outlawed, had never knowledge of such indictments, appeals, exigents, or outlawries; and therefore it is enacted, "That upon every indictment or appeal, by the which any subject, dwelling in other counties than those where such indictments or appeal shall be taken, of treason, felony, and trespass, before the justices of peace, or before any other, having power to take such indictments or appeals, or other commissioners or justices, in any county, franchise, or liberty

On indictments in one county against offenders residing in another, an *alias capias* shall issue to take the offender, or to make proclamation in two counties before the return of the writ.

" of

“ of England, before any *exigent* awarded upon any indictment or
 “ appeal so taken, presently after the first writ of *capias* returned,
 “ another writ of *capias* shall be awarded, directed to the sheriff
 “ of the county, whereof he, who is so indicted, is, or was sup-
 “ posed to be, conversant by the same indictment, returnable
 “ before the same justices or commissioners before whom he is
 “ indicted or appealed, at a certain day, containing the space of
 “ three months, from the date of the said last writ, where the
 “ counties be holden from month to month; and where the
 “ counties be holden from six weeks to six weeks, he shall have
 “ the space of four months, until the day of the return of the said
 “ writ: by which writ of second *capias*, the sheriff shall be com-
 “ manded to take him which is so indicted or appealed by his
 “ body, if he can be found within his bailiwick; and if he cannot
 “ be found within his bailiwick, that the said sheriff shall make
 “ proclamation in two counties before the return of the same
 “ writ, that he which is so indicted or appealed, shall appear
 “ before the said justices, or commissioners in the county, liberty,
 “ or franchise where he is indicted or appealed (i) at the day con-
 “ tained in the said last writ of *capias*, to answer to our lord the
 “ king, or to the party, of the felony, treason, or trespass whereof
 “ he is so indicted or appealed. After which second writ of *capias*
 “ so served and returned, if he which is so indicted or appealed
 “ come not at the day of the same writ of *capias* returned, the
 “ *exigent* shall be awarded against such persons indicted or ap-
 “ pealed and every of them.—And if any *exigent* be awarded
 “ upon any such indictment or appeal against the form aforesaid,
 “ or any outlawry be upon that pronounced, as well the *exigent*
 “ so awarded as the outlawry upon that pronounced, and every
 “ of them, shall be holden for none and void; and that the party
 “ upon whom such *exigent*, against the form aforesaid, is awarded
 “ or outlawry pronounced, be not endangered or put to loss of
 “ his goods or chattels, lands or tenements, nor of his life.”

Sect. 122. But by 8 Hen. 6. c. 10. s. 4. it is expressly pro-
 vided, “ That the above recited statute, 6 Hen. 6. c. 1. concern-
 “ ing process to be made before the king in his bench, stand in
 “ force.”

And by 8 Hen. 6. c. 10. s. 5. that this present statute shall not
 extend to “ indictments or appeals taken within the county of
 “ Chester.”

And by 8 Hen. 6. c. 10. s. 6. that “ if any person shall be in-
 “ dicted or appealed of felony or treason, and at the time of the
 “ same felony or treason supposed, was conversant within the
 “ county whereof the indictment or appeal makes mention, the
 “ like process be made against such person so indicted or ap-
 “ pealed as was used before.”

Sect. 123. By 10 Hen. 6. c. 6. it is recited, that by the clause
 in the above statute, “ returnable before the same justices or
 commissioners before whom he is indicted or appealed,” some
 thought that the writ of *capias* ordained to be directed to the
 sheriff of the county whereof he that is so indicted or appealed
 was supposed to be conversant by the same indictment or appeal,
 shall

(i) The writ
 therefore must
 require the per-
 son indicted to
 appear before
 the justices at
 the return of the
 writ, 3 Term
 Rep. 502.

shall be returned before the same justices or commissioners, or other before whom the indictment or appeal was taken, and not elsewhere, and therefore to defraud and make frustrate the statutes sued to remove such indictments and appeals out of the hands of the justices or commissioners aforesaid into the king's bench and elsewhere by *certiorari* or otherwise unknown to the party so indicted or appealed, and thereupon sued the process used at the common law, before the making of the said statute, in the king's bench and elsewhere, after such removal; and therefore it is enacted, "That the said statute shall be holden and kept, and put in due execution in all points; and also that if any such indictments taken before any justices of the peace, or before any other having power to take such indictments or appeals, or other justices or commissioners in any county, franchise, or liberty of England, shall be removed before the king in his bench or elsewhere by *certiorari* or otherwise, then after such removing, before any *exigent* awarded upon any such indictment or appeal in the form aforesaid taken, that presently after the first writ of *capias* upon every such indictment or appeal awarded and returned, that another writ of *capias* be awarded, directed to the sheriff of the county whereof he that is so indicted or appealed, is or was supposed to be conversant by the same indictment or appeal, returnable before the king in his bench at a certain day containing the space of three months or four, from the date of the said last writ of *capias*, according to the manner and form that the justices of the peace, and other in the said first statute contained, ought to have done before such removing after the making of the said statute; and moreover to make process according to the effect and purport of the said statute.—And if any such *exigent* be hereafter awarded upon any such indictment or appeal after such removing against the form aforesaid, or any outlawry thereon pronounced, as well the same *exigent* so awarded as the outlawry thereupon to be pronounced, and every of them, shall be holden for, none and void, according as in the said first statute is more fully contained."

Sect. 124. It is observable, that it seems to be holden generally in many (*k*) books, that every outlawry whatever, on an indictment, or appeal against a person living in a county different from that wherein the court sits is erroneous, if no such *capias*, with a command to the sheriff to make proclamation, as is given by 8 Hen. 6. c. 10. were awarded to the sheriff of the county wherein the party is supposed to be conversant, before the award of the *exigent*: and there are (*l*) precedents wherein outlawries in appeals, originally commenced in the king's bench, have been reversed for want of such a *capias*. Yet it seems, that on the other side it may be probably argued, that indictments of treason or felony, originally commenced in the king's bench are expressly provided for by the (*m*) statute of 6 Hen. 6. c. 1. which requires, "That a *capias* having the space of six weeks or more, shall be awarded to the sheriff of the county whereof the indietee shall be named;" and this statute is taken notice of by that of 8 Hen. 6. c. 10. which expressly enacts,

(*k*) 1 Ed. 4. 1.
19 H. 6. 2.
S. P. C. 67, 68,
69.
Summary, 209.
F. Process, 103.
39 H. 6. 1.

(*l*) Rastal, 304.
Vide 19 H. 6. 2.
F. Error, 26.
Rastal, 52.

(*m*) Sup. s. 120.
2 Hale, 195.

enacts, "that it shall stand in its full force," and therefore cannot well be imagined to intend either to supersede or repeal it; especially, considering that it begins with "justices of peace," and makes no express mention of the king's bench: and it is a (n) 2 Coke, 46. (n) general rule, in the construction of statutes, that where things of an inferior degree are first mentioned, those of a higher dignity shall not be included under subsequent general words. Also it appears from the preamble of 10 Hen. 6. c. 6. that neither indictments nor appeals, removed into the king's bench by *certiorari*, were within the benefit of 8 Hen. 6. c. 10. before the making of that statute, which expressly provides for indictments and appeals so removed; and there seems at least as good reason, that indictments and appeals, originally commenced in the king's bench, shall not be taken to be within the benefit of it. To which may be added, that it seems to have been admitted in the Year Book of (o) 31 Hen. 6. that an appeal originally commenced in the king's bench is within the equity of 6 Hen. 6. c. 1. and that an outlawry thereon is erroneous, if there were no *capias* containing the space of six weeks directed to the sheriff of the county whereof the appellee is named, as that statute requires; by which it seems to be implied, that such an appeal is not within the 8 Hen. 6. c. 10. but the 6 Hen. 6. c. 1. and that the same is still in force.

(p) S. P. C. 68. *Sect. 125.* It seems to have been (p) agreed, that by force of these statutes, a *capias* shall be awarded into a county palatine, where the defendant is named of any place in such county, in any indictment or appeal. And it seems, that such *capias* shall be directed to, and returned by the (q) chancellor of such county. And it hath been (r) said, that if he will not return it, the *exigent* may be awarded, as well as if he had returned it; because the court cannot compel him to return it; and the prosecution might be unreasonable, delayed, if the proceedings were to be stayed till he should return it. But (s) Staundforde makes a *quære*, Whether the court of king's bench may not enforce a return of the writ?

(p) Sum. 209, 210.
2 Hale, 196, 197.
19 H. 6. 2.
31 H. 6. 11.
F. Corope, 19.
B. Cin. Ports, 22.
Sed vide 1 H. 6. 10.
(q) Rastal, 52.
10 H. 6. 2.
31 H. 6. 11.
Con. S. P. C. 68.
F. Process, 197.
B. Cin. Ports, 22.
(r) 31 H. 6. 11. (s) S. P. C. 69. Vide Cro. Car. 252, 253.

Sect. 126. If a defendant be expressly named of the same county wherein he is indicted or appealed, and be also named under an *alias dictus* of another, it hath been (t) adjudged, that there is no need of any *capias*, with a command for proclamation, according to 8 Hen. 6. c. 10. because that which comes under the *alias dictus* is (u) no way traversable nor material. Also if a defendant be named of B. and late of C. there is no (x) need of any *capias* to the sheriff of the county wherein C. lies, because it appears that the defendant is at present conversant at B. But if a defendant be named of no certain place at present, but only late of B. and late of C. and late of D. &c. being all of them in counties different from that wherein the prosecution is commenced, a *capias* shall go to the sheriff of (y) every one of those counties.

(t) 1 E. 4. 1.
F. Process, 103.
Dyer, 214.
B. Proclam. 5.
S. P. C. 68.
(u) Sup. c. 25.
s. 70.
(x) S. P. C. 68.
F. Process, 192.
Crompton, 152.
(y) Sum. 210.
2 Hale, 196.

Sect. 127. Notwithstanding the words are express, "that any" "outlawry pronounced contrary to the directions of the statutes" "shall

"shall be void;" yet it seems to be agreed, (z) that it is not to be taken to be utterly void, but only voidable by writ of error. (z) 39 H. 6. 1. B. Utlag. 34. Error, 16. 19 H. 6. 2. F. Error, 26. C. Eliz. 179. 3 Coke, 59. Plowden, 137. Hob. 166. 1 Burrow, 641.

† By the statute 31 Eliz. c. 3. which settles the form of proceedings in outlawry in civil cases, it is recited, "that for the avoiding of secret outlawries in actions personal against the queen's subjects having known places of their dwellings, by reason that proclamations are made in the county-courts, and in quarter-sessions, which are places remote from their dwellings, and thereby they have not any convenient notice of such suits against them;" and enacted, "That in every action personal wherein any writ of *exigent* shall be awarded out of any court, in or after the Term of Easter next coming, one writ of proclamation shall be awarded and made out of the same court, having day of *teste* and return as the said writ of *exigent* shall have, directed and delivered of record to the sheriff of the county where the defendant at the time of the *exigent* so awarded shall be dwelling, which writ of proclamation shall contain the effect of the same action: and that the sheriff of the county unto whom any such writ of proclamation shall be directed, shall make three proclamations in this form following, and not otherwise, that is to say, one of the same proclamations in the open county-court, and one other of the same proclamations to be made at the general quarter-sessions of the peace, in those parts where the party defendant at the time of the *exigent* awarded shall be dwelling; and one other of the same proclamations to be made, one month at the least before the *quinto exact*, by virtue of the said writ of *exigent*, at or near to the most usual door of the church or chapel of that town or parish where the defendant shall be dwelling at the time of the said *exigent* so awarded; and if the defendant shall be dwelling out of any parish, then in such place as aforesaid of the parish, in the same county, and next adjoining to the place of the defendant's dwelling; and upon a Sunday immediately after divine service and sermon, if any sermon there be; and if no sermon there be, then forthwith after divine service: and that all outlawries had and pronounced after the end of next Easter Term, and no writs of proclamations awarded and returned, according to the form of this statute, shall be utterly void and of none effect; and that the officer, in whose office such writs of *exigent* and proclamation shall be made, shall and may take such fees as by the statute 6 Hen. 8. c. 4. is limited and appointed in that behalf, and no greater fees in any wise: and that the sheriff for making of the proclamation, at or near to the church or chapel door, as is aforesaid, shall have twelpence."

Three proclamations shall be made in every action personal, wherein any writ of *exigent* shall be awarded, &c. 31 Eliz. c. 9. Goldsb. 128.

1 Hen. 5. c. 5.

Utlawry Br. 34.

† And by the statute 4 and 5 William and Mary, c. 22. s. 4. it is recited, "That whereas it is agreeable to justice, that proceedings to outlawries in criminal causes should be as public and notorious as in civil causes, because the consequences to persons outlawed in criminal causes are more fatal and dangerous to them and their posterities, than in any other causes;" and enacted, "That upon the issuing of any *exigent* out of any of their majesties courts, against any person or persons for any criminal matter,

A proclamation at the time of the *exigent* in criminal cases to be delivered three months before return.

“matter, before judgment or conviction, there shall also issue
 “a writ of proclamation, bearing the same *teste* and return, to
 “the sheriff or sheriffs of the county, city, or town corporate,
 “where the person or persons in the record of the said pro-
 “ceedings is or are mentioned to be or inhabit, according to the
 “form of the statute 31 Eliz. c. 3. which writ of proclamation
 “shall be delivered to the said sheriff or sheriffs three months
 “before the return of the same.”

And upon these statutes the following points have been ad-
 judged :

Rex v. Barrington, 3 Term Rep. 501.
Rex v. Yendall, 4 Term Rep. 521.
 † FIRST, That a *capias cum proclamatione* commanding the prisoner “to appear before the justices at the return of the writ,” is erroneous, for it ought to command him to render himself to the sheriff on or before the day when he was exacted, so that the sheriff might have his body before the justices on the return.

Reynolds v. Adams, 3 Term Rep. 378.
 † SECONDLY, That the *capias utlagatum* and the sheriff’s return to it must be filed with the clerk of the *exigents*.

Rex v. Yendall, 4 Term Rep. 521.
 † THIRDLY, That it is sufficient if it appear on the record that the writ of proclamation was delivered to the sheriff three months before the return of it, although it be not so expressly alleged.

Wilkes’ case, 4 Burr. 2559.
Barrington’s case, 3 Term Rep. 500.
 † FOURTHLY, That in an outlawry after conviction for a misdemeanour in publishing a libel, no proclamation is necessary, either by the common law or by the above statutes; and it seems to be the same on a outlawry after conviction in felony.

Rex v. Wilkes, 4 Burr. 2564.
 and the authorities there cited.
 † FIFTHLY, That in the description of the county court at which an outlaw is exacted, after the words, “at my county court” should be added the name of the county; and after the word “held” should be added “for the county of, &c.” naming the county for which the court was held; and therefore where in a record of outlawry in Middlesex, the sheriff stated “at my county court” without saying “of Middlesex,” and that it was “held at the house, &c.” without adding the words “for the county of Middlesex” after the word “held,” the outlawry was reversed: but in a later case (†), on an outlawry for felony, where this objection was taken, *viz.* that in the sheriff’s return to the *capias cum proclamatione*, it was only said “in my county court” without adding the name of the county, or shewing that the place where it was held was in the county, it seems to be doubted whether in any return made by a sheriff any technical form of words is necessary. This objection has however prevailed in a great variety of cases: and in cases of outlawry the most scrupulous exactness is still required.

(†) **Rex v. Barrington, 3 Term Rep. 500.**

See 4 Burr. 2564.
5 Term Rep. 204.

Rex v. Almon, 5 Term Rep. 202.
 † SIXTHLY, That the sheriff must state in his return to the writ of *exigent* the day and year of each exaction; and therefore if such a return state, that on such a day “in the thirtieth year of the reign, &c.” he exacted the defendant a third time; that afterwards on such a day (omitting the year) he exacted him a fourth time; and that afterwards, on such a day “in the thirtieth year aforesaid he exacted him a fifth time, the outlawry is erroneous;

2 Roll. Abr. 802.
2 Hale, 203.
Crosses’ case, Hardes, 6.

neous; for in a record of outlawry it is necessary to state the year of the king's reign in which every exaction happened; though that is not required in other records.

† SEVENTHLY, That if a writ of *capias cum proclamatione* command the sheriff to take the defendant "and have his body before the justices at the general sessions of the peace next after the first of February next ensuing, &c. at which said general sessions of the peace holden for the county aforesaid, to wit, on Monday the twenty-fifth day of February, &c.;" and it appears by the sheriff's return to the *exigi facias* that the defendant was a fifth time exacted on the twenty-first day of February in the same year, the outlawry thereon is erroneous, for he has a day given in court after the outlawry pronounced.

Rex v. Barrington, 3 Term Rep. 499.

† EIGHTHLY, That a *capias cum proclamatione* requiring the sheriff to proclaim the party "in open court, in the sheriff's county," without saying "county court," is good; and that in his return to this writ he need not allege that the persons proclaimed "did not appear and render themselves"; but that in his return to the *exigent* this must be alleged.

Rex v. Yendall, 4 Term Rep. 521.

† NINTHLY, That the names of the coroners need not be subscribed to the judgment of outlawry; for it is sufficient if it appear that the judgment was given by them.

Rex v. Yendall, 4 Term Rep. 521.

† TENTHLY, That it need not appear that the writs of *capias* or *exigent* were sealed by the justices of oyer and terminer.

Rex v. Yendall, 4 Term Rep. 521.

† ELEVENTHLY, That where the *exigent* is directed to a sheriff consisting of two persons, as in the county of Middlesex, saying in the return that the defendant was exacted "at my county court, &c." it is good.

Rex v. Wilkes, 4 Burr. 2560.

† TWELFTHLY, That if the sheriff's return state the place where the county court was held in the first exaction, he may, in the second, third, fourth, and fifth exaction, say "at my court held at the same place, &c."

Rex v. Wilkes, 4 Burr. 2560.

† THIRTEENTHLY, It seems also, that the second *capias* issued in pursuance of the 8 Hen. 6. c. 10. must have three of four months between the *teste* and the return, according to the direction of that statute; and that if it appear by the record that this writ had only fifteen days between its *teste* and return, the outlawry is erroneous.

Rex v. Davis, 1 Burr. 639.

† FOURTEENTHLY, It seems also, that if a *capias cum proclamatione*, issued according to the statute 31 Eliz. c. 3. be *tested* and returned on the same day, the outlawry is erroneous.

Rex v. Davis, 1 Burr. 640.

As to the THIRD POINT, *viz.* What is particularly required in the award of process of outlawry against the principal and the accessory.

Sect. 128. It is recited by the statute of Westminster the first, c. 14. "That it had been used in some counties to outlaw persons being appealed of commandment, force, aid, or receipt, within the same time that he which he is appealed for the deed is

is

is outlawed:" and thereupon it is provided, "That none be
 "outlawed upon appeal of commandment, force, aid, or receipt,
 "unless he that is appealed of the deed be attainted; so that
 "one like law be used therein through the realm: nevertheless he
 "that will so appeal, shall not, by reason of this, intermit or leave
 "off to commence his appeal to the next county against them,
 "no more than against their principals which be appealed of the
 "deed, but their *exigent* shall remain, until such as be appealed
 "of the deed be attainted by outlawry or otherwise."

In the construction of this statute the following particulars seem most remarkable:

(a) Sum. 210.
 2 Hale, 200.
 2 Inst. 183.
 S. P. C. 46. 69.
 (b) 9 Co. 119.
 (c) S. P. C. 44.
 46, 69.
 (d) Bract. 127,
 128.
 Britton, s. 5.
 2 Inst. 183.

Sect. 129. FIRST, That it seems to be (a) agreed, that it extends as well to indictments as to appeals, not only because the word (b) "appeal" in the statute may, in a large sense, be taken for an accusation in general, but because indictments are certainly as much within the reason of the statutes as appeals; and the common law, for the (c) settling whereof this statute was made, did (d) not make any distinction in this respect between appeals and indictments.

(c) 43 E. 3. 17,
 18. 34.
 44 Assize, 16.
 Rastal, 48.
 (f) Sum. 210.
 2 Hale, 200.
 2 Inst. 183.
 S. P. C. 46.
 70. 148.
 (g) Vide 43 E.
 3. 17, 18. 34.
 44 Assize, 16.
 B. Appeal, 7. 79.
 B. Hale Exig. 44.
 F. Forfeiture, 14.

Sect. 130. SECONDLY, That it seems also to be (e) agreed, that wherever some of the defendants are expressly charged as principals, and others as accessaries, before the award of the *exigent*, the outlawry thereon of those charged as accessaries, cannot be but traversable; because it appears upon the record, that the *exigent* issued contrary to the directions of the statute. But if several be outlawed on a writ of appeal, which (f) chargeth them all alike, without any distinction, I (g) see not how any advantage can be taken of the appellant's not having pursued the statute since it appears not but that he might have charged them all as principals.

(h) S. P. C. 46.
 70.
 (i) 2 Inst. 183.
 (k) Sum. 210.
 2 Hale, 200.
 The principal authorities in the old books for the maintenance of this opinion seem to be
 7 H. 4. 27.
 F. Corone, 80.
 20 E. 3. 7.

Sect. 131. THIRDLY, That it is holden both by (h) Staundforde, (i) Coke, and (k) Hale, that if an appellant take out the *exigent* at the same time against all the defendants, he must, when they appear, count against them all as principals, and shall be concluded to count against some as principals, and others as accessaries, because he has taken out such process against them which is erroneous, where all are not principals. But granting that an *exigent* taken out at the same time against all the defendants, appear to have been erroneous, when by the declaration it appears that some of the defendants are accused only as accessaries, and therefore ought not to have had an *exigent* awarded against them, till the principal had been attainted; yet seeing this is only an error in the process to bring in the defendant, and all such errors are salved by an appearance, as the law seems to be now settled, and hath been more fully shewn, sections 107, &c.

It seems (l) questionable at this day, whether an appellant may not be at liberty to declare as he pleases against defendants appearing on such an *exigent*? However it is certainly safest (m) and
 (l) See 40 Ass. 25. where it appears that persons appealed as accessaries, and brought in by *exigent*, were still proceeded against as accessaries. See also 43 E. 3. 17, 18. 35. 44 Assize, 16. B. Appeal, 7. B. Exigent, 44. F. Forfeiture, 14. (m) B. Appeal, 107. 20 E. 3. 7.

and most adviseable for an appellant, when he comes to the *exigent*, to shew which of the defendants he intends to charge as principals, and which of them accessaries, and to take out the *exigent* against the former only, and a *capias* against the others.

† But it hath been determined, that if one *exigent* be awarded against the principal and accessory together, it is error only as to the accessory. Rex v. Yendall, 4 Term Rep. 521.

Sect. 132. FOURTHLY, That it seems the better *(n)* opinion, that where there are more than one principal, the *exigent* ought not to issue till all of them are attainted. (n) 2 Institute, 183.
1 H. H. P. C. 624.
2 Hale, 200,
"Exigent," 4.

201. Plowden, 29. *dubitatur*, 7 Hen. 4. pl. 36. B. Appeal, 22. contra. F. "Exigent," 4.

CHAP. XXVIII.

OF ARRAIGNMENT IN GENERAL.

HAVING shewn in what manner a person under a criminal accusation is to be brought into court; I shall, in the next place, endeavour to shew in what manner he is to be arraigned or put upon his trial. 2 Hale, 216 to 225.

And this I shall consider,

1. As it relates to all criminals in general;
2. As it relates to principal and accessaries in particular.

As to the Arraignment of all criminals in general.

Having already shewn in the twenty-fifth *(a)* chapter that regularly the court will not arraign a man upon an indictment while an appeal for the same crime is depending against him; *(1)* (a) Sect. 15.

I shall here consider only the following particulars:

1. In what manner a criminal is to be arraigned.
2. Whether the omission of it will be error.

3. Where a person shall be arraigned upon several appeals or indictments.

As to the first particular, *viz.* In what manner a criminal is to be arraigned: I shall observe,

Sect.

(1) The court, while the mode of proceeding by appeal existed, was not peremptorily bound to suspend the arraignment upon the indictment, but would exercise its discretion according to the circumstances of the case, 4 Coke, 45. b. 47. and by

the statute of 3 Hen. 7. c. 1. the justices were ordered to proceed to try the prisoner upon an indictment of murder or manslaughter, although the year limited for the appeal was not expired.

(b) 3 Inst. 34.
 2 Inst. 315.
 Mir. c. 5. s. 54.
 (c) Bracton,
 137. p. 3.
 Britton, 14. 17.
 Fleta, l. 1. c. 31.
 (d) Bract. 137.
 3 Inst. 34, 35.
 Summary, 212.
 2 Hale, 219.
 Kelynge, 10.
 (e) F. Cor. 432.
 S. P. C. 133.
 (f) 3 Inst. 34,
 35.
 Summary, 212.
 2 Inst. 315.
 Britton, 14. 17.

Sect. 1. FIRST, That every person at the time of his arraignment, ought to be used with all the (b) humanity and gentleness which is consistent with the nature of the thing, and under no other terror or uneasiness than what proceeds from a sense of his guilt, and the misfortune of his present circumstances; and therefore ought not to be brought to the bar in a contumelious manner; as with his (c) hands tied together, or any other mark of ignominy and reproach; nor even with fetters on (d) his feet, unless there be some danger of a rescous or escape. It seems indeed to have been holden by (e) some, that this is a particular privilege of persons in holy orders; but it seems the (f) better opinion, that the law makes no distinction in this respect between them and laymen. (2)

Bracton, 137. S. P. C. 133. Kelynge, 10. 8 Modern, 83.

(g) Agreed by
 all the judges
 in the Lord
 Stafford's case.
 Raymond, 408.

Sect. 2. SECONDLY, That there is no necessity that a prisoner at the time of his arraignment hold up his hand at the bar, or be commanded so to do; for this is (g) only a ceremony for making known the person of the offender to the court; and if he answer that he is the same person, it is all one. (3)

Sect. 3. THIRDLY, That on every indictment the arraignment must be in English, by virtue of 37 Edw. 3. c. 15. by which it is enacted, "That all pleas which shall be pleaded in any courts whatsoever, before any of the king's justices whatsoever, or in his other places, or before any of his other ministers whatsoever, or in the courts and places of any other lords whatsoever, within the realm, shall be pleaded, shewed, defended, answered, debated, and judged in the English tongue, and entered and inrolled in Latin."

(h) 1 Sid. 324.
 2 Jones, 210.
 C. Eliz. 69.
 1 Salkeld, 61.
 (i) As in the
 case of Smith
 and Bowen,
 Mich. 7 Ann.
 and that of
 Widdrington
 and Charton, Trin. 11 Ann.

But it seems to have been always taken, that appeals are not within this statute, but that they are to be arraigned, and the plea of the defendant to be read, in (h) French, in the same manner as anciently. And thus I have often known it done in my own (i) experience; but upon what reason this difference between appeals and all other prosecutions is grounded, I have never heard.

10 Modern, 86. and that of Reeve and Trundal, Pas. 3 Geo. 14

† Now by 4 Geo. 2. c. 26. explained by 6 Geo. 2. c. 6. and 14. "All proceedings whatsoever in any courts of justice in England, and in the court of exchequer in Scotland, which concern the law and administration of justice, shall be in the English tongue and language only, and not in Latin or French, or any other tongue or language whatsoever."

(k) 3 Jon. 210.
 1 Siderfin, 324.
 1 Salkeld, 62.

Sect. 4. FOURTHLY, (k) That an appeal in the king's bench ought to be arraigned on the plea-side, unless it come in by *certiorari*,

(2) In Layer's case, A. D. 1722, a difference was taken between the time of arraignment and the time of trial; and accordingly the prisoner stood at the bar in chains during the time of his arraignment. 6 State Trials, 230. 8 Mod. 83.

(3) This ceremony of holding up the hand is not required in the case of a peer. 4 State Trials, 211. 508.

tiorari, in which case it is said, that it ought to be arraigned on the crown-side.

Sect. 5. FIFTHLY, That where a writ of appeal is abated, the prisoner shall not (l) be arraigned on the count at the suit of the party, because the count depends upon the writ, and that being determined, all (m) falls to the ground. Yet it seems certain, that if the writ were good, the appellee may in many cases be arraigned at the suit of the king upon the count, as hath been more fully shewn, Chapter twenty-three. (†)

As to the second particular, *viz.* Whether the omission of an arraignment will be error.

Sect. 6. It is said in the third (n) Modern Report, that an attainder of high treason was reversed for this and other errors. Neither do I find any precedent of an attainder in Coke's Entries, on an indictment of (o) treason or (p) felony, in which it is not expressed either in these words, "*ad barram hic ductus in pro-pria personâ suâ committitur mareschallo, &c. et statim de premissis*," in case of felony, or "*de altis prodicionibus*," in case of high treason, "*ei superius impositis allocutus qualiter se velit inde acquietare dicit, &c.*" or in words (q) tantamount: and therefore it is certainly safest to express it in every record of such attainder, where the party appears and is condemned, whether upon confession or verdict, or standing mute, &c. Yet I find it wholly omitted in every attainder upon an (r) appeal in Coke's Entries, and much oftener (s) omitted than expressed (t) in such attainders in Rastal.

As to the third particular, *viz.* Where a person shall be arraigned upon several appeals or indictments.

Sect. 7. It seems, that by the common law, if a man be appealed of divers robberies at the suit of divers persons, he may be severally (u) arraigned on each appeal, and then severally tried on each, that each appellant may be equally intitled to the restitution of his goods, upon the conviction of the appellee.

And in like manner at this day a person charged with several (v) indictments of robbery at the prosecution of several persons, may be severally arraigned and tried on each indictment; because the prosecutor, since the statute of 21 Hen. 8. c. 11. is intitled to a restitution of his goods upon a conviction of such an indictment, in the same manner as the plaintiff is upon a conviction in an appeal.

And it is holden both by (y) Staundforde and (z) Hale, that even a person attainted of robbery at the suit of one person, may be arraigned and tried at the suit of another, if such suit were commenced before the attainder: But *quære*; for of the authorities cited for the maintenance of this opinion, two (a) seem to be directly against it; and the (b) other, which seems most to the point, does not come up to it.

Sect. See 44 Edw. 4. 44.

Ab. F. Co. 95. See also c. 23. s. 53. and the chapter concerning the plea of Autrefois Convict and Attaint.

- (c) S. P. C. 66. *Sect. 8.* It is made a *quære* by (c) Staundforde, whether a prisoner before his attainder shall answer to divers appeals of death or rape, in the same manner as in case of robbery.

CHAP. XXIX.

OF THE PRINCIPAL AND ACCESSARY.

1 Hale, c. 55
and 56.
4 Com. c. 3.
Foster Disc. 3.

AND now I am in the second place to consider the nature of ARRAIGNMENT, so far as it particularly relates to PRINCIPALS and ACCESSARIES.

For the better understanding whereof, it may not be improper to consider.

1. In what cases, in judgment of law, a man shall be said to be a principal, and in what cases he shall be said to be an accessory.

2. Where he shall be adjudged an accessory before the fact.

3. Where an accessory after the fact.

(d) Sum. 219.
3 Inst. 139.

Keilway, 107.

F. Corone, 80.

(e) 7 H. 4. 27.

F. Corone, 80.
176. 285.

(f) Lamb. b. 2.

c. 7. f. 291.

26 Assize, 52.

B. Corone, 104.

F. Corone, 196.

Crompton, 42.

S. P. C. 43.

(g) See the books
above cited, and
Summary, 219.

Sect. 1. And First, For the better understanding in what cases a man shall be said to be a principal, and in what an accessory, having premised, that where a felony is committed by divers persons, the (d) same man may be a principal and accessory in it, and so charged in the (e) same indictment or appeal; as where A. commands B. to kill C. and afterwards actually joins with him in the fact: and having also farther premised, that it is agreed by all the books, that the man may be an accessory after the fact, by (f) receiving one who was an accessory before, as well as by receiving a principal; and that there seems to be the same (g) reason, that a man may be an accessory before the fact, by procuring another to be in such manner an accessory to the principal:

I shall endeavour to shew,

1. In what offences there can be no accessories, but all must be principals, if any way guilty.

2. Where those who only abet a fact, shall be esteemed as much principals in it as those who actually do it.

3. Where those who are actually absent when a fact is committed may be esteemed principals in it.

4. Where one shall be adjudged a principal in an offence against a statute.

5. Whether the offence of an accessory can ever rise higher than that of the principal.

As to the first particular, *viz.* In what offences there can be no accessaries, but all must be principals, if any way guilty.

Sect. 1. It seems to have been always an uncontroverted maxim, that there can be no accessaries in (*h*) high treason, or (*i*) trespass.
 Sum. 215. 1 Hale, 613. 12 Coke, 81, 82. 2 Inst. 183. B. Treas. 19. 3 H. 7. 10. F. Cor., 55. 19 H. 6. 47. S. P. C. 3. 40. B. Cor. 135. Dalton, c. 108. Crompton, 42. Coke Lit. 57. (*i*) 12 Coke, 81, 82. 2 Inst. 183. B. Rape, 3. Coke Lit. 57. 1 Hale, 613.

Also it seems to have been always agreed, that whatsoever will make a man an accessary before in felony, will make him a principal in (*k*) high treason and trespass; as (*l*) battery, (*m*) riot, rout, (*n*) forcible entry, and even in (*o*) forgery, (*l*) and (*p*) petit larceny. And therefore, wherever a man commands another to commit a trespass, who afterwards commits it in pursuance of such command, he (*q*) seems by necessary consequence to be as guilty of it, as if he had done it himself. From whence it follows, that being, in judgment of law, a principal offender, he may be tried and found (*r*) guilty before any trial of the person who actually did the fact. (*2*)

Con. Summary, 223. 1 Hale, 616. (*q*) Moor, 787. Summary, 217. Plowden, 475. Vide infra, s. 7. F. Cor. 314, 433. S. P. C. 41. Qu. Moor, 53. (*r*) B. Tres. 256. 1 Lev. 124. 29 Ass. 59. F. Assize, 291. Con. 27 Assize, 4. Qu. Vaugh. 115, 116.

Sect. 3. It was formerly a (*s*) question, whether the same receipt of an offender, which will make the receiver an accessary after the fact in the case of felony, will make him a principal in high treason, as it seems to be (*t*) settled at this day that it will? For if it should be adjudged a misprision only, as (*u*) some have contended, a man would be subject to a less punishment for receiving a traitor than for receiving a felon; for he who receives a felon is certainly liable to judgment of death, as being an accessary to the felony, but he who receives a traitor would be liable only to fine and imprisonment, as being guilty of a misprision only.

Sect. 4. It seems (*x*) agreed, that whosoever agrees to a trespass on lands or goods done to his use, thereby becomes a principal in it; but that no one can become a principal in a trespass on the person of a man by any such agreement. Also it seems agreed,

38 E. 3. 18. Co. Lit. 180. F. Gard. 89.

(1) That is, in forgery at common law, which was but a trespass or misdemeanour. Vide vol. 1. tit. "Forgery."

(2) This rule requires distinction. In that species of treason touching the death of the king, &c. every accessorial agency is, independently and in its own nature, a complete overt act of compassing; and renders the offender guilty, though the fact itself should never be attempted. But in every other species of treason, the accessorial offence is of a derivative kind; some act must be done, to which act the offender must be accessary, and out of which his guilt must spring, before he can be converted, by this rule of law, into a principal offender.

It seems therefore, that although in the event of the prosecution such an offender may be considered as a principal, yet in his progress towards conviction he ought, from a principle of natural justice, to be considered merely as in the nature of an accessary, before or after the fact; as, if under such a consideration he were tried before the person who actually did the fact, the absurdity might follow, that the accessorial agent may be convicted, and the principal who did the act, and on whose guilt the offence of the accessary must alone depend, may be acquitted. Foster, 341 to 347. and 1 Hale, 613. 2 Hale, 223.

(y) Poph. 134.
2 R. Abr. 75.

(y) agreed, that no one shall be adjudged a principal in any common trespass, or inferior crime of the like nature, for barely receiving, comforting, and concealing the offender, though he know him to have been guilty, and that there is a warrant out against him, which by reason of such concealment cannot be executed. And if he cannot be punished as a principal, it is certain that he cannot be punished as an accessory; because in such offences, all who are punished as partakers of the guilt of him who did the fact, must be punished as principals in it, or not at all. Yet if a man knowing that there is a warrant against such offender, advise and persuade him to absent himself, (z) perhaps he may be indictable for a contempt of the law in hindering the due course of justice.

(z) 2 R. Abr.
75.

(a) Dalis. 16.
3 Inst. 20, 21.
Crompton, 42.
S. P. C. 40.
(b) 12 Coke, 81.
82.
C. Eliz. 750.
2 Inst. 183.

Sect. 5. It is certain, that in (a) petit treason, and also in such felony as shall have (b) judgment of death, there may be accessaries both before and after the fact, who must be proceeded against as such, and not as principals, as shall be more fully shewn in the following part of this chapter.

(c) See the citations to the next letter.

Con. B. Appeal, 154.

(d) Sup. c. 23.
s. 19.

22 Assize, 82.
1 Hale, 613.

Also it seems, (c) that there may be accessaries before the fact in *mayhem*, but that the appellant hath his (d) election to proceed against them either as principals, or as accessaries (e). But I find it no where holden, that there can be accessaries in *mayhem* after the fact.

F. Corone, 11. 132. 215. 221. Con. 40. Assize, 1. B. Appeal. 71. 154. (e) Sup. s. 4.

(f) S. P. C. 44.
Dalton, c. 108.
B. Praemunire,
4. 6. Plowden, 697. 1 Hale, 13.

Sect. 6. I do not find it agreed, (f) whether there can be any accessaries in *praemunire*?

As to the second particular, viz. Where those who only abet a fact shall be esteemed as much principals in it as those who actually do it.

(g) Plowden,
99.

F. Corone, 90.
216. 40.

Assize, 8. & 25.
B. Corone, 11.
40 Edw. 3. 42.
22.

S. P. C. 48. 41.
44 Edw. 3. 38.

See Bract. b. 3. c. 12. s. 10, 11. 13. C. 19. s. 11. C. 21. s. 8. 10. 11. Lamb. b. 2. c. 7. s. 283. Statute of Westminster, 1. c. 14. Con. F. Cor. 433. (h) Plowden, 97. Foster, 347.

Sect. 7. It seems to have been (g) anciently the more prevailing opinion, that those only were to be adjudged principals in felony who actually did the fact; as in murder, those only who gave the mortal blow; in rape, those only who actually ravished the party, &c. and that those in the company who were only present and abetted and encouraged the doing it, were to be esteemed accessaries; or at most principals in the (h) second degree only.

(i) 11 H. 4. 13.
F. Cor. 86. 228.
B. Appeal, 32.
Moor, 53.
9 Coke, 67.
Kelynge, 47.
Plowden, 98.
4 Coke, 42.

See the cases cited to the

other parts of this and the next section, and Bk. 1. c. 13. s. 31. c. 14. s. 5. and c. 41. s. 6. (k) Bk. 1. c. 13. s. 46. Summary, 216, 217. F. Corone, 60. 314. 350. 433. B. Corone, 172. Keilw. 161. Kelynge, 47. Salkeld, 334. S. P. C. 40.

But I take it to be settled at this day, that all those who (i) assemble themselves together with a felonious intent, the execution whereof causes either the felony intended, or any other to be committed, or with an intent to commit a (k) trespass, the execution whereof causes a felony to be committed, and continuing together abetting one another till they have actually put their design

sign in execution; and also all those who are (*l*) present when a felony is committed, and abet the doing of it; as by holding the (*m*) party while another strikes him, or by (*n*) delivering a weapon to him that strikes him, or by moving (*o*) him to strike, are principals in the highest (*p*) degree, in respect of such abetment, as much as the person who does the fact, which in judgment of law is as (*q*) much the act of them all, as if they had all actually done it; (*r*) and if there were malice in the abettor, and none in the person who struck the party, it will be murder as to the abettor, and manslaughter only as to the other.

216. F. Cor. 99. 309. 433. Dalton, c. 108. Lamb. b. 2. c. 7. f. 283. 7 H. 4. 27. not to be necessary for this purpose. F. Cor. 60. 4 H. 7. 18. (*m*) Summary, 216. F. Cor. 135. S. P. C. 40. 13 H. 7. 10. (*n*) Summary, 216. 2 Inst. 41. 82. (*o*) F. Corone, 60. S. P. C. 40. Summary, 216. 4 H. 7. 18. B. Corone, 141. B. Appeal, 85. (*p*) Summary, 215, 216. Plowden, 98. Sup. c. 23. s. 76. c. 25. s. 64. and see the case of Rex v. Syms and Merryweather, Foster, c. 1. (*q*) Plowden, 98. 100. F. Corone, 60. B. Corone, 141. B. Appeal, 85. 4 Hen. 7. 18. 9 Coke, 67 (*r*) Bk. 1. c. 13. s. 49, 54.

Sect. 8. It doth not seem necessary to the making an abettor a principal, that the person on whom the felony is committed should be under any (*s*) terror from the abetment, and by reason thereof discouraged from making that defence which otherwise he might have made. But it seems to be sufficient for this purpose, that the person who does the fact is encouraged and emboldened in it from the hopes of present and immediate assistance from the abettor, whether he be within view of the fact, or (*t*) not.

And upon this ground it hath been adjudged, (*u*) that where persons combined together to stand by one another in the breach of the peace, with a general resolution to resist all opposers, and in the execution of their design a murder is committed, all of the company are equally principals, though at the time of the fact some of them were at such a distance as to be out of view.

314. 350. 433. S. P. C. 40. Vide Kelynge, 47.

Also upon the same reason it hath been adjudged, (*x*) that where a company of rogues assault a man in the highway, who escapes from them, and then one of them rides from the rest, in the same highway, and robs another out of the view of his companions, and then returns to them, they are all of them equally principals.

And the like hath been (*y*) adjudged in relation to all those who accompany one another with an intent to commit a burglary, in the execution whereof some stand to watch only in the adjacent places, and the rest actually break and enter the house.

Sect. 9. But (*z*) where divers persons accompany one another in the doing of a lawful act, and one of them happens to kill a man, he that gives the wound is only guilty of the homicide, and the rest of the company shall neither be esteemed principals nor accessaries.

Also if the act intended, (*a*) though unlawful, were a bare trespass, and one of the company be guilty of larceny, it is a felony

(*l*) See B. 1. c. 14. s. 6. Moor, 53. 2 Institute, 182. 3 Institute, 138. 59. B. Appeal, 19. 132. B. Cor. 19. 167. 183. S. P. C. 40. 44. 41. 10 E. 4. 14. Summary, 215. Presence holden in Plowden, 98. (*s*) But this seems required in Plowden, 98. (*t*) F. Cor. 60. Summary, 216. 217. 4 H. 7. 18. Salkeld, 334. 335. (*u*) See B. 1. c. 13. s. 46. Summary, 216. 217. B. Corone, 172. Salkeld, 334, 335. Keilway, 161. F. Corone, 60. (*x*) Moor, 55. S. P. C. 40. (*y*) 11 H. 4. 13. 30. Moor, 55. (*z*) Keil. 161. (*a*) Kelynge, 47. in

in such offender only, because it is a crime of a nature entirely different from that intended, and not caused by the execution of it.

(b) S. P. C. 40. *Sect. 10.* Also those who by accident are barely present when a felony is committed, and are merely passive, and neither any way encourage it, nor endeavour to hinder it, nor to apprehend the offenders, shall (b) neither be adjudged principals nor accessaries; (c) yet if they be of full age, they are highly punishable by fine and imprisonment for their negligence, both in not endeavouring (d) to prevent the felony, and in not endeavouring (e) to apprehend the offender. And (f) if they any way shewed an assent to the felony, it seems that they may be punished as principals in it; because the shewing such an assent could not but give encouragement to it.

(d) Noy. 50. Dalton, c. 108. (e) Sup. c. 12. sect. 1, 2, 3, 4. (f) Vide infra, sect. 15. S. P. C. 40. Summary, 217. F. Corone, 115. Dalton, c. 108. Lamb. b. 2. c. 7. f. 282. But F. Corone, 92. and Cromp. 41. seem contrary.

As to the third particular, viz. Where those who are actually absent when a felony is committed, may be esteemed principals in it.

Sect. 11. I take it to be a settled rule, that whosoever a man procures a felony to be committed, and is absent at the time when it is committed, and no other person but himself can be adjudged a principal in it, he shall be esteemed as much a principal as if he had been present. For no one can be (g) punished as a felon, but either as a principal or as an accessary; and therefore where the procurer of a felony cannot be punished as an accessary, because there is no other to whom he can be an accessary, he must be punished as a principal, or not at all.

(h) 4 Coke, 44. 2 Inst. 183. Crom. 44. Summary, 216. 2 Hale, 435. 615, 616. Pulton, 122. Dalton, c. 108. 9 Coke, 81. 3 Inst. 138. (i) Sum. 218. 9 Coke, 81. Kelynge, 52, 53. (k) See B. 1. c. 1. sect. 7. 1 Hale, 617. (l) Summ. 216.

And upon this ground it seems to be clear, that if a man (h) persuade another to drink a poisonous liquor under the notion of a medicine, who afterwards drinks it in his absence (i); or if A. intending to poison B. put poison into a thing and deliver it to C. who knows nothing of the matter, to be by him delivered to B. and C. innocently deliver it accordingly in the absence of A.; or if one (k) incite a madman to kill another, who afterwards kills him in the absence of the person that incited him; in all these and the like cases, the procurer of the felony is as much a principal as if he had been present when it was done. And so (l) likewise all those seem to be, who were present when the poison was infused, and privy to, and consenting to the design.

(m) 4 Coke, 44. Crompton, 44. But (m) those who only abetted the crime by their command, counsel, or advice, but were absent when the poison was infused, are accessaries and not principals.

Also if A. intending to poison B. deliver a poisonous thing to C. to be by him delivered to B. and C. knowing it to be poisoned deliver it to B. in the absence of A.; in this case C. (n) only is a principal in the felony, and A. an accessary.

Sect. 12. By force of 3 Hen. 7. c. 2. all those who are accessaries

saries before to the forcible taking away of a woman, made felony by that statute, whether they were present or absent at the time of the taking, or accessaries after, by wittingly receiving the woman so taken away, shall be punished as (o) principals. But this depends on the express words of the statute, and not on any construction from the reason of the common law.

(o) See B. 1. c. 16. p. 123. and Sum. 217. 1 Hale, 614.

As to the fourth particular, *viz.* Where a man shall be adjudged a principal in an offence against a statute.

Sect. 13. It seems to have been always generally agreed, that notwithstanding all penal statutes are to be construed strictly (p); yet wherever a statute ordains, that those who are guilty of the thing prohibited by it, shall be adjudged traitors or felons, it, by a necessary implication, makes all the procurers and abettors of it principals or accessaries before, upon the same circumstances which will make them such in a treason or felony at common law; because such persons may properly be said to have done the thing in such a manner caused by them, and consequently to come within the very words of the statute. And therefore it seems to have been generally unquestionable, that those who procure the (y) clipping of the king's coin, or other offence made high treason by statute, in such a manner as will make them principal traitors in a treason at common law, shall be adjudged principal traitors by the statute; and that those who abet a (r) petit treason, or a felony by statute, as a (s) rape, or (t) buggery, &c. shall be adjudged principals if present when it was committed, and accessaries if absent, in the same manner as in felonies at common law, unless the statute expressly provide otherwise; as that of 3 Hen. 7. c. 2. does, as hath been shewn in the foregoing section.

(p) S. P. C. 44. 19 H. 6. 47. 3 Inst. 45. 59. 72. Crompton, 42. Dalton, c. 108. Lamb. b. 2. c. 7. f. 286. Dalison, 11. 22. Summary, 215. 1 Hale, 613. Qu. Dyer, 88. Dalison, 11. Summary, 223. 2d edit. (y) Sup. sect. 2. B. 1. c. 2. s. 55. 19 H. 7. 47. S. P. C. 3. Summary, 18. (r) B. 1. (s) Summary, 187. 215. B. 1. c. 15. S. P. C. 44. 11 H. 4. 13. Dalison, 22.

F. Corone, 86. 228. B. Rape, 2, 3. (t) 3 Inst. 59. Sum. 21 Vide Foster, 355, 356.

Sect. 14. But there (u) seems to have been formerly some opinions, that the receivers of a felon by statute, shall not be adjudged accessaries to the felony after the fact, in the same manner as the receivers of a felon at common law, because such persons can in no propriety of speech be said to have done the thing prohibited, as the procurers of it may be said to have done.

(u) S. P. C. 44. sup. sect. 3.

But this seems (x) to have been more strongly holden in respect of those statutes which expressly provide that accessaries before to the offence prohibited, shall be punished as felons, &c. but say nothing of accessaries after; from which words it may be argued, that they must be either intended to exclude accessaries after the fact, or have no manner of effect.

(x) S. P. C. 44. Lamb. b. 2. c. 7. f. 284. 1 Hale, 614.

Yet I take it to be settled at this day, that in these and all other cases where a statute makes any offence (y) treason or (z) felony, it involves the receiver of the offender in the same guilt with himself, in the same manner as in treason or felony at common law, unless there be an express provision to the contrary. For since it is agreed, that such new treason or felony shall have the same construction with a treason or felony at common law

(y) Sup. sect. 3. B. Treason, 19. S. P. C. 3. 3 H. 7. 10. (z) Sum. 215. Dalison, 22. Lamb. b. 2. c. 7. f. 284. 285. 3 Inst. 45, 51. 72, 73.

(a) Sup. c. 18. to all other (a) intents and purposes; why should it not also have the same in relation to those who are to be esteemed principals and accessaries in it? And as to the objection that the receivers of the offender cannot thereby be so properly said to have done the offence, as the accessaries before, it may be answered, that they may properly enough be said to be partakers in the guilt of the offender; and what crime such a partaking shall be adjudged to amount to, is most reasonably determined by the rules of law in other cases of like nature. And as to the objection, that a statute by expressing accessaries before, must be intended to exclude accessaries after, or to have no manner of effect, it may be answered, that nothing is more common than for statutes to express those things which the law would have implied; in which cases it seems a very reasonable construction, that *expressio eorum quæ tacite insunt nihil operatur*.

As to the fifth particular, *viz.* Whether the offence of the accessory can ever rise higher than that of the principal.

(b) 3 Inst. 20. *Sect. 15.* I take it to be an uncontroverted (b) rule, that it never shall; it seeming incongruous and absurd that he who is punished only as a partaker of the guilt of another, should be adjudged guilty of a higher crime than the other. And therefore it seems clear, (c) that if a wife or servant cause a stranger to murder the husband or master, and are absent when the murder is committed, they cannot be said to be accessaries to petit treason, but to murder only, because the offence of the principal is but murder. But if such wife or servant had been (d) present when the murder was committed, they would have been guilty of petit treason, and the stranger of murder; because in respect of such presence they would have been principals in killing, as hath been more fully shewn, book the first, in the chapter of Petit Treason, section the sixth.

See also F. Corone, 216. which is an abridgement of the same case. (d) 3 Inst. 20. Summary, 24, 25. 1 Hale, 615. Dyer, 128. 254. 332. Crompton, 19. Moor, 91. Dalison, 16.

As to the SECOND POINT, *viz.* In what case a man shall be adjudged an accessory before.

(f) 2 Inst. 182. *Sect. 16.* It seems to be (f) agreed, that those who by hire, command, counsel or conspiracy, and it seems to be generally (g) holden, that those who by shewing an express liking, approbation, or assent to another's felonious design of committing a felony, abet and encourage him to commit it, but are so far (h) absent when he actually commits it, that he could not be encouraged by the hopes of any immediate help or assistance from them, are all of them accessaries before the fact, both to the felony intended, and to all other felonies which shall happen in and by the execution of it, if they do not (i) expressly retract and countermand their encouragement, before it is actually committed.

(i) 3 Inst. 51. Crompton, 42. Summary, 217, 218. Lamb. b. 2. c. 7. f. 289. 1 Hale, 537. Foster, 354. Plowden, 475, 476.

Sect. 17. But it doth not seem necessary in any indictment or appeal against a man as accessory before the fact, to set forth the special

special manner by which he abetted it, but only to charge him (*k*) generally, *quod felonice, &c. abbetavit, incitavit, et procuravit, &c.* Also the like general way of setting forth the aid given to a felon, seems to be sufficient both as to those who are (*l*) principals by being present when the felony is committed, and also as to those who are (*m*) accessories after.

(*k*) Co. Ent. 56.
57.
Rastal, 51.
F. Corone, 433.
seems somewhat
contrary.
(*l*) 4 Coke, 41.
Coke Ent. 57.
(*m*) Coke Ent.
56. Rastal, 48. 52.

Sect. 18. It cannot be doubted, but that if a man advise a woman to kill her child as soon as it shall be born, and she kill it in pursuance of such advice, he is an (*n*) accessory to the murder, though at the time of the advice, the (*o*) child not being born, no murder could be committed of it; for the influence of the felonious advice continuing till the child was born, makes the adviser as much a felon as if he had given his advice after the birth.

Also it seems (*p*) agreed, that if I command another to beat a man, and he beat him in such a manner that he dies thereof, I am an accessory before to the felony, (*q*) because it happened in the execution of a command which naturally tended to endanger the life of the other. And (*r*) *à fortiori* therefore it follows, that if a man command another to rob a man, and he in robbing him kill him; or to burn the house of J. S. and he by burning it, burn also the house of J. N.; the commander is as much an accessory to the subsequent felony as to that which was directly commanded.

(*n*) Dyer, 186.
3 Inst. 51.
Dalton, c. 108.
Lamb. b. 2. c. 7.
Crompton, 41.
1 Hale, 617.
(*o*) Sec B. 1.
(*p*) Sum. 217.
Plowden, 475.
Lamb. b. 2. c. 7.
1 Hale, 617.
(*q*) S. P. C. 41.
F. Corone, 314.
Vide Plow. 475.
Dalt. c. 108.
Crompt. 43.
(*r*) Plowd. 475.

Also it is said, (*s*) that if I command a man to rob another, and he kills him in the attempt, but do not rob him, I am guilty of the murder, because it was the direct and immediate effect of an act done in execution of my command to commit a felony.

(*s*) Plow. 475.
Dalton, c. 108.
Lamb. b. 2.
f. 286.
Crompton, 42.

But if I persuade A. to poison B. and A. accordingly give poison to B. who eats part of it, and gives the rest to C. who is killed by it, I am guilty of a great misdemeanour only in respect of C. but not (*t*) an accessory to his murder, because it was not the direct and immediate effect of the act done in pursuance of my command, but happened accidentally through the act of B. to which I being no way privy, cannot be made accessory by reason of it. Yet in this case A. is certainly guilty of the murder of C. as hath been more fully shewn, book the first (Ch. 13.).

(*t*) Plowden,
474, 475.
Dalton, c. 108.
Lamb. b. 2.
c. 7. f. 288.
Crompton, 42.

Sect. 19. It seems to be holden generally in some (*u*) books, that wherever a felony ensues and follows upon any unlawful act commanded by another, and executed in the same manner as it was commanded, the commander is an accessory to the felony. But this (*x*) seems to be too large a rule, and liable to great difficulties, unless limited by some distinctions.—But finding little in the books concerning this matter, I shall leave it to be farther considered by others.

(*u*) Plow. 475.
Moor, 487.
Dalton, c. 108.
3 Inst. 51.
(*x*) S. P. C. 41.
F. Corone, 314.
Dalton, c. 108.
Moor, 53.
Foster, 369.

Sect. 20. It seems to be (*y*) agreed, that if the felony committed be the same in substance with that which was intended, and variant only in some circumstance, as in respect of the time or place at which, or the mean whereby it was effected, the abettor of the intent is altogether as much an accessory as if there had been no variance at all between it and the execution of it; as

(*y*) Plow. 475.
Summary, 217.
1 Hale, 617.
Lamb. b. 2.
c. 7. f. 287.
3 Inst. 51.
Crompton, 42.
Dalton, c. 108.
as Foster, 370.

as where a man advises another to kill such an one in the night, and he kills him in the day, or to kill him in the fields, and he kills him in the town, or to poison him, and he stabs or shoots him.

(s) Sum. 217.
1 Hale, 617.
Plowden, 475.
Dalton, c. 108.
Lamb. b. 2.
c. 7. f. 287.
Crompton, 42.
(a) Plow. 475.
3 Inst. 51.
Dalton, c. 108.
Lamb. b. 2. c. 7.
f. 287, 288.
Crompton, 42.
Vide Foster,
370, 371.

Sect. 21. But if a man command another to commit a felony on a particular person or thing, and he do it on (z) another; as to kill A. and he kill B. or to burn the house of A. and he burn the house of B. or to steal an ox, and he steal an horse; or to steal such an horse, and he steal another; or to commit a felony of one kind, and he commit another (a) of a quite different nature; as to rob J. S. of his plate as he is going to market, and he break open his house in the night, and there steal the plate; it is said, that the commander is not an accessory, because the act done varies in substance from that which was commanded.

(b) Plow. 475.
(c) But this case is not stated in this manner, either by Laubard, Dalton, or Crompton. See Lamb. b. 2. c. 7. f. 287.
Dalton, c. 108.
Crompton, 42.
Vide Foster, 371, 372. for several observations upon this case.

Sect. 22. But it is observable, that (b) Plowden, in his report of Saunders' case, which seems to be the chief foundation of what is said by others concerning these points, in putting the case of a command to burn the house of A. which shall not make the commander an accessory to the burning the house of B. unless it were caused by burning that of A. states in this (c) manner: "If I command a man to burn the house of such an one, which he well knows, and he burn the house of another, there I shall not be accessory, because it is another distinct thing, to which I did not give assent, &c." By which it seems to be implied, that it is a necessary ingredient in such a case to make B. no accessory, that he knew the house which he was commanded to burn; for if he did not know it, but mistook another for it, and intending only to burn the house which he was commanded to burn, happen by such mistake to burn the other, it may probably be argued, that the commander ought to be esteemed an accessory to such burning, because it was the direct and immediate effect of an act wholly influenced by his command, and intended to have pursued it.

(d) Lamb. b. 2.
c. 8. f. 289.
Moor, 8.
S. P. C. 37.
Sum. 129, 219.
3 Inst. 139, 142.
(e) See B. 1. c. 7.

Sect. 23. It seems to be generally agreed, (d) that he who barely conceals a felony which he knows to be intended, is guilty only of a misprision (e) of felony, and shall not be adjudged an accessory.

But this is made a *quære* by Dalton, c. 108. 2 Inst. 183.

(f) F. Cor.
116. 172.
B. Cor. 33. 80.
15 Assize, 7.
11 H. 4. 93.
Crompton, 43.
B. Ferf. 13.
1 Hale, 615,
616.

Sect. 24. It seems to be certain, that no one can be any (f) way punished as an accessory to homicide *per infortunium*, or *se defendendo*, because they are not felonies; from whence it follows, that if he who is indicted or appealed as a principal in murder, be found guilty of such homicide only, those who are only charged as his accessories before or after, shall be discharged.

(g) 4 Coke, 43,
44.
Summary, 217.
1 Hale, 615,
616. Moor, 461. C. Eliz. 540. Crompt. 43. Dalt. c. 108.

And so also shall those (g) who are charged only as accessories before, where the principal is found guilty of manslaughter, be cause

cause that necessarily supposes the fact to have happened on a sudden; for if it had been done upon premeditation, it would have been murder.

And *quare*, If they who are charged as accessaries (*h*) after should not also be discharged at common law, where the principal is found guilty of manslaughter, and admitted to the benefit of his clergy, because in such case it could not appear by any judgment that there was a principal. But the law in this respect seems to be altered by 1 Ann. c. 9. set forth more at large in the following part of this Chapter, which makes a conviction equivalent, as to this purpose, to an attainder.

(*h*) Vide Crom. 44.
3 Inst. 55.
Moor, 461.
C. Eliz. 540.
Vide Foster, 363.

Sect. 25. Before the statute of 11 and 12 Will. 3. c. 7. accessaries to piracy were not within the purview of 28 Hen. 8. c. 15. by which piracy is triable according to the course of the common law. But for this I shall refer the reader to Book the first, chapter twenty.

As to the **THIRD POINT**, *viz.* In what cases a man shall be adjudged an accessory after: I shall endeavour to shew,

1. What kind of receipt of a felon will make the receiver such an accessory.

2. Whether it be necessary that such receiver know of the felony.

3. Where the receivers of a felon shall be excused in respect of the relation they bear to him.

4. How far the felony must be complete at the time of the receipt, to make the receiver an accessory.

As to the first particular, *viz.* What kind of receipt of a felon will make the receiver an accessory after the fact.

Sect. 26. It seems agreed (*i*) that, generally, any assistance whatever given to one known to be a felon, in order to hinder his being apprehended or tried, or suffering the punishment to which he is condemned, is a sufficient receipt for this purpose; as where one assists him with a (*k*) horse to ride away with, or with money or victuals to support him in his escape; or where one harbours and (*l*) conceals in his house a felon under pursuit, by reason whereof the pursuers cannot find him; and much more, where one harbours in his house, and openly (*m*) protects such a felon, by reason whereof the pursuers dare not take him.

(*i*) 2 Inst. 183.
S. P. C. 41.
Dalton, c. 108.
Lamb. b. 2. c. 7. f. 289, &c.
Summary, 218.
1 Hale, 618.
Dalton, c. 108.
Crompton, 43.
(*k*) Sum. 218.
Dalton, c. 108.
Crompton, 43.
(*l*) Dalton, cap. 108.

F. Corone, 427. Lamb. b. 2. c. 7. s. 291. S. P. C. 43. Crompton, 42. (*m*) 26 Assize, 47. Adj. B. Cor. 130. F. Corone, 195.

Sect. 27. Also I take it to be settled at this day, that whoever (*n*) rescues a felon from an arrest for the felony, or voluntarily (*o*) suffers him to escape, is an accessory to the felony.

(*n*) Sup. c. 21.
s. 7, 8.
F. Cor. 158.
433.
Summary, 116.
(*o*) Sup. c. 19.

Contra, F. Corone, 48. S. P. C. 43. Dalton, c. 108. 1 H. 7. 6. B. Corone, 130. sect. 10. 22. 26.

Also some have said, (*p*) that all those are in like manner guilty who oppose the apprehending of a felon.

(*p*) Sup. s. 10.
and c. 17. s. 1.

But

But for these matters I shall refer the reader to the former part of this book, wherein they are more fully handled.

(q) B. Escape. 43. Sect. 28. It seems to be holden both by (q) Brook and (r) Staundforde, that the bare receiving into one's house a person known to be a felon, is sufficient without any farther circumstances to make a man an accessory to the felony. And this seems to be favoured by the Year Books of Edward the Third (s) and Henry the Sixth (t).

(u) S. P. C. 41. Also it seems to be holden both by (u) Staundforde and (x) Dalton, that not only such a receipt of such a felon into one's house, but any other favour or aid voluntarily afforded him, as by relieving him with money, meat, or drink, is sufficient for this purpose. But it is observable, that the case in the Book of (y) Assizes whereon Dalton seems chiefly to ground his opinion, and which is more accurate than any other Year Book I met with on this subject, is of one who was indicted "for having received a felon, and for that no one by reason of him dared to take him."

Whereupon it is said by Shard; "If one receive a felon in favour and aid of the felony, I hold such a one an accessory to the felony." Also it is further observable, that the Year Book of Henry the Fourth, (z) on which the above-mentioned opinion of Brook seems to be grounded, seems to prove only that every receiver of a felon, knowing him to be such, is indictable, but not that he is indictable for felony; and the chief purport of the case is to shew, that one who, having a felon in his house, voluntarily suffers him to go at large, is not guilty of a felonious escape, unless he had arrested him. To which may be added, that (a) Lambard doth not say generally, that all those who receive a felon, knowing him to be such, are accessories after; but all those who feloniously, and with an evil mind receive a felon, &c. And Sir Edward Coke, in his (b) Second Institute, describes such accessories as those who knowing a felony receive the felon, and not only conceal his offence, but favour and aid him, that he be not known. And in his (c) Third Institute he saith, "If one receive a thief, and aid and maintain him in his felony, he is an accessory;" by which expressions it seems to be implied, that there ought to be some other circumstance besides that of the bare suffering of a person known to be a felon to be in one's house, to make a man an accessory.

(s) 9 Hen. 4. 1.
Ab. F. Cor. 76.
B. Corone, 26.
B. Escape, 43.

(a) Lamb. b. 1.
s. 289.

(b) Page 183.

(c) Page 134.
F. Cor. 427.
1 Hale, 619.

(d) 1 Hale, 620.
Dalton, c. 108.
Crompton, 42.

(e) Dalt. c. 108.
Crompton, 42.
Lamb. b. 2. f.
209. are to the
same purpose.

(f) 26 Ass. 47.
B. Corone, 103.
F. Corone, 195.
S. P. C. 41.
Summary, 219.
1 Hale, 621.
3 Inst. 139.
Lamb. b. 2.
f. 289, 290.

Sect. 29. However, it seems to be (d) agreed, that no one shall be adjudged an accessory to a felony for receiving into his house a person under bail for such crime, or for relieving with money or victuals a person so bailed, or in prison; and the reason given by (e) Dalton is, because the felony cannot be concealed, nor the trial hindered by it. And if this be a sufficient reason, why may not any other receipt or relief of a felon, whereby the felony is not concealed, nor the trial, &c. hindered, come under the like rule? as it seems (f) agreed, that the sending a letter to procure the deliverance of a felon, or the instructing him to (g) read, in order to entitle him to the benefit of clergy, shall do; and even the (h) advising

(g) 3 Inst. 139. Summary, 219. 1 Hale, 621. (h) 3 Inst. 139.

advising his friends to persuade witnesses not to come against him at his trial; and also the (i) labouring of witnesses in pursuance of such advice. And yet the two last of these practices are certainly very highly criminal; and though they do not tend totally to prevent the trial, yet are the most likely means to make it fruitless and ineffectual.

Also it seems to be agreed, that the suffering a felon to escape (k) without arresting him, (l) or the bare concealment of a felony, though they are crimes of a very high nature, do not make a man an accessory.

Sect. 30. Also I take it to have been generally agreed, before the statute of 3 and 4 Will. and Mary, c. 9. that neither the receiving of (m) other men's goods, known to have been stolen, nor the taking of one's (n) own goods again from one that had stolen them, on an agreement not to prosecute him, nor the taking of any other (o) reward on such an agreement, did make a man an accessory to the felony, unless he also had received the thief. But now it is enacted by that statute, and by 5 Ann. c. 31. s. 5. "That if any person or persons shall buy or receive any goods or chattels that shall be feloniously taken or stolen from any other person, knowing the same to be stolen, he or they shall be taken and deemed an accessory or accessories to such felony after the fact, and shall incur the same punishment as an accessory or accessories to the felony after the felony committed." And it is further enacted by 1 Ann. c. 9. "That such persons may be prosecuted for a misdemeanour, before the principal shall be convicted," as shall be shewn more at large in the following part of this chapter, sect. 44.

1 R. Abr. 67. Cro. Eliz. 486. Vide Noy, 90. (o) Sum. 130. 3 Inst. 134. 138. Lamb. 290. 2 And. Qu. Moor, 8. and Dalton, c. 108. Vide Bk. 1. c. 19. "Tit. Receivers." Appeal, 8. For the offences in buying and receiving stolen goods, vide Bk. 1. c. 19.

Sect. 31. It doth not seem to be settled, (p) whether the receipt of a felon who is pardoned by the king, but still liable to an appeal, may not make the receiver an accessory.

As to the second particular, viz. Whether it be necessary that a man know the felony in order to make him an accessory by receiving the felon.

Sect. 32. There can be no doubt but that it is necessary that such receiver have (q) notice of the felony either express or implied; and therefore it is the settled form of all (r) indictments and appeals (s) against accessories after the fact, expressly to charge them with having known that the person received by them had committed the principal felony.

429. 22 Assize, 55. Summary, 218. (s) Rastal, 43. 54. 51. Co. Ent. 56, 57. 3 Peer. Wms. 493.

Sect. 33. But it is not clearly settled, whether in some cases an implied notice of the felony be not sufficient for this purpose; as where a man receives a person attainted of felony, in the same county wherein he is attainted; in which case it hath been (t) holden, that he is an accessory to the felony, whether he had actually notice of the attainder or not; because it appears by matter of record in the same county, whereof every man is said to be

(i) 3 Inst. 139.

(k) Sum. 219.

1 Hale, 618.

Sup. s. 10. 27.

Moor, 8.

(l) Sup. s. 10. 27.

(m) Aleyn, 57.

Style, 91.

C. Eliz. 888.

Yelverton, 4, 5.

Lamb. 290, 291.

1 R. Abr. 68.

Summary, 218.

1 Hale, 619, 620.

25 E. 3. 39.

Ab. F. Cor. 126.

27 Assize, 69.

Ab. F. Cor. 208.

B. Cor. 114.

Con. Crompt.

42, 43. 39.

It is made a

Qu. Crom. 42.

and S. P. C. 43.

(n) Sum. 130.

1 Hale, 619.

Dalton, c. 108.

Moor, 8.

Crompt. 41, 42.

Lambard, 290.

Con. Crompt. 41.

Appeal, 8.

(p) Vide Plow-

den, 476.

Dalton, c. 108.

(q) S. P. C. 41.

Summary, 218.

1 Hale, 622.

(r) 7 H. 6. 42.

Ab. B. Indict. 4.

3 H. 7. 10.

B. Cor. 150.

F. Cor. 55. 285.

(s) Peer. Wms. 493.

(t) S. P. C. 41.

96.

Crompton, 43.

Dyer, 355.

F. Cor. 377.

Dalton, c. 108.

Qu. 7 Hen. 6.

42, 43. and see

1 Hale, 323.

contra.

be

(u) Co. Lit. 391. be conusant. But to this it may be answered, that felony implies in it something of wilfulness and baseness; something (u) *felleo animo perpetratum*; and that it would be extremely hard, by such a forced way of reasoning, to presume a man guilty of it, who probably may be entirely innocent; and to this opinion the greater number of (v) authorities seem to incline.

(v) S. P. C. 41. Dalton, c. 108. Lamb. 293. and see Rex v. Burridge, 3 Peer. Wms. 495. where Lord Hardwicke says, that the true way of understanding the authorities upon this point is, that "an outlawry or attainder in a particular county may, as the case shall happen to be circumstanced, be some evidence to a jury of notice to an accessory in the same county, but that it cannot with any reason or justice create an absolute legal presumption of notice, so as to excuse the not charging the fact to be done knowingly in the indictment."

As to the third particular, viz. Where the receivers of a felon shall be excused in respect of the relation they bear to him.

(x) Lamb. b. 2. Sect. 34. It seems agreed, (x) that the law hath such a regard to that duty, love, and tenderness, which a wife owes to her husband, as not to make her an accessory to felony by any receipt whatsoever given to her husband. Yet if she be any way guilty of (y) procuring her husband to commit it, it seems to make her an accessory before the fact in the same manner as if she had been sole. Also it seems agreed, that no other relation beside that of a wife to her husband, will exempt the receiver of a felon from being an (z) accessory to the felony. From whence it follows, that if a master receive a servant, or a servant a master, or a brother a brother, or even a husband a wife, they are accessories in the same manner as if they had been mere strangers to one another.

(y) Bract. l. 3. c. 32. s. 9, 10. Dalton, c. 108. See B. 1. c. 1. sect. 11, 12. F. Co. 383.

(z) Dalt. c. 108. Crompton, 42. s. 22. Summary, 219. S. P. C. 26.

As to the fourth particular, viz. How far the felony must be complete at the time of the receipt, to make the receiver an accessory.

(a) 21 Hen. 7. Sect. 35. It seems to be clearly agreed, (a) that a man shall never be construed an accessory to a felony, in respect of the receipt of an offender, who at the time of the receipt was not a felon, but afterwards becomes such by matter subsequent; as where one receives another who has wounded (b) a person dangerously, that happens to die after such receipt. For though the offender be for special reasons adjudged to some purposes guilty of homicide *ab initio*, yet he shall not be so esteemed in respect of any others but himself; for fictions of law shall never be carried farther than the reasons which introduce them necessarily require.

(b) Sup. c. 18. s. 13. c. 19. s. 25.

Having thus shewn who are to be esteemed principals, and who accessories; I am now to shew in what manner they are to be arraigned.

And I shall endeavour to shew,

1. How far it is necessary that the principal be actually attainted or convicted before the accessory shall be proceeded against.

2. Whether the accessory shall in any case be arraigned or tried before any principal hath appeared.

3. Whether

3. Whether a person charged as accessory to more than one, may be tried before all the principals have appeared.

4. Whether the principal and accessory may be both tried by the same inquest, and in what manner they are to be tried.

5. In what manner the accessory shall be tried, where his offence arises in a different county from that of the principal.

As to the First Point, viz. How far it is necessary that the principal be actually attainted (c) or convicted before the accessory shall be proceeded against.

(c) Vide 9 Ass. 5. Bract. 128. 13. 14.

and the notes to the fourth of these points.

Sect. 36. It seems clear, that whatsoever the nature of the felony be, if the principal be in such manner (d) acquitted of it, (e) whether at the suit of the king or of the party, that he may plead such acquittal in (f) bar of any subsequent prosecution for the same felony, the accessory shall not be arraigned, but shall be discharged, according to the rule, *ubi factum (g) nullum, ibi fortia nulla*.

(d) F. Ass. 291. Conspira. 4. Summary, 221. 1 Hale, 623, 624. S. P. C. 47, 48. Sup. c. 23. s. 140. F. Corone, 222. 33 H. 6. 1. 29 Assize, 59. c. 23. sect. 142.

Rastal, 57. Raymond, 477. F. Off. de Court, 23. (e) F. Cor. 277. (f) Vide sup. (g) 4 Co. 43. S. P. C. 47.

Sect. 37. How far the accessory shall be discharged upon the principal's being found guilty of manslaughter, &c. hath been already shewn, section 24.

Sect. 38. It is certain, that the *exigent* shall not be awarded against the accessory before the principal is attainted, as hath been more fully shewn, Ch. 27. sect. 128, &c.

Sect. 39. It seems also to be clear, that where the law requires the attainder or conviction of the principal before the accessory shall be convicted, it requires that such attainder and conviction of the principal be on the (h) same suit, and for the same crime, of which the accessory is to be convicted; for it is agreed, that an attainder of the principal at the suit of the (i) king no way helps the proceedings against the accessory at the suit of the party, and *sic è converso*.

(h) B. App. 19. (i) 2 Inst. 184. Plowden, 98, 99. Summary, 221. S. P. C. 47. B. Corone, 19. 7 H. 4. 27. Dyer, 133.

Also it seems to be agreed, that the attainder of the principal of one felony is no way (k) material as to the proceedings against the accessory for another.

(k) 40 Ass. 25. Summary, 221. 1 Hale, 625. 22 Assize, 40.

Sect. 40. But where the principal is actually attainted, though erroneously, of the same felony with which the accessory is charged, it seems (l) agreed, that such attainder, while it stands unreversed, is as sufficient for this purpose as it would have been if there had been no error in it. Yet it seems (m) certain, that if the principal be attainted, and then the accessory, the reversal of the attainder of the principal, *ipso facto* reverses the attainder of the accessory; and that the heir may have an assize of *mortdancer* against the lord of the fee, having entered into the lands of such an accessory, as having escheated to him by reason of the attainder.

(l) F. Cor. 58. 2 R. 3. 21, 22. Sum. 222, 223. 2 Inst. 184. Crompton, 43. B. Cor. 165. 174. S. P. C. 47. 7 H. 4. 16. 9 Coke, 68. 119.

(m) Summary, 164. 207. Sect. B. Cor. 156.

18 E. 4. 9 Crompt. 41. 1 R. Abr. 777. 9 Coke, 119. F. Mortdancer, 46.

(n) *Prea. Ann.* • *Sect. 41.* It seems to have been in a great measure settled (n) before the statute of 1 Ann. c. 9. notwithstanding the great variety of opinions in the old books concerning this matter, that whether the attainer of the principal was prevented by his (o) death, or (p) standing mute, or challenging (q) peremptorily above the number allowed him by law, or being admitted (r) to the benefit of clergy, or (s) pardoned, whether before or after his conviction, the accessory should not be arraigned.

9. (o) *B. App. 19.* *B. Corone, 86.* *H. 4. 27.* *F. Corone, 378.* *Conspi. 4.* *Respond. 35.* *F. N. B. 115.* *Summary, 221.* *44 E. 3. 7.* *33 H. 6. 12.* *21 H. 7. 31. 18.* *22 Assize, 40.* (p) *Summary, 221.* *2 Inst. 284.* *Con. F. Cor. 58.* *Qu. S. P. C. 47.* (q) *Stat. 1 Annæ, c. 9.* *Qu. S. P. C. 47.* *F. Corone, 51.* *3 H. 7. 12.* (r) *C. Eliz. 541.* *4 Coke, 43, 44.* *Summary, 221.* *3 Inst. 114. 139.* *3 H. 7. 1.* *C. Car. 556, 557.* *Cromp. 43, 44.* *Raymond, 477.* *F. Corone, 145. 176. 193. 252. 376. 450.* *B. Cor. 18. 70, 71. 83. 101. 132. 138.* *18 Assize, 13.* *26 Assize, 27.* *5 Assize, 5.* *7 H. 4. 16.* *B. Clergy, 15.* *Con. F. Cor. 58. 53. 270. 466.,* *Crompton, 42.* *10 H. 4. 15.* *B. Corone, 158.* *Qu. 3 H. 7. 12.* *S. P. C. 47 H. 48.* (s) *Sum. 221.* *F. N. B. 115.* *C. Eliz. 541.* *F. Cor. 53.* *F. Conspi. 4.* *33 H. 6. 1.* *B. Corone, 18.* *4 Coke, 43, 44.* *3 Inst. 139.* *Cromp. 44.* *3 H. 7. 12.* *7 H. 4. 16.* *Raymond, 477.* *Qu. Cromp. 42.* *S. P. C. 47.* *Con. F. Cor. 151. 260.* *B. Cor. 70.* *3 Ass. 14.* *Vide Dyer, 88.*

(t) *C. Eliz. 541.* *4 Coke, 43, 44.* *Summary, 221.* *Raymond, 477.* *Con. F. Cor. 450.* *Sect. 42.* But it seems to have been generally agreed, (t) that after the principal is actually attainted, whether after a conviction by verdict, or by (u) outlawry, &c. his death or pardon, &c. subsequent, will no way avail the accessory.

(u) *4 Coke, 43.* *Dyer, 120.* *F. Cor. 58. 93.* *4 Assize, 8.* *43 E. 3. 17.* *3 H. 7. 1.* *9 H. 4. 8, 9.* *B. Corone, 16. 5.* *B. Mainprize, 58.* *Con. as to abjuration, 7 H. 4. 16.* *B. Corone, 18.*

Sect. 43. By 1 Ann. sess. 2. c. 9. s. 1. "If any principal offender shall be convicted of any felony, or shall stand mute, or shall peremptorily challenge above the number of twenty persons, returned to serve on the jury, it shall and may be lawful to proceed against any accessory either before or after the fact, in the same manner as if such principal felon had been attainted thereof, notwithstanding any such principal felon shall be admitted to the benefit of his clergy, pardoned, or otherwise delivered before his attainer; and such accessory shall suffer the same punishment, if he or she shall be convicted, or shall stand mute, or peremptorily challenge above the number of twenty persons returned to serve on the jury, as he or she should have suffered if the principal had been attainted."

Sect. 44. By 1 Ann. sess. 2. c. 9. s. 2. which recites, "that the buyers and receivers of stolen goods had oftentimes conveyed away and concealed the principal felons, so that they could not be convicted of such principal felony, and thereby such buyers and receivers had escaped all manner of punishment, which had greatly encouraged the buying and receiving of such stolen goods," it is enacted, "That it shall and may be lawful to prosecute and punish every such person or persons buying or receiving any stolen goods knowing the same to be stolen, as for a misdemeanor, to be punished by fine and imprisonment, although the principal felon be not convicted before of the said felony, which shall exempt the offender from being punished as accessory, if the principal shall be afterwards convicted."

† By 5 Ann. c. 31. s. 6. "If any such principal felon cannot be taken so as to be prosecuted and convicted, it shall and may be lawful to prosecute and punish every such person and persons, buying or receiving any goods stolen by any such principal felon,"

“felon, knowing the same to be stolen, as for a misdemeanor,
 “to be punished by fine and imprisonment, or other such corporal
 “punishment as the court shall think fit to inflict, although the
 “principal felon be not before convict of the said felony, which
 “shall exempt the offender from being punished as accessory, if
 “such principal felon shall be afterwards taken and convicted.”

(1)

As to the SECOND POINT, viz. Whether the accessory shall in any case be arraigned or tried before any principal hath appeared.

Sect. 45. Notwithstanding the numerous (x) authorities in the old books, that an accessory shall not be compelled to answer before the principal have appeared and answered, I take the contrary opinion to be in a great measure (y) settled at this day. And yet it seems to have been always agreed, (z) that his plea cannot be tried before such appearance or attainder, (a) unless he desires it himself; in which case it is agreed, that he may be tried without the principal, according to the rule, that *quilibet potest renunciare juri pro se introducto*.

40 Edw. 3. 42. 44 Edw. 3. 7. 25 Edw. 3. 44. 40 Assize, 8. 25. B. App. 9. 189. 2 Rich. 3. 21. B. Mainprize, 58. S. P. C. 46. It is said that the law was so anciently, but that it is now changed. Yet Dalton, c. 108. seems to be for the old opinion. (y) Summary, 222. 9 Hen. 4. S. F. Cor. 77. B. Appeal, 28. S. P. C. 46. (z) Summary, 222. 1 Hale, 623. 2 Hale, 223, 224. B. Appeal, 28. 9 Hen. 4. 3. F. Corone, 77. S. P. C. 46. 1 And. 109. (a) F. Corone, 12. 124. 463. Sum. 222. S. P. C. 46.

Besides the cases above stated, s. 43. by 22 Geo. 3. c. 58. “In
 “all cases whatsoever, where any goods or chattels (except lead,
 “iron, copper, brass, bell metal and solder,) (b) shall have been
 “feloniously taken and stolen, whether the offence shall amount
 “to grand larceny or some greater offence, or to petty larceny
 “only (except where the felon shall have been already convicted
 “of grand larceny, or some greater offence), every person who
 “shall knowingly buy or receive any such goods and chattels, may
 “be

(x) B. Cor. 11.
 20. 118.
 Fort. 374.
 9 H. 7. 19.
 Bract. 128.
 139, 142, 143.
 F. Resp. 35, 36.
 F. Cor. 33.
 82. 90. 135.
 136. 216. 350.
 F. Tres. 199.
 44 Edw. 3. 38.
 9 Edw. 4. 48.

(b) This is provided for by 29 Geo. 2. c. 30. Vol. 1. p. 220.

(1) There is a case of the King v. Pollard and another, in 2 Lord Raymond, 1370, in which it is said that the prosecutor has his election whether he will prosecute for the felony or the misdemeanor. But this is denied to be law by Mr. J. Foster, (3 Discourse on Accessories,) who says that the only election the prosecutor has, is either to prosecute for the misdemeanor if the principal is not amenable to justice, or to wait until he can be apprehended, and then prosecute for the felony. But that if the principal felon be forthcoming, the accessory ought to be prosecuted for the felony. And he observes, that there was another point in the case of the King v. Pollard, namely, it was objected that the indictment did not aver that the principal felon, could not be taken, which it was contended was a necessary averment in that form of indictment. * This objection, he observes, had never been taken before, and if allowed, would have overset every former judgment on the statute, and that might have been the true ground of the court's decision. This averment, that the principal cannot be taken, or an averment that he has not been convicted, have been both held not to be necessary

averments in an indictment against a receiver (Rev. 1. Baxter, 5 Term Rep. 83.) It is there said, it being a negative averment, it is matter for the defendant to prove and not for the prosecutor.

But it is sufficient to sustain an indictment for the misdemeanor, if at the time of the prosecution, the principal felon is not amenable to justice, although before that time he might have been apprehended. In the case of one Wilkes who was convicted on the stat. 3 W. & M. c. 9. s. 4. and 5 Anne, c. 31. s. 6. for receiving stolen goods, as for a misdemeanor, it appeared that the prosecutor, some months previous, had had an opportunity of apprehending the principal felon, but suffered him to go at large. Judgment was respite on a doubt whether, as the prosecutor might once have apprehended the principal felon, it came within the meaning of the act, which speaks of cases where the principal felon “cannot” be taken. But a majority of the judges, seven against four, held that the word “cannot” in the statute, must be applied to the time of the prosecution, if the principal felon was then, without collusion, out of custody, as was then the case.

“ be prosecuted for a misdemeanor, and shall be punished by
 “ fine, imprisonment, or whipping, as the court of quarter ses-
 “ sions, or any other court shall think fit to inflict; although the
 “ principal felon or felons be not before convicted of the said
 “ felony, and whether he, she, or they is or are amenable to jus-
 “ tice or not (2).—And in cases where the felony actually com-
 “ mitted shall amount to grand larceny, or to some greater of-
 “ fence, and where the person or persons actually committing such
 “ felony shall not be before convicted, such offender or offenders
 “ shall be exempted from being punished as accessory or acces-
 “ saries, if such principal felon or felons shall be afterwards con-
 “ victed.—Provided, par. 6. that this act shall not repeal any
 “ former law against this offence, and that offenders punished
 “ under this act shall be exempted from punishment under any
 “ other act for the like offence.”

As the former statutes applied only to the receiving goods and chattels either generally or of a particular description, and not to securities for money, the statute of 3 Geo. 4. c. 24. s. 3. extended the offence to receiving securities for money, (3) by s. 3. enacts, “ That in all cases where the offence of any person re-
 “ ceiving or buying stolen goods or chattels, or any such stolen
 “ order, tally, bill, bond, warrant, debenture, or note, knowing
 “ the same to have been stolen, shall be deemed and construed
 “ to be felony, such offender shall and may be tried and convicted
 “ of such felony, as well before as after the trial of the principal
 “ felon, and whether the said principal felon shall have been
 “ apprehended, or shall be amenable to justice, or not.” (4)

And by the same statute 3 Geo. 4. c. 24. s. 4. in order effec-
 “ tually to reach the inciters to thefts, it is enacted, “ for the due
 “ punishment of accessories before the fact to burglary, robbery,
 “ and larceny, in cases where the principal offender shall not have
 “ been discovered, or shall be concealed, or not be amenable to
 “ justice;” it is enacted, “ That if any person or persons shall
 “ counsel, hire, procure, or command any other person or persons
 “ to commit any burglary, robbery, or larceny whatsoever, of the
 “ degree of grand larceny, then and in any such case (except
 “ where the person or persons actually committing any such
 “ felony as aforesaid shall have been actually convicted thereof)
 “ the person or persons so counselling, hiring, procuring, or
 “ commanding as aforesaid, shall be held and deemed guilty of
 “ and may be prosecuted for a misdemeanor, and being convicted
 “ thereof shall be liable to be imprisoned only, or to be imprisoned
 “ and kept to hard labour, in the common gaol, house of correc-
 “ tion, or penitentiary house, for any term not exceeding two
 “ years, although the principal felon or felons be concealed or be
 “ conveyed away, or be not before convicted of any such felony

(2) The principal felon may be an evidence against the receiver upon this act. Adjudged by all the judges in the case of *Rex v. Haslam*, 26 Geo. 3.

(3) Vide vol. 1. p. 236.

(4) This clause seems wholly inoperative; for with respect to orders, tallies, bills, bonds, war-

rants, debentures, or notes, the receiving or buying them, before the passing of this act, was no felony, and therefore could not be deemed and construed to be felony. And therefore it is presumed as to them the act is wholly inoperative.

"as aforesaid, and whether he, she, or they is or are amenable to justice or not; any law or statute to the contrary notwithstanding:" Provided always, "That any such offender, after having been prosecuted and convicted under this act, shall not for the same offence be afterwards punished, or liable to be punished, as an accessory before the fact, if the principal felon or felons shall be afterwards convicted."

As to the THIRD POINT, viz. Whether a person charged as accessory to more than one principal, may be tried before all of them have appeared.

Sect. 46. It seems to be holden by Sir (c) Matthew Hale, agreeably to what seems to be the stronger (d) opinion in Plowden, that if a man be indicted as accessory to more than one, and one of the principals appear and be convict, the court may, if they please, try the accessory, as being accessory to such principal, and also condemn him, if the issue be found against him; and if it be found for him, may afterwards arraign and try him as accessory to the others when they shall appear.

(c) Sum. 222.
1 Hale, 624.
(d) Plow.
98, 99.

But the contrary opinion is certainly supported by great (g) authorities; neither do I find any instance in the books wherein the Court hath actually proceeded to the trial of an accessory in such a case before all the principals have either appeared or been attainted: and (h) unless there be some very particular circumstances in the case, it cannot be doubted but that it will be a weighty motive to induce the court in discretion to respite the trial of an accessory, to shew that some of those to whom he is charged as an accessory, are neither attainted, nor have appeared; for it must be owned, that it is a strong objection against the trying him immediately, as accessory to those who do appear, that thereby the country may be subject to the trouble of attending two trials where one might do as well; and the person tried may be subject to the hardship and hazard of two trials for his life; which is contrary to the general course of the law (as shall be more fully shewn under the chapter concerning the plea of *auterfois acquit*); whereas if the trial should be deferred till all the principals be attainted or appear, he would be tried but once. (i) But if there be several principals, and a person be charged as accessory to one of them only, it seems clear, that it is no objection against his being tried as accessory to such a principal, that the others have not yet appeared, nor are attainted, &c.

(g) S. P. C. 46.
See the books
cited to section
47.
7 H. 4. 36.
Qu. B. App. 22.
7 Hen. 4. 36.
Keilw. 107.
(h) Plow. 99,
7 Hen. 4. 36.

As to the FOURTH POINT, viz. Whether the principal and accessory may be both tried by the same inquest, and in what manner they are to be tried.

Sect. 47. It seems (k) to be settled at this day, that if the principal and accessory appear together, and the principal plead the general issue, the accessory shall be put to plead also; and that

(k) Sum. 222.
1 Hale, 624.
2 Hale, 222, 223
Dyer, 120.
if 2 Inst. 184.
28 E. 3. 94.

F. Corone, 10, 11. S. P. C. 46. Rastal, 50. 52. 53. F. Exigent, 4. B. Mainprise, 3. Con. Bract, 128. 139. 142. 148. 40 E. 3. 7. F. Corone, 82. 90. 135. 216. 350. F. Trespass, 199. 40 E. 3. 42. 25 E. 3. 44. 40 Assize, 25. 44 E. 3. 8. B. Appeal, 9. F. Corone, 11. 118. F. Mainprise, 58. 2 R. 3. 21. In all which books it seems to be holden, that the accessory is not compellable to answer till all the principals be convict.

(1) See the books cited to letter k. Con. F. Cor. 10. 77. 82.
96 H. 4. 3.
7 H. 4. 36. Dyer, 120. S. P. C. 46. (m) Summary, 222. F. Corone, 10. Rastal, 50, 51, 52. 54. 9 Co. 417.

if he likewise plead the general issue, both may be tried by (l) one inquest; but that the principal must be (m) first convicted; and that the jury shall be charged, that if they find the principal not guilty, they shall find the accessory not guilty.

(n) B. Perem. 42.
2 Inst. 184.
S. P. C. 46.
Foster, 360 to 368.

But it seems agreed, that if the principal plead a plea in abatement or to the writ, the accessory shall not (n) be driven to answer till such plea be determined (1).

As to the FIFTH POINT, viz. In what manner the accessory shall be tried, where his offence arises in a different county from that of the principal.

(o) 14 Assize, 16.
43 E. 3. 17. 21. 34.
B. Cor. 93.
B. Cor. 125.
45 Assize, 9.
B. Appeal, 80.
and S. P. C. 63.
This case seems to be cited with some doubt.
(p) 3 Hen. 7. 12.
Dyer, 38, 39, 40.
7 Coke, 2.
But F. Cor. 93.
B. Cor. 125.
B. Appeal, 7. 45 Assize, 9. and S. P. C. 63. seem to be contrary. In S. P. C. 65. there is an opinion, that in this case there shall be several appeals in the several counties. But now one appeal is sufficient, in the case of murder, by force of 2 & 3 Edw. 6. 24. set forth more at large in the next section. Summary, 168. Qu. 44. Assize, 16. 43 E. 3. 17. 21. 34. (q) Dyer, 38, 39, 40. 7 Co. 2.

Sect. 48. It seems to have been (o) agreed anciently, that by the common law, if a town extend into more than one county, and a felony be committed in that part of it which lies in one county, and there were accessories in that part of it which lies in another county, an appeal may be brought against the accessories as well as the principals, in that county in which the principal felony was committed; and where the counties are at a distance, it seems that it may be probably argued, (p) that an appeal may be brought in like manner against all in the county wherein the principal felony was committed; because in an appeal the trial may be by a jury returned from each county. But where one of the counties cannot join with any other in taking an inquest, as that of London, &c. it (q) hath been adjudged, that an appeal against the accessory cannot be brought in either.

(r) Finch, 411.
B. 1. c. 13. s. 13.

Also, because there can be no (r) joinder of counties for the finding of an indictment, it seems to have been very doubtful (2) at the common law, where the offence of the accessory arose in a different county from that of the principal, whether it could be indicted at all; because the county in which it arose could not take consanguinity of the principal felony arising in another county, without which they could not find that of the accessory.

Sect.

(1) Where the principal and accessory are tried by the same inquest, the accessory may enter into the full defence of the principal, and avail himself of every matter of fact, and of every point of law tending to his acquittal; and when the accessory is tried after the conviction of the principal, if it shall come out in evidence that the offence of which the principal was convicted did not amount to felony in him, or not to that species of felony with which he was charged; or if it shall manifestly appear in point of fact that he was innocent, the accessory ought to be acquitted. M^r Daniel's Case, Foster, 121. 10 State Trials, 417. Foster's Third Discourse, 365. and Smith's Case, Cases in Cro. L. 237.—It is also said, that the production of the record of conviction of the principal is sufficient to put the accessory upon his defence. Foster, 363. But it seems that some additional evidence is necessary for that purpose, in order to apply and

connect it with the case of a prisoner indicted as accessory; for a bare unqualified record can only be evidence against those who are parties to it. O. B. 1784. p. 474. Foster, 365.

(2) Keilw. 67. The accessory in such case is said to be indictable in the county in which the principal felony was committed. But in the Year Book of 9 Edw. 4. 48. 1. abridged F. Cor. 33. and B. Indict. 52. the accessory was indicted in the county in which he was accessory, and the court wrote to the justices of the county wherein the principal felony was committed, to certify whether the principal was indicted before them. And in S. P. C. 90. this case is holden to be law. See also 3 Inst. 49. 135. But in S. P. C. it is said, that there was no remedy at common law against the accessory where his offence was in a different county from that of the principal. See 1 Hale, 623.

Sect. 49. But these matters are fully cleared by the statute of 2 and 3 Edw. 6. c. 24. s. 3. by which it is enacted, "That an appeal of murder may be sued in the same county where the party feloniously stricken or poisoned shall die, as well against the principals as accessaries, in whatsoever county or place the accessaries shall be guilty; and the justices before whom any such appeal shall be commenced, sued, and taken, within the year and day after such murder and manslaughter committed and done, shall proceed against such accessaries in the same county where such appeal should be so taken, in like manner and form as if the same offence of accessaries had been committed in the same county where such appeal shall be so taken, as well concerning the trial by the jurors, or twelve men of such county where such appeal shall be taken upon the plea of not guilty, as otherwise."

Vide Rex v. Burridge, 3 Peere Will. 466, 494.

Sect. 50. And by 2 and 3 Edw. 6. c. 24. s. 4. "That where any murder or felony shall be hereafter committed and done in one county, and another person, or more, shall be accessory or accessaries in any manner of wise to any such murder or felony in any other county, that an indictment found or taken against such accessory or accessaries upon the circumstances of such matter before the justices of peace, or other justices or commissioners to inquire of felonies in the county where such offences of accessory or accessaries in any manner of wise shall be committed or done, shall be as good and effectual in the law, as if the said principal offence had been committed or done in the same county where the same indictment against such accessory shall be found: and that the justices of gaol-delivery, of *oyer and terminer*, or two of them, of or in any such county where the offence of any such accessory shall be hereafter committed and done, upon suit to them made, shall write to the *custos rotulorum*, or keepers of the records, where such principal shall be attainted or convicted, to certify them whether such principal be attainted, convicted, or otherwise discharged of such principal felony; who, upon such writing to them, or any of them, directed, shall make sufficient certificate in writing, under their seal or seals, to the said justices, whether such principal be attainted, convicted, or otherwise discharged, or not: and after they that so shall have the custody of such records, do certify that such principal is attainted, convicted, or otherwise discharged of such offence by the law; that then the justices of gaol-delivery, or of *oyer and terminer*, or other thereto authorised, shall proceed upon every such accessory, in the county where such accessory or accessaries became accessory, in such manner and form as if both the said principal offence and accessory had been committed and done in the same county where the offence of accessory was or shall be committed or done: and that every such accessory shall answer upon his arraignment, and receive such trial, judgment, order and execution, and suffer such forfeitures, pains and penalties, as is used in other cases of felony; any law or custom to the contrary before used in any wise notwithstanding."

In the construction of this statute, the following points seem most remarkable, viz.

Coke, 118.
Vide sup. c. 25.
sect. 60.

Sect. 51. FIRST, An indictment against an accessory, in pursuance of this statute, in the county wherein he was accessory, ought expressly to recite that the principal did the felony in the other county, and not barely that he was indicted for it; for that is only an argument, and no direct affirmation that he did it.

(a) 3 Inst. 49.
135.
9 Coke, 118.
Summary, 223.
See the notes to
sect. 48. under
letter (q).
(b) 3 Inst. 49.
135.

Sect. 52. SECONDLY, The court of (a) king's bench, in relation to a person there indicted as an accessory in the county wherein the said court happens to sit, to a felony in another county; and the lord (b) high steward, in relation to a peer to be tried before the lords on an indictment against him as accessory in one county to a felony in another; are within the purview of the said statute; not only because it is a remedial law, and made to supply a very mischievous defect of the common law, which oftentimes necessarily occasioned a failure of justice, and therefore ought to have a beneficial construction; but also because the court of king's bench, being the (c) supreme court of *oyer* and *terminer*, and gaol-delivery, may naturally be included in the very words of a statute which gives such justices any new power; or if it be not thought to be strictly within the words, it is at least within the meaning of them, which otherwise would give a higher privilege to an inferior court than to a superior: and the like in effect may be said in the case of the lord (d) steward, who by the words of his commission, as well as the nature of the thing, seems to be a justice of *oyer* and *terminer*, and within the very words of the statute, or at least within the meaning. To which may be added, that these words in the latter part of the statute, "That the justices of gaol-delivery, or of *oyer* and *terminer*, or other there authorized, shall proceed against such accessories," &c. seem plainly to imply, that such other so authorized may also send for a certificate of the record relating to the principal; for nothing can be more natural than to expound one part of the statute by another. As to the objection, that the words of the statute are, that the said justices, "or two of them," shall write to the *custos rotulorum*, &c. and therefore that the lord steward cannot do it, because he is but one, it may be (e) answered, that those words are to be thus construed, that where there are two or more such justices, they must write, &c. but not where there is but one.

(c) Vide sup.
c. 3. sect. 11.

(d) 3 Inst. 136.

(e) 3 Inst. 136.

(f) Dyer, 253,
54.
12 Coke, 32.
But Sir F. Coke,
in 3 Inst. 49.
135. seems to
make it neces-
sary for the jus-
tices of the
king's bench
only to write in
the king's name.

Sect. 53. THIRDLY, Not only the justices of the king's bench, the pleas before whom are properly styled (f) *placita coram rege*, and not *coram justiciariis*, but any other justices, writing for a certificate in pursuance of the statute, ought to do it by writ in the king's name, and not by a precept in their own names, and under their own seals, and the reason given by Dyer is, because it is a writing from justices to justices.

(g) 3 Inst. 49.
136.

Sect. 54. FOURTHLY, Where some of those supposed to have been accessories to a felony in a different county, are proceeded against in the king's bench, in pursuance of the statute, if there be a likelihood that others will be in the same manner proceeded against in another court, it seems most advisable (g) to send for the

the record relating to the principal by a special writ formed upon the matter according to the words of the statute, and not by *certiorari*, because that would wholly (h) remove the record from the court below into the court of king's bench, which might cause a doubt, whether either the court below or that of the king's bench could certify it upon a subsequent writ; for as to the court below, it might be objected, that, being no longer a record of that court, it cannot be certified by it; and as to the king's bench, it might be objected, that the principal was neither attainted nor convicted there; whereas the words of the statute are, "That the justices shall write to the keepers of the records where such principal shall be attainted or convicted." But these doubts are avoided by (i) directing a special writ to the court below, on which a special certificate shall be made in pursuance of the statute, and the record shall still remain below, and consequently may be certified from thence on a subsequent writ.

(h) Vide sup. c. 27. sec. 62 to 69. and sec. 77 to 87.

(i) 3 Inst. 49. 136.

† Sect. 55. And for preventing any failure of justice, and taking away all doubts touching the trial of *murders*, it is enacted by 2 Geo. 2. c. 21. "That where any person shall be feloniously stricken or poisoned upon the sea, or at any place out of England, and shall die of the same within England; or shall be so stricken or poisoned within England, and die of the same upon the sea or out of England; an indictment by the jurors of the county in which such death, stroke, or poisoning shall respectively happen, whether found before the coroner, or before justices of the peace, or other justices or commissioners who have authority to inquire of murders, shall be good as well against the principal as the accessary; and the gaol-delivery and *oyer* and *terminer* for the county, and also any superior court, into which the indictment shall be removed by *certiorari*, may proceed therein in all points as if the fact had been wholly committed in the said county. And the offenders shall be entitled to all and the same advantages, &c. except challenges for the hundred."

Murder, how it may be tried as if it had wholly happened in England.

CHAP. XXX.

OF STANDING MUTE.

HAVING shewn in what manner a prisoner is to be arraigned, I am in the next place to examine in what manner he is to be dealt with afterwards; and to that end shall endeavour to shew,

1. What is to be done with a prisoner in standing mute.
2. What is to be done with a prisoner upon his confession.

3. What is to be done with a prisoner upon his pleading.

And FIRST, As to the prisoner's standing mute, I shall consider,

1. Where he shall be said to stand mute.
2. How it shall be tried whether he do so of malice, or by the act of God.
3. What shall be done where one is found to stand mute by the act of God.
4. Where he who stands mute shall be awarded to the same execution as if he had not stood mute, and where he shall be adjudged to his penance.
5. What is the nature of such penance.
6. What he shall forfeit, and to whom.
7. Whether the prosecutor of an indictment or appeal of larceny be entitled to a restitution of the goods stolen, upon the defendant's standing mute.
8. Where one that stands mute shall have the benefit of clergy.

As to the FIRST POINT, *viz.* In what cases a man shall be said to stand mute.

Sect. 1. I take it to be agreed, that he who answers impertinently, or ineffectually, or refuses to put himself upon his trial in such manner as the law directs, may as properly be said to stand mute as he who makes no answer at all; as where a man (a) refuses to plead a plea in chief, or the general issue, but insists on some frivolous defence, or even to plead a good (b) dilatory plea, and refuses to plead over to the felony, in which case after such a plea is found against him, he shall not (c) be admitted to plead in chief, but shall be adjudged to his penance in the same manner as if he had made no plea at all. And so shall he who pleads a good plea in chief, or the general issue, but (d) refuseth to put himself upon the inquest (that is, to be tried by God and his country if a commoner, or by God and his (e) peers if a lord) or to wage battle where such trial is (f) allowed.

(a) Dyer, 49.
241.

2 Hale, 316, 317.
Summary, 226.
S. P. C. 150.

(b) Keilw. 70.

Vide B. Cor. 22.

(c) Keilw. 70.

(d) B. Pain. 2.

14, 15.

S. P. C. 150.

B. Appeal, 93.

2 Inst. 178.

Summary, 226.

F. Corone, 27.

30. 359. 4 E. 4. 11. 7 E. 4. 29. 14 E. 4. 7. 3 Inst. 227. B. Cor. 149. 8 E. 4. 3. (e) Kely. 57.

(f) See post, c. 44. S. P. C. 81.

(g) 2 Inst. 178.

(h) Sum. 259.

Sect. 2. It seems to be holden in the (g) Second Institute, and also in the latter part of Sir Matthew Hale's Pleas of the (h) Crown, that if a prisoner on his trial peremptorily challenge above the number allowed him by law, he shall not be dealt with as one that stands mute, but shall be hanged: but this very point is made a *quare* in another (i) part of Hale's Pleas of the Crown, and also in (k) Kelynge; and the contrary is holden in the Third (l) Institute: neither does it seem easy to assign a reason why he who challenges more jurors than he ought, shall, in respect of an implied refusal of a legal trial, be thought worthy of a greater punishment than he who obstinately, directly, and expressly refuses

(i) Sum. 226.

(k) Kely. 36.

(l) 3 Inst. 227.

fuses it. To which may be added, that there seems to be but one (m) full authority in the old books for the maintenance of this opinion, whereas there is a great (n) number of the other side (l). (m) 3 H. 7. 12. F. Corone, 56. B. Corone, 136. B. Pain. 5. And note, there

is no other authority cited for this opinion by Coke, Hale, or Kelynge. 2 Inst. 178. Summary, 259. Kelynge, 36. (n) F. Cor. 359. 3 H. 7. 12. Abr. F. Cor. 51. B. Clergy, 27. And note that this case is the more remarkable, because of the very same year with the former, and subsequent to it. Vide Kelynge, 36. 3 H. 7. 2. 5. The like is said to be adjudged by all the justices but Keble; and this case is adjudged. B. Appeal, 82. B. Pain. 4. 2 Hale, 316.

Sect. 3. But it is clear, (o) that he who demurs in law to an indictment or appeal, shall not be esteemed to stand mute, nor be dealt with as such, as having refused a trial by his country, for he puts himself upon a trial by the court, which is the proper trial of a matter in law. (o) See the next chapter, sect. 5.

Sect. 4. Also it seems clear, that after a man hath (p) confessed himself guilty, or pleaded, and put himself upon his (q) country, he shall not afterwards be demeaned as one that stands mute, in respect to his subsequent silence; but the jury shall be charged, and the trial shall proceed, and the like judgment shall be given as in common cases. (p) S. P. C. 150. Same point admitted, 8 H. 4. 3. 5. which is abridged, B. Pain. 2. But in these books it is incidentally

holden, that where a man does not confess, but pleads not guilty, and after stands mute, he shall be put to his penance. (q) Kelynge, 36, 37. Summary, 225, 226. 2 Hale, 316. 15 Edw. 4. 33. Abr. B. Penance, 9. B. Corone, 51. Con. 8 Hen. 4. 3, for which see the note next above.

As to the SECOND POINT, viz. In what cases, and in what manner it shall be tried, whether one who stands mute do so of malice, or of the act of God.

Sect. 5. It seems agreed, (r) that where a prisoner wholly stands mute without making any answer at all, the court shall take an inquest of office by the oath of any (s) twelve persons that (t) happen to be present, whether he do so of malice, or by the act of God. But (u) after an issue hath been joined, if the prisoner stand mute when the jury are in court, if there be any need for such inquiry, it shall be made by them, and not by an inquest of office. (r) Sum. 225. S. P. C. 150. 2 Inst. 177, 178. 8 H. 4. 1. F. Cor. 71. 225. 43 Assize, 30. B. Appeal, 24. (s) Rast. Ent. 385. 3. (t) 8 Hen. 4. pl. 1, 2.

F. Corone, 71. B. Appeal, 24. (u) S. P. C. 150. from the authority of 8 Hen. 4. 3. for which see the notes to the precedent section.

Sect. 6. Where (x) a man answers, but not effectually, it seems needless to make any inquiry whether his refusal be owing to his malice or not, because it is apparent. (x) Sum. 226. S. P. C. 150. 2 Inst. 177, 178. 2 Hale, 317.

As to the THIRD POINT, viz. What shall be done where one is found to stand mute by the act of God.

Sect. 7. It is agreed, (y) that in such a case, the judges of the court (who are always to be of counsel with the prisoner, to see that he have law and justice) shall not only cause the felony to be inquired of, but also whether the prisoner be the same person, and all other matters which he might have pleaded in his defence. (y) S. P. C. 150. 2 Inst. 177, 178. Cases in Crown Law, 358.

And

(1) A prisoner thus perversely and obstinately offending is, in high treason, *ipso facto*, attainted. 2 Hale, 268. And in felony the challenge shall be overruled. 2 Hale, 376. Vide infra, sect. 7. notes.

- (z) Sum. 225. And such inquiry shall be made, as I suppose, not by an inquest of office, but by a jury returned by the sheriff in the same manner as if the defendant had actually pleaded; for since it is no way his fault that he did not so plead, there is no reason why his trial should be in a more loose and summary manner, or any way less regular or solemn, than if he had. To which may added, that Sir Matthew Hale, saith, (z) "that the felony shall be inquired of, &c. in the same manner as if the prisoner had pleaded "not guilty;" from which words it seems plain, that, in his opinion, the inquiry ought to be by an inquest returned by the sheriff as in the other trials at the mise of the parties, because if the defendant had pleaded, it must certainly have been so. And therefore it seems reasonable, that where Sir William Staundforde (a) having spoke of such inquiry adds immediately, that "it is but an inquest of office," ought to be understood, not of the inquiry of the felony, whereof he had last spoken, but of the inquiry whether the prisoner stood mute of malice, or by the act of God, whereof he had spoken in the sentence next before; and I the rather incline to think that this is his meaning, because the (b) books cited by him, to this point, relate to this inquiry only (1).
- (a) S. P. C. 150.
- (b) F. Cor. 225.
43 Assize, 30.
8 H. 4. 1.
2 Hale, 316,
317. accords.

As to the FOURTH POINT, viz. In what cases he that stands mute shall be awarded to the same execution as if he had not stood mute, and where he shall be adjudged to his penance, I shall consider,

1. What shall be done to him who stands mute after an attainder.
2. What to a person arraigned for high treason.
3. What to one arraigned for petit larceny.
4. What to one arraigned for felony by statute.
5. What to one arraigned upon an appeal.
6. What to one indicted of a capital felony or petit treason.

As to the first particular, viz. What is to be done to him who stands mute after an attainder.

- (c) Sum. 226. Sect. 8. It seems to be settled (c) at this day, that wherever one who is attainted, either by judgment on a verdict, or confession, or by outlawry, or abjuration, stands mute to the demand why execution should not go against him, he shall not be awarded to his penance, but to the same kind of execution, if any, that would have been awarded, if he had not stood mute.
- (c) Sum. 226.
2 Hale, 315. 316.
Kelynge, 36.
S. P. C. 150.
So adjudged,
8 Hen. 4. S.
Ab. B. Pain. 2.
B. Corone, 22.
as to the cause
of abjuration or any other attainder after a confession; but the contrary is insinuated as to other attainders. But in 26 Assize, 19. Ab. F. Cor. 191. B. Pain. 12. F. Cor. 99. one who had abjured, standing mute, was put to his penance and not hanged.

Yet

(1) Old Bailey session, 1778. (No. 32.) Francis Mercier, on his arraignment for murder, stood mute. The sheriff was directed to return a jury to inquire whether it was "through obstinacy or the visitation of God."—The jury found that he stood mute

"fraudulently, wilfully, and obstinately, and not "by the providence of God." The judge immediately passed sentence, and he was executed. Vide 12 Geo. 3. c. 30. Infra, sect. 25.

Yet there seems to be this difference, that where one who hath always continued in prison, after an attainder by verdict or confession, stands mute to the demand why execution should not go, it shall be awarded (*d*) against him, without any inquiry whether he stand mute by malice, or otherwise, or whether he be the same person who is so attainted or not; because it sufficiently appears that he is the same person, and that is sufficient to justify an award of execution against him, where nothing appears to the contrary. But if a person so attainted, be retaken after an escape; or if one be taken after an outlawry or abjuratiop, and stand mute to the demand, why execution should not go against him? it shall be inquired, whether he stand mute of malice, or of the act of God; and if it be found of malice, it seems that execution shall be awarded without any farther inquiry: (*e*) but if it be found to be of the act of God, it seems, that it ought to be also inquired, whether he be the same person or not, in the same manner as where one stands mute by the act of God, when first brought upon his trial.

(*d*) S. P. C. 150.
10 Edw. 4. 19.
26.
F. Corone, 36.
B. Corone, 155.

(*e*) S. P. C. 150.
10 Edw. 4. pl.
19. pl. 26.
F. Cor. 36.
B. Corone, 155.

As to the second particular, *viz.* What is to be done to one who stands mute to an arraignment for high treason.

Sect. 9. It is clearly settled (*d*) at this day, that standing mute upon an arraignment for high treason is equivalent to a conviction by verdict or confession, and consequently subjects the criminal to the same kind of judgment and execution as such a conviction would do. But I take it for granted, that such standing mute must in (*g*) like manner appear to be obstinate: and that if it be found to be the act of God, the whole matter shall in like manner (*h*) be inquired of, as hath been more fully shewn in the former part of this chapter. But where such person appears to stand obstinately mute, I do not find it any where holden, that there is any necessity that he probably appear to be guilty, or that any evidence be examined to prove him so, before he shall be condemned or executed. But this is advisable, where one stands obstinately mute on an arraignment for felony by statute, as shall be more fully shewn in the fourteenth and fifteenth sections.

(*f*) Sum. 226.
2 Hale, 317.
Skinner, 145.
Savile, 56.
Kelynge, 57.
Dyer, 205.
1 Inst. 177.
B. Pain. 19.
Co. Lit. 391.
3 Inst. 14.
S. P. C. 150.
Con. F. Cor.
283.

(*g*) Vide sup.
sect. 5, 6, 7.
18 Ed. 3. 26.
S. P. C. 150.
(*h*) S. P. C. 150.

As to the third particular, *viz.* What is to be done to one who stands mute to an arraignment for petit larceny.

Sect. 10. I take it to be agreed (*i*) that if a man appear to stand obstinately mute on an arraignment for petit larceny, he shall have the like judgment, &c. as if he had confessed the indictment.

(*i*) 2 Inst. 177.

As to the fourth particular, *viz.* What is to be done to those who stand mute to an arraignment for felony by statute.

Sect. 11. It is expressly enacted by 33 Hen. 8. c. 12. s. 12. "That if a person indicted, and arraigned of treason, misprision of treason, murder, manslaughter, or bloodshed, &c. against that act, within the verge of the court, shall obstinately refuse to answer directly, or shall stand mute, he shall have the like judgment, &c. as if he were found guilty, &c." But (*k*) where a statute, as that of piracy, &c. ordains a trial by the common course

(*k*) Dyer, 241.
3 Inst. 114.
2 Hale, 320.
St. Tr. 367.
S. P. C. 150.
Summary, 226.
2 Hale, 318, 319.

course of the law, it hath been adjudged, that the criminal shall have judgment of his penance, &c. as in other felonies.

As to the fifth particular, *viz.* What is to be done to one who stands mute to an arraignment on an appeal.

(l) *Sum.* 226.

Sed 2 *Hale*,

317. 322. *con.*

(m) *S. P. C.* 150.

(n) *B. Pain.* 8.

19.

(o) 2 *Inst.* 178,

179.

(p) *Kelynge*, 37.

(q) 8 *Hen.* 4. 1.

Ab. B. Pain. 1.

B. Forfeit. 11.

B. Appeal. 24.

F. Corone, 71.

4 *Ed.* 4. 11. 18.

Ab. F. Cor. 71.

B. Appeal, 93.

B. Pain. 14.

43 *Assize*, 30.

Ab. B. Pain. 13.

B. Appeal, 78.

B. Corone, 123 or 124.

F. Corone, 225; and in

14 *Edw.* 4. pl. 7. this point is made a *quere*; but in the very next folio, pl. 17. *Ab. B. Corone*, 161.

it is adjudged by all the justices, that the appellee in such case should have his penance. (r) 21 *Ed.* 3.

pl. 18. *Ab. B. Pain.* 8.

B. Appeal, 40.

B. Corone, 43.

But neither *F. Corone*, 56. nor 3 *Hen.*

7. 2. pl. 5. nor 3 *Hen.* 7. 12. pl. 5. cited by *Staundforde*, seem to come up to this point, but rather to be

authorities of the other side. See *B. Corone*, 82. (s) *Vide* *sup.* c. 15. sect. 41.

authorities of the other side. See *B. Corone*, 82. (s) *Vide* *sup.* c. 15. sect. 41.

authorities of the other side. See *B. Corone*, 82. (s) *Vide* *sup.* c. 15. sect. 41.

authorities of the other side. See *B. Corone*, 82. (s) *Vide* *sup.* c. 15. sect. 41.

authorities of the other side. See *B. Corone*, 82. (s) *Vide* *sup.* c. 15. sect. 41.

authorities of the other side. See *B. Corone*, 82. (s) *Vide* *sup.* c. 15. sect. 41.

authorities of the other side. See *B. Corone*, 82. (s) *Vide* *sup.* c. 15. sect. 41.

authorities of the other side. See *B. Corone*, 82. (s) *Vide* *sup.* c. 15. sect. 41.

authorities of the other side. See *B. Corone*, 82. (s) *Vide* *sup.* c. 15. sect. 41.

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authorities of the other side. See *B. Corone*, 82. (s) *Vide* *sup.* c. 15. sect. 41.

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authorities of the other side. See *B. Corone*, 82. (s) *Vide* *sup.* c. 15. sect. 41.

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authorities of the other side. See *B. Corone*, 82. (s) *Vide* *sup.* c. 15. sect. 41.

authorities of the other side. See *B. Corone*, 82. (s) *Vide* *sup.* c. 15. sect. 41.

authorities of the other side. See *B. Corone*, 82. (s) *Vide* *sup.* c. 15. sect. 41.

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authorities of the other side. See *B. Corone*, 82. (s) *Vide* *sup.* c. 15. sect. 41.

authorities of the other side. See *B. Corone*, 82. (s) *Vide* *sup.* c. 15. sect. 41.

Sect. 12. It is holden by Sir Matthew Hale, (l) that an appellee of felony standing mute shall not have judgment of penance, but to be hanged; but this is made a *quere* in (m) *Staundforde*; and (n) *Brook*; and the contrary opinion seems to be favoured by Sir (o) *Edward Coke*, and is expressly holden by (p) *Kelynge*, and supported by several (q) resolutions in the old books; whereas the Year Book of Edward the Third (r) seems to be the only resolution in favour of the other side. To which it may be answered, not only that three of the above-cited resolutions to the contrary are much later, but also that the appellee in this case appears to have been taken with the *mainour*, (s) which probably might be a circumstance of considerable weight in the judgment.

As to the sixth particular, *viz.* What is to be done to one who stands mute to an indictment of a capital felony, or a petit treason.

Sect. 13. It is enacted by the (t) above-mentioned statute of Westminster the first, c. 12. "That notorious felons which

"openly be of evil fame, and will not put themselves in inquests
"of felonies, that men shall charge them with before the justices
"at the king's suit, shall have strong and hard imprisonment, as
"they which refuse to stand to the common law of the land."
But this is not to be understood of such prisoners as be taken on light suspicion.

Sect. 14. Sir (u) *Edward Coke*, in the construction of this statute, saith, that "no person shall be put to this punishment, unless the matter be evident or probable, which it is the duty
"of the judge to look into;" and Sir William (x) *Staundforde* saith, "that there ought to be evident or probable matter to convict the party of the crime whereof he is arraigned, or otherwise that he be a notorious felon, or openly of bad fame;" and therefore he advises the judge, for the satisfaction of this statute, and discharge of his duty, to examine the evidence which proves the prisoner guilty of the fact, before he proceed to the judgment of *peine forte et dure*. Yet I cannot find any book which takes notice of any examination of this kind, or of any entry that the defendant appeared to be a notorious felon, before such judgment given against him, upon his standing mute, whether upon an (y) indictment or (z) appeal: but all the books cited in the margin seem to intimate, that the standing mute is of itself a sufficient ground for such judgment. Yet all that can be inferred from thence seems to be this, that it is not necessary to make any thing

thing of this kind part of the record, it being a matter left to the discretion and conscience of the judge, and to be presumed where it is not expressed. But as to all capital appeals whatsoever, and all indictments and appeals of petit treason, perhaps it may be said, that (a) not being within this statute, but remaining as they were at the common law, the obstinacy of a criminal in standing mute to them, may be of itself, without more, a sufficient inducement to a judge to award him to his penance. But considering that such appeals and indictments are within the same reason with those mentioned in the statute; and it is uncertain how the common law stood in relation to these matters, as appears by the best authors (b) differing among themselves concerning them; and seeing the method prescribed by the statute is very just and equitable; it seems prudent at least in a judge to observe the same rules in all cases of this kind.

(a) S. P. C. 150.
2 Inst. 177,
178, 179.
and the books
cited, sect. 12.
under let. (q).

(b) S. P. C. 149.
2 Inst. 178, 179.

Sect. 15. I do not find it said in any book, what shall be done to a prisoner who obstinately standing mute to an arraignment, shall appear to be charged upon very light suspicion; but I take it for granted, that he may be severely fined and imprisoned for the contempt.

As to the FIFTH POINT, viz. What is the nature of the penance to which a prisoner is to be adjudged upon his obstinately standing mute.

Sect. 16. It is observable, that the above-cited statute of Westminster the first says only in general, "that felons standing mute shall be put in prison forte et dure," without saying anything of the manner of it, which it seems to leave as a known thing to the usual practice in such cases; which we shall best find from the books of Entries, and other law books, all of which generally agree, that the prisoner shall be remanded (c) to the place from whence he came, and put (d) in some low dark room, (e) and there laid on his back, without any manner of covering, except for the privy parts, and (f) that as many weights shall be laid upon him as he can bear, and more, and that he shall have no manner of sustenance but of the worst (g) bread and (h) water, and that he shall (i) not eat the same day in which he drinks, nor drink the same day on which he eats; and that he shall so continue till he (k) die. But it is said, (l) that anciently the judgment was not, "that (d) This clause is omitted in

(c) Sum. 227,
2 Hale, 319.
399, 400.
S. P. C. 150.
Keilw. 70.
4 Ed. 4. pl. 11.
14 E. 4. 8.
Ab. B. Cor.
161.
2 Inst. 178.
Rast. Ent. 385.
8 H. 4. 1.
(d) This clause
is omitted in

Keilw. 74. 4 E. 4. 11. but it is mentioned in all the other books above cited, but with this difference, that 14 E. 4. 11. says only that he shall be put in a chamber, without adding that it shall be low or dark. (e) In this all the books above cited seem to agree; and the Year Book, 14 E. 4. 8. pl. 17. S. P. C. 150. and 2 Inst. 178. add, that he shall lie without any litter or other thing under him, and that one arm shall be drawn to one quarter of the room with a cord, and the other to another, and that his feet shall be used in the same manner; but these clauses are wholly omitted in all the other books above cited, except Hale's Summary, which takes notice of the latter of them only; and Rastal Entries, 385. pl. 2. adds, that a hole shall be made for the head; and Keilway, 70 a. says, that the head shall not touch the earth; but none of the other mention either of these clauses. (f) In this all the books above recited agree. (g) But 14 Edw. 4. 8. S. P. C. 150. and 2 Inst. 178. are, that he shall only have three morsels of barley bread a day; Keilw. 70 a. that he shall have only rye bread; and Rastal, 385. and 2 Hen. 4. 1. generally that he shall have of the worst bread. (h) 14 Ed. 4. 8. S. P. C. 150. 2 Inst. 178. and 8 Hen. 4. 1. and Keilway, 70. are, that he shall have the water next the prison, so that it be not current; but Rastal, 385. is general, that he shall have the worst water. (i) This is omitted in Keilway, 70. and in 8 Hen. 4. 1. (k) This is omitted in none of the books above cited, except 14 Edw. 4. pl. 11. and Summary, 227. but neither of these books give the whole judgment at large. (l) S. P. C. 150. 151. Britton, 11.

"that he should so continue till he should die," but "till he should answer," and that he might save himself from the penance by putting himself on his trial, which he cannot do at this day after the judgment of penance is once given.

(m) 2 Inst. 177.
2 Hale, 319.

Sect. 17. It seems clear, (m) that women, upon standing mute, are liable to such penance as well as men.

(n) Kelynge, 27.
This practice is rendered unnecessary by 12 Geo. 3. c. 20.
Vide infra, sect. 25.

Sect. 18. It is said (n) to be the constant practice of Newgate sessions, where a prisoner refuses to plead, to endeavour to compel him to do it by tying his thumbs together with whipcord, and not to proceed to the judgment and penance, before all methods of persuading him to plead are found ineffectual.

As to the SIXTH POINT, viz. What he who obstinately stands mute shall forfeit, and to whom.

(o) See the books cited to sect. 9.
(p) 14 E. 4. 7.
Sum. 226, 227.
2 Hale, 319.
Coke, Lit. 391.
F. Esc. 10.
F. Corone, 51.
Assize, 421.
S. P. C. 151. a.
B. Forf. 11. 64.
B. Appeal, 24.
8 H. 4. 1, 2.
3 H. 7. 12.

Sect. 19. There is no doubt but that in case of (o) high treason he shall forfeit both lands and goods, in the same manner as if he had been attainted any other way. Also I take it for granted that in the case of felony and petit treason, where a person by standing mute shall not avoid being attainted for such crimes, he shall forfeit his lands and goods in the same manner as on other attainders. But wherever a person standing mute is adjudged to his penance, and thereby prevents that attainder which otherwise he might have incurred, it seems agreed, (p) that he forfeits his chattels only, and not his lands.

(q) 8 H. 4. 2.
B. Appeal, 24.

Sect. 20. It is agreed in the Year Book of 8 (q) Hen. 4. that the goods so forfeited ought not to be delivered to any person claiming them under a grant from the crown, till he have shewed a good title to them in the king's court, by some grant sufficient to pass them.

(r) Dyer, 268.
18.
8 H. 4. 2.
B. Forfeit. 11.

Sect. 21. And it seems, (r) that such goods will not pass by grant of all felons goods, having no words specially extending to the goods of those who stand mute, &c. because a person adjudged to his penance for standing mute, does not seem to suffer as a felon, being neither attainted nor convicted of any felony, but as a person refusing to stand to the law of the land. And it seems rather the stronger opinion, (s) that they pass not by the grant of "all goods of felons and fugitives of all persons within such a district; so that if such persons for any trespass or other fault ought to lose life or member; or shall fly and refuse to stand to judgment, or do any other trespass for which they ought to lose their chattels."

(s) Dyer, 268.
8 H. 4. 2.
B. Forfeit. 11.

As to the SEVENTH POINT, viz. Whether the prosecutor of an indictment or appeal of larceny be entitled to a restitution of the goods stolen, upon the defendant's standing mute.

(t) Vide sup. c. 23. sect. 53.
8 H. 4. 1.
Ab. B. App. 2.
S. P. C. 166.

Sect. 22. It seems agreed, (t) that by the common law, where a persons stands mute to an appeal of larceny, it is proper to charge the same inquest which is to inquire whether the standing mute be of malice or not, to inquire also whether the goods mentioned in the appeal are the goods of the appellant, and whether the

the defendant were taken upon a fresh suit (u) made by such appellant; which points being found (x) for him, he shall have an award of restitution to such goods, and to such only, (y) in whose hands soever (z) they are found. And it is said in general in some books, (u) that in any appeal of larceny, there shall be a restitution of the goods, upon the appellee's standing mute, without saying any thing of any inquiry concerning the property, or fresh suit; but I take it for granted, that where it is so omitted, it is taken as a thing known, and done of course, and therefore needless to be expressly mentioned.

(u) Vide c. 23. sect. 50, 51, 52.
(x) Sup. c. 23. sect. 53.
(y) Sup. c. 23. sect. 57.
(z) Sup. c. 23. sect. 54.
(a) 21 E. 3. 19. Ab. B. App. 10. 43 Assize, 30. Ab. B. App. 78. B. Corone, 123. F. Corone, 225.
Vide 10 Assize, 39. Ab. B. Corone, 217.

Sect. 23. But it seems questionable, whether the prosecutor of an indictment of larceny be in like manner entitled to a restitution upon the defendant's standing mute? because it seems agreed, (b) that by the common law there could be no such restitution upon any other prosecution but an appeal; and it is certain, that the prosecutor of an indictment is not entitled to a restitution by the express words of 21 (c) Hen. 8. c. 11. which require, "that the felon be found guilty, or otherwise attainted, &c." and I do not know that he is entitled to it by any other statute, or any equitable construction of this.

(b) Sup. c. 23. sect. 55, 56.
(c) Set forth more at large, c. 23. sect. 55.

As to the EIGHTH POINT, viz. Where one who stands mute shall have the benefit of his clergy.

Sect. 24. It seems clear, (d) that unless it happen to be otherwise specially provided by some statute, wherever he shall be allowed it upon a conviction, by verdict or confession, he shall have it upon his standing mute.

(d) F. Cor. 233. 283. Assize, 421. 8 H. 4. 3. Summary, 231. 2 Hale, 320.

380. Moore, 550. 3 H. 7. 12. Ab. B. Clergy, 27. F. Corone, 51. 3 H. 7. 12. F. Cor. 53. seems contrary, but I cannot find any thing in 3 H. 7. 1. which is the Year-book cited to this note, to warrant this opinion.

Sect. 25. Also I take it to be agreed, (e) that a statute taking away the benefit of clergy from those who shall be convicted of a crime, doth not thereby take it away from those who stand mute on an indictment or appeal for such crime.

(e) See Sum. 332 to 338. 2 Hale, 345.

Sect. 26. But it is enacted by 3 and 4 Will. and Mary, c. 9. set forth more at large in the chapter of clergy, "That if any person shall be indicted of any offence, for which by virtue of any former statute he is excluded from the benefit of his clergy, if he had been thereof convicted by verdict or confession, if he stand mute he shall not be admitted to it."

Sect. 27. But appeals and offences excluded from the benefit of clergy by subsequent statutes, seem not to be within the purview of this statute; for the fuller consideration whereof I shall refer the reader to the chapter of clergy.

It is now, however, immaterial whether a prisoner stands mute or pleads, and the learning upon the subject of little importance, for it is enacted by 12 Geo. 3. c. 20. "That if any person being arraigned on any indictment or appeal for felony, or on any indictment for piracy, shall upon such arraignment stand mute, or will not answer directly to the felony or piracy, he shall be convicted

Vide ante. sect. 6.

" convicted of the felony or piracy charged in such indictment or appeal; and the court before whom he shall be so arraigned shall thereupon award judgment and execution against such person in the same manner, and attended with the same consequences, as if he had been convicted by verdict or confession."

CHAP. XXXI.

OF CONFESSION AND DEMURRER.

AND now I am to consider what is to be done to a prisoner upon his confession; which may be either express or implied.

Sect. 1. An express confession is where a person directly confesses (a) the crime with which he is charged, which is the highest conviction that can be, and may be received (b) after the plea of "not guilty" recorded, notwithstanding the repugnancy; for the entry is, that the defendant *postea* or *relictâ verifikatione* "*cognovit indictamentum*."

(a) S. P. C. 142.
Lamb. b. 4. c. 9.
Finch, 38.
(b) Kelynge, 11.
Qu. if the law be the same in civil actions.
Affirmed Cro. Eliz. 144. Denied 2 Jones, 156.

Sect. 2. Such a confession carries with it so strong a presumption of guilt, that an entry (c) on record *quod cognovit indictamentum*, &c. in an indictment of trespass, estops the defendant to plead "not guilty" to an action brought afterwards against him for the same matter. But it seems questionable, whether such entry of a confession of an indictment of a capital crime, will in the like manner estop a defendant to plead "not guilty" to an appeal, because in case of life the court will be very tender in going upon presumptions.

(c) 9 H. 6. 60.
F. Estoppel, 24.
102.
11 H. 6. 65.
Lamb. b. 4. c. 9.
Tr. per Pais, 25.

And where a person upon his arraignment actually confesses (d) himself guilty, or unadvisedly discloses the special (e) manner of the fact, supposing that it doth not amount to felony, where it doth, yet the judges, upon probable circumstances, that such confession may proceed from fear, menace, or duress, or from weakness or ignorance, may refuse to record such confession, and suffer the party to plead not guilty.

(d) S. P. C. 141.
1 Hale, 225.
(e) 22 Ass. 71.
b. F. Cor. 180.
27 Assize, 40.

Sect. 3. An implied confession is where a defendant, in a case not capital, doth not directly own himself guilty, but in a manner admits it by yielding to the king's mercy, and desiring to submit to a small fine: in which case, if the court think fit to accept of such submission, and make an entry that the defendant *posuit se in gratiam regis*, without putting him to a direct confession, or plea (which in such cases seems to be left to discretion), the defendant shall (f) not be estopped to plead not guilty to an action for the same fact, as he shall (g) be where the entry is *quod cognovit indictamentum*.

(f) 9 H. 6. 60.
Ab. F. Estoppel, 24.
11 H. 4. 65. 21.
Lamb. b. 4. c. 9.
Farreley, 40.
(g) Sup. § 2.

Sect. 4. I take it for granted, that no confession whatever shall,

shall, before final (h) judgment, deprive the defendant of the privilege of taking exceptions in arrest of judgment to faults apparent in the record; (i) for the judges must *ex officio* take notice of all such faults, and any one, as *amicus curie*, may inform them of them.

Sect. 5. It seems to be taken for granted, both by (k) Brook and (l) Staundforde, (m) Coke and (n) Hale, speaking, as I suppose, of a general demurrer, that it amounts so far to a confession of the indictment as laid, that if the indictment be good, judgment and execution shall go against the prisoner. But it is observable, that no adjudged case is cited for the maintenance of this opinion; nor any authority from the old books except the Year-book of 14 Edw. 4. 7. a. pl. 10. (1) in which it is reported to have been said by Choke, that if a defendant demur to a plea, he shall be hanged; *quod fuit concessum*. But to this it may be said, that it was only spoken incidentally, and not a point adjudged; and besides that, it is so short and obscure that it is scarce intelligible, which appears by Brook's abridging it in different senses; for in one place (o) he seems to understand it of a demurrer by a defendant to a plea in bar, which seems impossible; and in another (p) place he seems to understand it in a different sense. And therefore perhaps the meaning of it may be only this, that after a defendant hath pleaded such a bar as confesses the fact, and concludes him to plead the general issue afterwards, as some pleas are said (q) to do; if he afterwards demur to a replication to such plea, he shall be condemned, if the demurrer be adjudged against him, and the indictment or appeal be good.

Sect. 6. But howsoever the law may stand in relation to a (q) general demurrer concluding in bar of an appeal, or indictment, as in common demurrers in civil actions, or a demurrer to a plea in bar, (r) which admits the fact, or to a (s) replication to such a plea, it hath been adjudged, that if an appellee demur in law to an appeal by reason of the (t) insufficiency of the declaration, or generally demur to the declaration, with a (u) conclusion "*et petit judicium de narratione illâ et quod narratio illa cassetur*;" or, having prayed (x) *Dyer* of the writ and process, demand judgment of the appeal, "*quia dicit quod breve de appello predict. et process. inde minus sufficient' in lege existunt ad ipsum W. C. ad dictum breve de appello respondere compellend'*; et hoc paratus est *verificare prout cur'*, &c. unde *petit judicium de brevi de appello predict. et petit inde allocationem, et quod breve illud de appello cassetur*;" such demurrer shall not conclude him from pleading over to the felony, either at the same time (y) with the demurrer, or (z) after it shall be adjudged against him.

Sect.

demurrer was continued on the record with a *casset narratio exinus*, &c. and after the demurrer was determined against the defendant, a *venue* was awarded. (z) *Dyer*, 38. *Salkeld*, 59, 60. *Cro. Eliz.* 196.

(1) Hale says, this authority must be taken *cum grano salis*. 2 Hale, 237. Vide also 225, and 4 Comm. 328. where it is said, that although a man may in some cases lose his property, yet the law will not suffer him by such niceties to lose his life.

However, upon this doubt, demurrers to indictments are seldom used, since the same advantages may be taken upon the guilty or in arrest of judgment.

(h) 1 Salkeld, 77, 78. Farresly, 100. (i) Finch, 226. 2 Danv. Ab. 252. 2 Levinz, 223.

(k) B. Peremptory, 86. (l) S. P. C. 150. (m) 2 Inst. 178. (n) Sum. 243. 2 Hale, 315.

(o) B. Demurrer, 17.

(p) B. Peremptory, 86.

(q) Vide sup. c. 23. sect. 137.

(q) See the preceding section. (r) Vide B. Peremptory, 86. F. Cor. 12.

(s) Vide B. Peremptory, 86. (t) *Dyer*, 38, 39. *Cro. Eliz.* 196.

(u) As it was done in the case of *Smith v. Bowen*, Mich. 7 Ann.

Vide *Salk.* 59.

(v) As it was done in the case of *Widdrington and Charlton*, Hil. 10 Ann.

(y) *Smith and Bowen*, Mich. 7 Annæ, in which case the

Sect. 7. But it seems, that in criminal cases not capital, if the defendant demur to an indictment, &c. whether in abatement or otherwise, the court will not give judgment against him to answer over, but final (a) judgment. For it seems, that in such cases there can be no demurrer properly in abatement, except (b) it be to a plea in abatement, or to a (c) replication to such a plea.

(a) Vide Salk. 220.
(b) Salk. 218.
(c) Rastal, 160. 611.

Sect. 8. A demurrer to an appeal hath been (d) received after issue joined: but it hath been adjudged, (e) that a demurrer to an indictment ought not to be received after verdict.

(d) Cro. Eliz. 196.
(e) 1 Sider. 208. wherein the precedent in Co. Ent. 363, to the contrary is denied to be law.

CHAP. XXXII.

OF SANCTUARY.

BEFORE I consider in the third place, how a prisoner is to be demesned upon his pleading, I shall examine the nature of the several kinds of pleas in criminal cases; which are either dilatory, or in chief.

Dilatory Pleas are either Declinatory, or, in Abatement.

Declinatory pleas are:

1. Of the privilege of sanctuary.
2. Of the benefit of clergy.

27 Hen. 8. c. 19.
32 Hen. 8. c. 12.
3 Peere Will. 39.
4 Comm. 326.
358. 429.

Vide also 9 Geo. 1. c. 28. for suppressing the

pretended privileged place in Saint George's Fields called the Mint. And also 11 Geo. 1. c. 22. for suppressing another pretended sanctuary of the same nature in the hamlet of Wapping, Stepney.

Sect. 1. As to the plea of the "privilege of sanctuary," the learning relating to it being made in a great measure useless by the statute of 21 Jac. 1. c. 28. s. 7. by which it is enacted, "That no sanctuary, or privilege of sanctuary, shall, after that time, be admitted or allowed in any case;" I shall but briefly consider it under the following heads:

1. What was the nature of the privilege of sanctuary.
2. What authority was necessary for the creating it.
3. To what matters it extended.
4. At what time, and in what manner, it was to be pleaded.

As to the FIRST POINT, viz. What was the nature of the privilege of sanctuary.

(a) Finch, 374. S. P. C. 108.
2 Hale, 323, 324.
(b) What those precincts were, Keilway, 189. 191. 9 H. 7. 20. S. P. C. 113. B. Sanctuary, 10. (c) Keilw. 188, 189, 190, 191. 8 H. 6. 4. Ab. F. Corone, 5. 1 H. 7. 23. Ab. F. Corone, 49. 9 E. 4. 28. Ab. F. Corone, 32. Keilw. 107. 188.

Sect. 2. It seems to be agreed, (a) that so far as a place was allowed to have it, it gave all those that fled to it for safeguard, and continued within its (b) precincts, a (c) freedom from being apprehended,

9 H. 7. 20. S. P. C. 113. B. Sanctuary, 10. (c) Keilw. 188, 189, 190, 191. 8 H. 6. 4. Ab. F. Corone, 5. 1 H. 7. 23. Ab. F. Corone, 49. 9 E. 4. 28. Ab. F. Corone, 32. Keilw. 107. 188.

apprehended, or compelled to answer in any court of justice, and a right to be remanded if taken out against their will.

As to the SECOND POINT, viz. What authority was necessary for the creating it.

Sect. 3. It seems, that it belonged of common (d) right to every church and churchyard for the space of forty days, but could not be claimed for a longer time, either by force of any bull from the (e) Pope, nor even by (f) prescription, (g) especially in the case of high treason; but only by a grant (h) from the king, made, or at least confirmed (i) or allowed (k) in eyre, since the time of memory. But it is said, that it did not gain (l) the name of a sanctuary till it had the Pope's bull, though it had the (m) full privilege of one, as to all exemption from temporal courts, by the king's grant only.

S. P. C. 110, 111. B. Sanct. 6. 15. 5 Coke de Jure Regis Eccles. 26. (f) 1 Inst. 114. Keilw. 188, &c. But *quere* if such prescription were confirmed by king, or allowed in eyre, since time of memory. Keilway, 188, 189, 190, 191. (g) S. P. C. 112. 1 H. 7. 23, 25, 26. Ab. F. Corone, 49. Prescrip. 20. Vide Rastal, 584. (h) S. P. C. 108, 110, 111. 1 H. 7. 25, 26. B. Sanctuary, 7. Keilw. 189, 190, 191. (i) Keil. 189, 190. 1 H. 7. 23. 2 R. Abr. 268, 269. (k) Keilw. 189, 190. 2 R. Abr. 268, 269. 1 H. 7. 23. B. Sanct. 7. 15. This is made a *quere*, S. P. C. 112. (l) Finch, 375. (m) Finch, 374, 375.

As to the THIRD POINT, viz. To what matters it extended.

Sect. 4. It seems agreed, that it never was any farther protection against any action merely civil, (n) than to save the defendant from execution of his body. Also it seems to be generally agreed, that if it were granted by general words, it extended not to (o) high treason. But it seems agreed, (p) that in such case it extended to all felonies except (q) sacrilege, and to all inferior crimes except such as were committed by a sanctuary man (r) within the sanctuary, or even (s) out of it, *sub spē redeundi*.

B. Sanct. 6. 1 H. 7. 23, 25, 26. Ab. F. Cor. 49. Prescription, 20. Cont. Keilw. 190, 191. Qu. Finch, 374. (p) See the books cited to the other parts of this section. *Quere* if in such case it extended to petit treason. B. Sanct. 2. (q) 3 Inst. 115. Fitz. 420. (r) Agreed by all the canonists. Keilway, 191. (s) Denied by many of the canonists. Keilway, 191.

As to the FOURTH POINT, viz. At what time, and in what manner, it was to be pleaded.

Sect. 5. It seems agreed, that the defendant lost the benefit of it, unless he pleaded it before any (t) other plea, and properly made out his case; but for this matter I shall wholly refer the reader to the old (u) books.

9 E. 4. 28. Ab. F. Cor. 32. (u) Keilw. 90, 107, 108, 189. S. P. C. 113. 1 H. 7. 23, 24, 25, 26. 9 H. 7. 20. Rastal's Entries, 581, 683.

Sect. 6. The learning of abjuration, (x) depending much upon that of sanctuaries, and seeming to be of very little use at this day, I shall refer to Staundforde's Pleas of the Crown, book 2. chap. 40. and to what hath been said already concerning that matter in the chapter concerning Coroners, section 44.

CHAP. XXXIII.

OF THE BENEFIT OF CLERGY.

FOR the better understanding the nature of the benefit of clergy, or rather of the (a) statute at this day, I shall endeavour to shew:

(a) See the latter part of this chapter.

1. By what kind of persons it is demandable.
2. For what crimes clergy is demandable.
3. At what times clergy is demandable.
4. Whether it shall be allowed where it is not demanded.
5. Who is to judge whether the person who demands it have a right to it or not.
6. How far the ordinary was punishable at law for demanding or refusing a clerk against law.
7. In what manner at the common law a clerk was to be delivered to the ordinary, and what is to be done to him afterwards.
8. What is to be done to him at this day, and how far it shall be to his benefit.

As to the **FIRST POINT**, viz. By what kind of persons the benefit of clergy, or rather of the statute at this day, is demandable.

Sect. 1. It may not be improper to look a little back into the original of clergy, whereby we shall find, that anciently the clergy (b) strongly insisted, that by the law of God their persons were so sacred, that they could not, without a violation of that law, be convened before, and much less be punished with the loss of life, or member, by any secular judge, for any crime whatsoever. But there seems to be so little colour for any pretence of this kind from scripture, that I almost wonder how it was possible that any persons could be so far prejudiced, as seriously to be persuaded that it is deducible from thence.

(b) Keilw. 181.
185.
2 Hale, 323.
330, &c.

Sect. 2. But it seems agreed, (c) that all persons in holy orders have this privilege by the canon law. But this law being no farther in (d) force here than as it hath been received, and is consistent with the common or statute law, it will be proper to shew how far it hath been received, and is consistent with those laws; which I shall at present consider under this head, so far as it relates to the persons intitled to this privilege; and shall farther consider it as to other matters, in the following part of this chapter.

(c) See Lyndw. book 2. in the chapter *de foro competente*.
Kely. 99. 101, &c.
S.P.C. 123, 124.
Finch, 462.
(d) Keil. 181, &c.
5 Coke de Jure Regis Eccles. 13, &c.
2 Hale, 325.

Sect. 3. It seems agreed, that before the statute of *Articuli Cleri*

Cleri, c. 13. made in the ninth year of Edward the Second, it was (e) generally denied to those who had abjured, or who had any other way confessed themselves guilty. But by a favourable interpretation of that statute, which expressly extends only to those who fly to the church for safeguard, it hath been allowed (f) to all those who have confessed themselves guilty upon their arraignment or otherwise, in the same manner as if they had not confessed.

27 H. 6, 7.

Sect. 4. Also it seems, that notwithstanding the clergy (g) contended, that the word "*clericus*" (which is the word generally used by the (h) canon law, as well as ours, (i) to express those who are entitled to this privilege) did include those of the inferior orders, as well (k) as bishops, priests, and deacons; (l) yet it seems, (l) that the temporal judges sometimes denied it to those in inferior orders, as well as to mere (m) laymen, before the statute of 25 Edw. 3. c. 4. which reciting, "that the prelates had grievously complained, that secular clerks, as well chaplains as other monks, and other people of religion, had been drawn and hanged by award of the secular justices, in prejudice of the franchise of holy church, &c." doth enact, "that all manner of clerks, as well secular as religious, &c. shall freely enjoy the privilege of holy church, &c."

times allowed it to mere laymen, being able to read.

Sect. 5. It seems, that by a favourable interpretation of this statute, which universally prevailed soon (n) after it was made, not only those actually admitted into some inferior order of the clergy, (o) but also those who were qualified to be admitted into orders, (which was (p) tried by putting them to read a verse), have been taken to have a (q) right to this privilege, as much as persons in holy orders, whether they were persons lawfully born or (r) bastards, (s) aliens or denizens, in the communion of the church or (t) excommunicate, within the common benefit of the law, or (u) outlaws, &c. so that they were not (x) heretics convict, nor (y) Jews, Mahometans, nor Pagans; nor under (z) perpetual disability of going into orders; admitting of no dispensation, as (a) blind and maimed persons formerly were, and women (b) still are; nor liable to the objection of bigamy, viz. of having (c) married two different women successively, or a widow, which by a constitution of the Council of Lyons, (d) received in this kingdom, was a bar to the demand of the privilege of the clergy, and

chapter. (q) 9 E. 4. 28. Ab. B. Cler. 7. (r) B. Cler. 22. 2 Hale, 373. (s) B. Clergy, 20. (t) B. Clergy, 20. Sum. 229. 11 Coke, 29. (u) See 3 & 4 W. & M. 9. 11 Coke, 29; b. (x) S. P. C. 133. B. Clergy, 20. 11 Coke, 29. (y) B. Clergy, 20. 11 Coke, 29. Sum. 229. 2 Hale, 373. (z) 11 Coke, 29. (a) 11 Coke, 29. Summary, 229. Con. B. Clergy, 21. (b) Finch, 463. 11 Coke, 29. See prea. 21 Jac. 1. c. 6. and 3 & 4 W. & M. c. 9. s. 7. Yet it is admitted, F. Corone, 461. that a woman might claim the benefit of clergy. (c) S. P. C. 134, 135. Rastal, 106. 2 Hale, 372. (d) See stat. of bigamy, 4 E. 1. c. 5. 5 Coke de Jure Regis Ecclesiastico, 13. S. P. C. 125.

(1) The Roman clergy consisted of two classes, those in holy orders, viz. bishops, priests, deacons, and sub-deacons, and those who were *clerici in minoribus*, as *exorcists* *acolyti*, (or light bearers), singers, readers, and door-keepers. The former

were created by the sacramental unction, the latter, merely by the episcopal benediction; and a distribution of sacred vestments. For their respective duties, see Inst. Jur. Can. Launcelotti, lib. 1. tit. 5.

(e) F. Cor. 155.
11 Coke, 29.
S. P. C. 124.
Keilway, 186.
Seld. Ju. Ang.
c. 10.
(f) B. Clergy,
3, 7, 8.
9 E. 4. 28.
8 H. 4. 3.
1 Assize, 4.
F. Cor. 191.

(g) Kelynge,
99, 100.
(h) Lindw. b. 2.
c. de foro compe-
tente.
(i) See st. Marl.
c. 28.
West. 1. c. 2.
Art. Cleri, c. 15.
and the old
books cited,
2 Inst. 633,
634, &c.
(k) Keilw. 181.
Kely. 99, 100.
(l) Kely. 99,
100.
(m) F. Cor. 233.
But they some-
times allowed it to mere laymen, being able to read. F. Corone, 117.

(n) Yet it was
holden the next
year after the
statute, *quod li-
teratura non facit
clericum nisi ha-
beat sacram ton-
suram*.
26 Assize, 19.
Ab. F. Cor. 191.
S. P. C. 124.
2 Hale, 372, 373.
(o) Kely. 100,
101, 102.
B. Clergy, 7, 20.
(p) Kelynge,
100, 101.
Finch, 462, 463.
S. P. C. 133.
34 H. 6. 49.
F. Corone, 464.
See the cases
cited to the
fourth general
point of this

(s) B. Clergy, 20. (t) B. Clergy, 20.

(x) S. P. C. 133.

(y) B. Clergy, 20.

(z) 11 Coke, 29.

(d) Rast. 160. by force of 18 Edw. 3. c. 2, was triable by the certificate (d) of the bishop.
S. P. C. 134, 135.

11 H. 4. 11. Ab. F. Corone, 85. 40 E. 3. 42. Ab. F. Attorney, 39.

Sect. 6. But it is expressly enacted by 1 Edw. 6. c. 12. s. 16. "That any person who by the law of this realm ought to have the benefit of his clergy, shall be admitted to it, although he have been divers times married to any single woman, or to any widow or widows, or to two wives or more." But it bore some (f) question whether this statute were not impliedly repealed by 1 and 2 Philip and Mary, c. 8. while it stood in force, which repealed "all clauses, &c. against the See of Rome."

(f) S. P. C. 134.

Dalison, 21.

Dyer, 201.

B. Clergy, 20.

Summary, 223.

2 Hale, 372.

In what cases women shall have the benefit of clergy.
Fost. 305.

+ *Sect. 7.* But still all persons not capable of holy orders, as women, who from the delicacy of their frame seem to be most susceptible of human passions, and some others, were left to the extreme rigour of the common law, and to the mercy of the crown; for at common law, all felonies except petit larceny, rape, and mayhem, were considered as capital offences, unless in cases where the offender was capable of holy orders, and qualified for them. But it is enacted by 21 Jac. 1. c. 6. "That on a conviction of grand larceny under the value of ten shillings, being no burglary, nor robbery in or near the highway, nor a felonious private taking from the person, &c. but only such an offence for which a man might have his clergy, they shall be burnt in the hand, and imprisoned, &c."

Sec. 8. But it is enacted by 3 and 4 Will. and Mary, c. 9. s. 7. "That where a man being convicted of any felony may demand the benefit of his clergy, if a woman be convicted for the same or the like offence, upon her prayer to have the benefit of this statute, judgment of death shall not be given against her upon such conviction, or execution awarded upon any outlawry for such offence; but she shall suffer the same punishment as a man should suffer, that has the benefit of his clergy allowed him in the like case; that is to say, shall be burnt in the hand by the gaoler in open court, and further be kept in prison for such a time as the justices in their discretion shall think fit, so as the same do not exceed one year's imprisonment."

The case of the Duchess of Kingston for bigamy, 11 State Trials, 262.

+ But it has been determined upon the construction of these statutes, that a peeress convicted by her peers of a clergyable felony, is by law intitled to the benefit of the statutes, so as to excuse her from capital punishment, without being burnt in the hand or being liable to any imprisonment.

(g) S. P. C. 31, 32, 123, 124, 135.

F. Cor. 112, 117.

120, 250, 257.

4 Inst. 314.

12 Assize, 39.

Ab. B. Clergy, 10.

17 Assize, 4.

17 E. 3. 13.

Ab. F. Corone, 112.

9 E. 4. 28.

Ab. B. Clergy, 7.

27 Assize, 42.

Ab. F. Cor. 205.

Ab. B. Clergy, 13.

11 Coke, 29.

(h) Yet it seems to be holden, 26 Assize, 19, 27. Ab. B. Cler. 11, 12. F. Corone, 191, 193. that one who had been guilty of sacrilege might demand it as well as any other. 2 Hale, 333, 366. And it seems to be holden, F. Corone, 232, 250, 257, 419. 2 Hale, 372. that one who had broken the prison of the ordinary had no manner of right to it. 12 Assize, 39. Ab. B. Clergy, 10. This point is made a *quare*. 9 Edw. 4. 28. pl. 40. Ab. B. Clergy, 7.

Sect.

Sect. 9. It seems, (g) that one who had been guilty of sacrilege, or of breaking the prison of the ordinary, had no right to the benefit of clergy, but at the (h) discretion of the ordinary.

Sect. 10. It seems clear, (i) that before the statute of 4 Hen. 7. c. 13. he who had been admitted to the benefit of clergy, might have it a second time as well as the first, unless he had broken the prison of the ordinary, to which he was committed when clergy was first allowed him; in which case it seems, (j) that he could not save himself from a second prosecution, though for the very same felony for which he was before convicted, unless he could shew a purgation.

was attainted before he first had the benefit of clergy. (j) F. Corone, 232. and the books cited to letter (b), and to the former section.

(i) Sum. 230.
S. P. C. 31, 32.
107. 124. 135.
See Pream.
4 H. 7. 3. 13.
But 17 Ass. 4.
17 E. 3. 15. 17.
Ab. F. Cor. 112.
it seems to have
been doubted
where the clerk

Sect. 11. But by 4 Hen. 7. c. 13. it is enacted, "That every person, not being within orders, who hath once been admitted to the benefit of his clergy, eftsoons arraigned of any such offence, be not admitted to have the benefit or privilege of the clergy, &c."

And by 4 Hen. 7. c. 13. it is provided, "That if any person at the second time of asking his clergy, because he is within orders, hath not there ready his letters of his orders, or a certificate of his ordinary, witnessing the same; that then the justices afore whom he is so arraigned, shall give him a day by their discretion to bring in his said letters or certificate; and if he fail, and bring not at such a day his said letters or certificate, then the person to lose the benefit of his clergy, as he shall do that is without orders."

Sect. 12. But by 28 Hen. 8. s. 7. it is enacted, "That persons within holy orders shall be under the same pains and dangers for the offences referred to by that statute, and be used and ordered to all intents and purposes, as other persons not being within holy orders."

And by 32 Hen. 8. c. 3. s. 8. it is further enacted, "That persons within holy orders who shall be admitted to their clergy, shall be burnt in the hand in like manner as lay clerks, and shall suffer and incur all such pains, dangers, and forfeitures, and be ordered and used for their offences of felony, to all intents, purposes, and constructions, as lay persons admitted to their clergy be, or ought to be, &c."

Sect. 13. But by 1 Edw. 6. c. 12. s. 10. it is enacted, "That in all cases of felony, other than those in that act mentioned, every person who shall be found guilty, or confess, or stand mute, or not answer directly, shall have the benefit of his clergy, in like manner and form as before the first year of King Henry the Eighth."

And therefore it seems plain, that where lay persons are not excluded from the benefit of clergy the first time, persons in holy orders may have it as often as they want it, in the same manner as they might upon the foot of the said statute of 4 Hen. 7. c. 13. (a) except they shall be outlawed, or challenge above the number of twenty, in which case they are not within the purview of 1 Edw. 6. which extends only to those "who shall be found guilty, or confess, or stand mute, &c." But (b) where the crime itself charged against a person in holy orders, is, by any statute,

generally

(a) Sum. 238,
239.
S. P. C. 135.
(b) S. P. C. 135
136.
Sum. 235, 236.
Vide 2 Hale,
374. 376. 339.
341, 342. 345.

generally excluded from clergy, such person shall no more have the benefit of it than if he were a mere layman.

Sect. 14. By 34 and 35 Hen. 8. c. 14. it is recited, "That divers persons had been indicted and attainted, and some of them clerks convict, and some of them clerks attainted, &c. before justices of peace, gaol-delivery, &c. within divers cities, counties, franchises, &c. the records of which attainders and convictions often, by negligence of the clerks, &c. having the rule and keeping thereof, had been embezzled, and not ready to be objected against such persons, being newly arraigned before other justices, &c. And for that it hath not been known certainly whither to resort for the same records, because they were not certified into any place certain, such offenders had often had the benefit of the clergy where they ought not, &c. And thereupon it is enacted, "That the clerk of the crown, clerks of the peace, and clerks of assize, where any such attainer or conviction shall be so had, shall certify a transcript, briefly containing the effect of every such indictment, &c. and clerk attainted, &c. that is to say, the name, surname, and addition of every such person, &c. and the certainty of the offence, &c. and the day and place of his attainer or conviction, &c. and the day and place of his offence, &c. before the king in his bench at Westminster, there to remain of record for ever, within forty days of such attainer, &c. if the term be then, and if not, then within twenty days after the next term, &c. on pain of forty shillings, &c. And that the clerk of the crown in the king's bench shall receive the same without fee, under the like pain."

(c) Omitted in Keble's Statutes: but inserted in Russell's.

Sect. 15. By 34 and 35 Hen. 8. c. 14. it is provided, "That if there be more persons contained in any such indictment, other than such person so attainted or convicted, that then such clerk shall certify such transcript only (c) concerning the person or persons so attainted or convicted, which shall be as effectual against such person and persons against whom it shall be objected, alledged, or pleaded, as if the very record were present."

Sect. 16. And by 34 and 35 Hen. 8. c. 14. it is further enacted, "That the said clerk of the crown in the king's bench, at all such times as the justices of gaol-delivery, or justices of the peace, in every county within this realm of England, do write unto him for the names of such persons, which be so attainted or convict, and certified in the said bench, shall incontinently certify the said names and surnames of the said persons, with the causes why and wherefore they were convicted or attainted, unto the justices of gaol-delivery, or justices of the peace, &c. on pain of forty shillings."

Sect. 17. But by 34 and 35 Hen. 8. c. 14. it is provided, "That this act shall not extend to the clerks of the crown, &c. in Wales or Chester, or counties palatine of Lancaster and Durham, to make any transcript of any such attainer or conviction before the king's justices of his counties in Wales, &c."

(d) Dyer, 253.

Sect. 18. It seems (d) that the justices may, by force of this act,

act, write, in their own names, to the clerk of the crown in the king's bench, for a certificate of the transcript of an attainder or conviction, and need not do it by writ in the king's name under their *teste*, &c. which is required (e) by the construction of 2 and 3 Edw. 6. c. 24. where the justices of one county write to those of another for the certificate of the attainder or acquittal of the principal, in order to proceed against the accessory. And the reason of the difference is, because in this last case justices write to justices, but in the former to an officer only. (e) Sup. c. 29. sect. 53.

Sect. 19. By 3 and 4 Will. and Mary, c. 9. s. 7. it is farther provided as followeth: "Forasmuch as such men and women who have once had their clergy, &c. may happen to be indicted for an offence committed afterwards in some other county;" be it therefore enacted, "That the clerk of the crown, clerk of the peace, clerk of the assizes, where such man or woman shall be convicted, shall, at the request of the prosecutor, or any other in his majesty's behalf, certify a transcript briefly, and in few words, containing the effect and tenor of every indictment and conviction of such man and women, of his or her having the benefit of the clergy, &c. and addition of every such person or persons, and the certainty of the felony and conviction, to the judges and justices in such other county where such man or woman shall be indicted; which certificate being produced in court, shall be sufficient proof that such man or woman have before had the benefit of clergy, &c." (1) 2 Hale, 373.

As to the SECOND POINT, *viz.* For what crimes the benefit of clergy, or rather of the statute, may be demanded; I shall premise,

Sect. 20. FIRST, That it seems to be generally agreed, that by the common law, it is demandable as well upon an (f) appeal as (f) 11 Coke, indictment, for any crime whatsoever which subjects the offender 29. to

(1) Against the defendant's prayer of clergy the prosecutor may file a counter-plea, alleging some fact which, in law, deprives the defendant of the privilege he claims. Thus, before the statute *de Bigamis*, the offender on a conviction for bigamy in the temporal courts, was allowed his clergy; but this privilege having been taken away by the pope at the council of Lyons, (*vide ante*, sect. 5.) the practice was to enter a counter-plea stating the offence to have been committed within a certain diocese; which allegation carried the trial of the fact into the ecclesiastical court, and upon a certificate of the truth of it from the bishop, the offender was ousted of his clergy. To this counter-plea, however, the prisoner might reply, that the first marriage was made within the age of consent, and that he disagreed to it on his attaining to maturity; and the issue taken on this replication being triable by the country and not by the bishop, restored the offender to clergy. Staundforde, 134. 4 Inst. 24. 2 Hale, 373. Thus also it is a good counter-plea to the prayer of clergy, that the offender is not entitled to the benefit of the statute in such case made and provided, because he was before convicted of an offence, and thereupon prayed the benefit of the statute, which was allowed to him, alleging the

truth of the fact, and praying the judgment of the Court, that he may die according to law; which fact is to be tried by the record in pursuance of 34 & 35 Hen. 8. c. 14. Staundforde, 135.—Divers other counter-pleas also by which an offender may be deprived of clergy may be framed from a consideration of the persons to whom it is allowed or denied by the common law, and of the circumstances under which that allowance or denial it has been placed by divers acts of parliament. Staundforde, 138.—The use of this counter-plea, however, had for many years become obsolete and out of practice; no traces of it appearing in any of the books since the time of Sir William Staundforde, who was chief justice of the king's bench in the reign of Queen Elizabeth. But the daring practices of some money coiners have occasioned its revival, and accordingly in the case of the King v. Marston Rothwell and Mary Child, who were convicted for coining, at the old Bailey, in September sessions, 1783, before Mr. Justice Ashurst, the counsel for the crown filed a counter-plea of record on the part of the prosecution, alleging that they had been before allowed the benefit of the statute, &c. and the offenders were thereby ousted of their clergy.

(g) S. P. C. 124. to the (g) loss of life or member, except (h) high treason, (whether
B. Clergy, 19. against the king's person (i) or not), and sacrilege; for the first
Finch, 462, 463. of which the common law seems to give the offender no manner
(h) S. P. C. 124. of right to the benefit of his clergy, and for the latter to have it
P. Corone, 283. of right to the benefit of his clergy, and for the latter to have it
19 H. 6. 47. left to the discretion of the ordinary, as hath been more fully
Ab. F. Cor. 8. shewn in the ninth section.
B. Clergy, 6. Vide 2 Inst. 634.

And all new-created treasons which in judgment of law are levelled at the person of the king or his royal majesty, are excluded without special words for that purpose, as coming within the exception of the statute *de Clero*. Foster, 190. (i) So it appears from the books cited to letter (h). Yet in Summary, 330. and 11 Coke, 29. and B. Clergy, 25. 31. it seems to be holden, that by the common law clergy was excluded from such high treason only as was against the person of the king. But *quære* upon what ground this is holden. And see 25 E. 3. *de Clero*, c. 5. and 2 Hale, 332. and Foster, 191.

(k) S. P. C. 124. Sect. 21. SECONDLY, That it seems to be doubtful, (k) whether
Summary, 230. it were demandable at the common law for petit treason. But
Finch, 463. this was settled by 25 Edw. 3. *de Clero*, c. 4. which expressly
11 Coke, 29. allows it for "any treasons or felonies touching other persons
"than the king himself, or his royal majesty."

(l) Sup. c. 25. Sect. 22. THIRDLY, That after this a construction (l) prevailed
sect. 59. that clergy might be denied to felons charged as *insidiatores*
S. P. C. 124. *viarum, et depopulatores agrorum*. But this is remedied by the
2 Hale, 328. fourth of Henry the Fourth, chapter the second.
333.

(m) Sum. 230. From these premises it seems to be generally agreed, (m) that
231. the following conclusions necessarily follow:

Sect. 23. FIRST, So far as a person, who in respect of his orders or learning, or otherwise, is qualified to be admitted to the benefit of clergy, is denied it in respect of his (n) crime, not amounting to high treason or sacrilege; such denial must be grounded on some act of (o) parliament made since the twenty-fifth of Edward the Third.

(n) S. P. C.
124, &c.
Sum. 232, &c.
(o) 2 Hale, 332.
Summary, 230.

(p) Sum. 230. Sect. 24. SECONDLY, Wherever an offence is made felony by
2 Hale, 330, 334. statute, it (p) shall have the benefit of clergy, unless it be expressly excluded from it.

(q) Sum. 231. Sect. 25. THIRDLY, Wherever a person is denied the benefit
2 Hale, 336, 344. of clergy, in respect of a statute, excluding it from the crime
11 Coke, 37. charged against him, the (q) indictment or appeal, and the (r)
S. P. C. 114, 130. evidence thereon, must expressly bring his case within the words
(r) S. P. C. 130. of such statute. And therefore, if a (s) murder be not expressly
Dyer, 261, 224. laid, and proved to have been done of malice prepense; and the
(s) Sum. 231. offence of an accessory (t) before, to have been done maliciously;
S. P. C. 150. and that of a (u) cut-purse *clam et, secreta à persona*, &c. the of-
Dyer, 261. fender shall have his clergy. And agreeably hereto it hath been
Vide 3 H. 8. c. 1. adjudged, (x) that an indictment of robbery "*in quâdam viâ regiâ*
1 E. 6. 12. s. 10. *pedestri ducent' de London ad Islington*," shall not oust the de-
(t) Sum. 231. fender of the benefit of his clergy; because the words of the sta-
1 And. 195. tute (y) to this purpose are in, or about, or near the highway.
11 Coke, 37. Dyer, 183.
Vide 4 & 5
Ph. & M. 41.

(u) Sum. 231. 8 Eliz. c. 4. (x) Moore, 5. 2 Hale, 349. (y) 23 Hen. 8. c. 1. s. 3. 1 Edw. 6. c. 12.
Par. 10. 4 & 5 Ph. & M. 4. But by 2 & 3 Will. & Mary, c. 9. the benefit of clergy is taken away ge-
nerally from the crime of robbery, and therefore an indictment without these words would not perhaps
be good.

(z) 1 And. 195. Yet it hath been adjudged, (z) that an indictment against a man
as accessory to a murder before the fact, by the words *malitiosè*
excitavit,

excitavit, movit et procuravit, &c. is sufficient to oust the offender of the benefit of clergy, by force of 4 and 5 Philip & Mary, the words whereof are, "that all persons who shall maliciously command, hire, or counsel any person, &c." which are not expressly pursued in such indictment. But the counselling another being necessarily included in the moving, procuring, and exciting him, which therefore are tantamount in sense and different only in the manner of expression, such an indictment is as much within the statute as if it followed the very words.

Also it hath been adjudged, that in order to oust a man of the benefit of clergy by force of a statute which takes it away from a capital offence at common law, there is no need that the indictment or appeal conclude *contra formam statuti*, because the statute doth no way alter the nature of the offence, but only leaves it to its proper judgment, and takes away a personal privilege or exemption from such judgment.

Sect. 26. FOURTHLY, A statute excluding the principals from the benefit of clergy, doth (a) not thereby exclude the accessaries before or after. Neither (b) doth a statute excluding the accessaries thereby exclude the principals. And it seems agreed, (c) that where a statute excludes those from the clergy who shall be found guilty of petit treason, murder, burglary, robbery, or any other kind of crimes, it shall be construed to intend only to exclude the principals, and not accessaries before or after, notwithstanding they are certainly in a high degree partakers in the guilt of the principal offender, as hath been more fully shewn chapter 29, sections 13, 14. Yet inasmuch as such statutes, taking away a privilege of so high a consequence to the subject, ought to receive the strictest interpretation, and the words of them may, without any manner of strain, or repugnance to the general rules of law, be taken in such a sense as will include the principals only, I do not know that they have ever been carried farther.

Sect. 27. FIFTHLY, Where clergy is allowable, it shall be as much allowed to one who stands (d) mute, or challenges peremptorily (e) above the number of twenty, or is (f) outlawed, &c. as to one who is convicted by verdict, or confession, &c.

(e) 3 H. 7. 12. Ab. B. Clergy, 27. F. Corone, 51. Sum. 231. 25 H. 8. c. 3. s. 2. c. 9. (f) 11 Coke, 29. See 3 & 4 W. & M. c. 9.

Sect. 28. SIXTHLY, A statute taking the benefit of clergy from those who shall be found guilty, doth not (g) thereby take it from those who stand mute, or challenge peremptorily above the number of twenty, or are outlawed, &c.

Sect. 29. SEVENTHLY, But it seems (h) clear, that a statute taking it away from those who shall be found guilty, extends as well to those who shall confess themselves guilty upon record, as to those who shall be found guilty by verdict; for as the latter are found guilty by a jury, so are the former by the court, and their conviction being from their own mouths, is of the highest nature possible.

And now I shall endeavour to shew for what crimes persons are

Foster's Crown Law, 126. 131.

1 Ventris, 13.
2 Hale, 191.

(a) Sum. 7. 58.
231.
2 Hale, 335, 336.
11 Coke, 29 to 36.
1 And. 195.
Dyer, 99. 183.
See 4 & 5 Ph. & M. 4.
Foster, 355 to 358.
(b) 11 Coke, 29 to 36.
Savil, 46.
(c) Sum. 587.
1 And. 195.
Dyer, 99. 183.
Foster, 355 to 360.

(d) Sum. 232.
25 H. 8. 3. c. 2.
Sup. c. 30. s. 24.
Moor, 550.
Con. F. Corone, 283.

(g) See 25 H. 8. c. 3. s. 2.
4 W. & M. c. 9.
11 Coke, Poulter's Case.
2 Hale, 335.

(h) 11 Coke, 29.

are excluded from the benefit of clergy by statutes made since 25 Edw. 3. c. 4. which being somewhat perplexed and intricate, I shall for the better clearing of this matter, first take a general view of those statutes so far as they are in force at this day, and then shall more distinctly consider them as they particularly concern the several kinds of capital crimes.

Sect. 30. The first of those statutes I shall take notice of, is 23 Hen. 8. c. 1. s. 3. by which it is enacted, "That no person who shall be found guilty after the laws of this land for any manner of petit treason, or for any wilful murder of malice prepensed,—or for robbing any churches, chapels, or other holy places,—or for robbing of any person or persons, in their dwelling houses, or dwelling place, the owner or dweller in the same house, his wife, his children, or servants, then being within, and put in fear and dread by the same,—or for robbing of any person or persons in or near about (i) the highways,—or for wilful burning of any dwelling houses or barns, wherein any grain or corn shall happen to be,—nor any person or persons being found guilty of any abetment, procurement, helping, maintaining, or counselling of or to any such petit treasons, murders or felonies, shall be admitted to his clergy; such as be within holy orders only excepted."

(i) So Rastal's Statutes; but Pulton omits the word *about*, and Keble the word *near*.

(k) 11 Coke, 30.
2 Hale, 338.
(l) Sup. s. 28.

(m) 11 Coke, 30.
(n) See pream.
25 H. 8. c. 3. &
11 Coke, 30.

Sect. 31. NOTE, That this statute extends (k) as well to appeals as to indictments and to those who shall (l) confess, as much as those who shall plead and be found guilty. For the words are general, "that no person who shall be found guilty after the laws of this realm, &c. shall be admitted to his clergy, &c." But it extends not (m) to persons outlawed, and was easily evaded (n) by persons brought to their trials, by standing mute or challenging peremptorily above the number of twenty, whereby they prevented their being found guilty.

(o) This challenge now imports nothing as to the point of clergy, for the challenge is over-ruled.
2 Hale, 339. 345.

Sect. 32. But these two last defects are provided for by 25 Hen. 8. c. 3. by which it is enacted, par. 2. "That every person who shall from thenceforth be indicted of petit treason,—wilful burning of houses,—murder,—robbery,—burglary,—or other felony, according to the tenor and meaning of 23 Hen. 8. and thereupon arraigned, do stand mute of malice or froward mind, or challenge peremptorily above the number of twenty (p), or else will not, or do not answer directly to the same indictment and felony whereupon he is so arraigned, shall from thenceforth lose the benefit and privilege of his clergy, in like manner and form as if he had directly pleaded to the said petit treason, murder, robbery, burglary, or other felony, whereupon he is so arraigned, and thereupon had been found guilty, after the laws of the land."

(p) 11 Coke, 31.
1 Hale, 339.

Sect. 33. But this statute extends not (p) to those who are outlawed, any more than 23 Hen. 8. Neither doth it extend to appeals, nor to accessaries before, both of which are included in the twenty-third of Henry the Eighth.

Sect. 34. After came the statute of 1 Edw. 6. c. 12. s. 10. "That no person who shall be in due form of the laws attainted
" or

"or convicted of murder of malice prepensed, or of poisoning of
 "malice prepensed, or of breaking of any house by day or by
 "night, any person being then in the same house where the same
 "breaking shall be committed, and thereby put in dread; or of
 "robbing any person in the highway, or near the highway; or
 "of feloniously stealing of horses, geldings, or mares, or of felo-
 "niously taking of any goods out of any parish church, or other
 "church or chapel; or being indicted or appealed of any of the
 "same offences, and thereupon found guilty by verdict of twelve
 "men, or shall confess the same upon his arraignment; or will
 "not answer directly according to the laws of this realm, or shall
 "stand wilfully, or of malice, mute, shall not be admitted to the
 "benefit of his clergy: and that in all other cases of felony all
 "persons that shall be arraigned, or found guilty upon their
 "arraignment, or shall confess or stand mute in form aforesaid, or
 "will not answer directly in form aforesaid, shall have their
 "clergy in the same manner as before the first year of King
 "Henry the Eighth."

Sect. 35. NOTE, That this statute extends as well to (q) appeals (q) 11 Coke, 32.
 as to indictments, in which respect it is more fully penned than 2 Hale, 343.
 25 Hen. 8. and that it extends to persons in holy (r) orders, as
 much as to laymen, and to all persons attainted in general, and (r) 11 Coke,
 consequently to those who are outlawed, in which respects it is 31, 32.
 more fully penned than either twenty-third or twenty-fifth of Henry
 the Eighth. Yet it hath several considerable defects; as

Sect. 36. FIRST, In that it doth not exclude those from the (s) 11 Co. 32.
 benefit of the clergy, who challenge above the number of twenty; Sup. s. 27, 28.
 so that it is easily made ineffectual (s) by taking such challenges But S. P. C.
 as to crimes excluded from the benefit of clergy by this statute, 126. it is made
 and no other. But as to the crimes within 25 Hen. 8. it (t) seems a *quære* whether
 plain, that a person that takes such challenges might be excluded those who chal-
 from his clergy by force of that statute even before it was revived lenge more than
 by 5 and 6 Edw. 6. set forth more at large sect. 42. &c. because twenty, are not
 1 Edw. 6. restores the benefit of clergy, as it was before the included under
 reign of Henry the Eighth, to such only as shall be found guilty, the word con-
 or confess, or stand mute, or not answer directly; and conse- vict.
 quently (u) those who challenge above the number of twenty, seem (t) But in 11
 clearly to be excluded, in the same manner as if the first of Coke, 32. it
 Edward the sixth hath never been made. seems to be
 otherwise
 holden.
 (u) Vide Sum.
 239.

Sect. 37. SECONDLY, In that it omits accessaries in the clause
 which takes away clergy, but includes them in that which restores
 it, which is general as to all cases of felony, not mentioned in the
 act, whereof any person shall be found guilty, and consequently
 as to accessaries wholly takes off the force of 23 Hen. 8. which
 extends only to those who are found guilty, and is the only statu-
 te in this reign which excludes accessaries from the clergy.
 And accordingly we find, (x) that after this statute accessaries (x) 11 Coke, 31.
 were admitted to their clergy, in the same manner as before the Dyer, 133.
 reign of Hen. 8. till the making of 4 and 5 Ph. & Mary, set forth
 more at large section forty-five.

Sect. 38. THIRDLY, In that it also omits arson in the clause
 which takes away clergy, but includes it in the general words of
 that

(y) 11 Coke,
31, 32, &c.
Vide sup. s. 36.

that which restores it, and consequently re-entitled those (y) convict of it to clergy, in all cases but that of challenging more than twenty, till the making of 5. and 6 Edw. 6. as shall be more fully shewn hereafter.

(z) Vide infra,
sect. 61.

Sect. 39. FOURTHLY, In that the clause which ousts horse-stealers of their clergy, is worded in such a manner as makes it doubtful whether it extend to those who steal but one, which occasioned the making of 2 (z) and 3 Edw. 6. c. 33. which declares, "That a person feloniously stealing one horse, gelding or mare, shall be put from his clergy, in the same manner as if he had been indicted or appealed for stealing of two, &c."

(a) Yet *quare*,
for this matter is
doubtfully ex-
pressed.

S. P. C. 126.

11 Coke, 31, 32.

(b) S. P. C. 125,
126.

11 Coke, 31, 32.

Sect. 40. FIFTHLY, In that the clause which ousts house-breakers of their clergy, is not worded in such a manner as fully brings their offence under the notion of felony; for it is thus expressed, "Any person who shall be attainted, &c. of breaking any house by day or night, any person being therein and put in fear or dread, &c." But such a breaking even in the night is no felony, unless it be done with an intent to commit a felony, which makes it burglary; neither can it be felony, if done in the day with any intent whatsoever; for though a felony follow, which may make the house-breaking done with an intent to commit it, properly enough to be called felonious; yet it seems, that it cannot make it become (a) a felony, because it is not reducible to any species of felony. And therefore the statute must be supplied by a reasonable intendment, and (b) construed to mean such house-breaking only as amounts to, or is attended with felony.

(c) 11 Coke, 31.

(d) Moor, 756.
3 Inst. 111.

(e) B. 1. c. 20.
s. 6, 7.
2 Hale, 370.

Sect. 41. It is holden by Sir Edward Coke, (c) that piracy was restored to the benefit of clergy by this statute; but as to piracy on the high sea, the contrary hath been solemnly (d) adjudged and confirmed by constant experience, and is certainly agreeable to the (e) legal notion of piracy in other cases; which being a capital offence by the civil law only (even after the statute of 23 Hen. 8. c. 15. which altered not the nature of the offence, but only the manner of the trial), shall not be included in a statute speaking generally of felonies, which shall be construed only of those felonies which are such by our law; as those piracies are (f) which are committed in a creek or port within the body of a county, but no other.

(f) Bk. 1. c.
20. s. 15.
2 Hale, 369.

(g) Vide sup.
sect. 30.

Sect. 42. The next general statute relating to these matters is 5 and 6 Edw. 6. c. 10. which first recites the above-mentioned (g) clause of 23 Hen. 8. concerning clergy, and takes notice that it was defective in omitting those who rob, &c. in one county, and remove the thing taken into another, and there tried, &c. and that this omission was supplied by 25 Hen. 8. and that the said statute of 25 Hen. 8. was in this respect made ineffectual by 1 Edw. 6. c. 12. which restored clergy as it stood before the reign of Hen. 8. to all the felonies not therein mentioned; and that by reason of the said statute of 1 Edw. 6. divers persons had committed robberies, &c. in one county and after had been taken, &c. and tried in another, and there had their clergy, which they would not have had, if the said statute of 25 Hen. 8. had stood in force; and then goes on in these words, "For redress whereof from henceforth

2 Hale, 341.

"henceforth to be had, be it enacted, &c. that the said act made in the said 25 year, touching the putting of such offenders from their clergy; and every article, clause and sentence contained in the same, touching clergy, shall, from henceforth, touching such offence to be henceforth committed and done, stand, remain, and be in full strength and virtue, in such manner and form, as it did before the making of the said act in the first year of the reign of our sovereign lord the king that now is; any clause, article, or sentence comprised therein to the contrary notwithstanding."

Sect. 43. It was for some time a great question, Whether this statute revived 25 Hen. 8. for the whole, or only for such part of it which relates to felons removing the thing feloniously taken into a different county from that wherein they took it, and there tried, &c. And Sir William Staundforde (g) inclines to the latter opinion: because the words are, "that the said act made in the said twenty-fifth year, touching the putting such offenders from their clergy, shall be revived, &c." where the word "such" shall have relation only to the offenders mentioned before; which are those who steal in one county, and remove the thing stolen into another. And this objection is strengthened (h) by the title of the act, which is only this, "That such as rob in one shire, and fly into another, shall not have their clergy." To which it may added, that all statutes which take away, are to be construed strictly *in favorem vitæ*. (g) S.P.C. 120. (h) 11 Coke, 33.

Yet it hath been adjudged, (i) and is, as I take it, fully (k) settled, that this statute revived 25 Hen. 8. as to every other part of it, as well as that concerning felons carrying the things stolen from one county into another. For granting that the makers of the statute of 5 & 6 Edw. 6. had the case of such felons principally in their view; which appears pretty plainly, not only from the title of the statute, but also from the preamble and purview; for the preamble expressly takes notice of no other mischief from the repeal of 25 Hen. 8. but only this, "that thereby many of such felons had their clergy;" and then follows the enacting clause, which begins in these words, "For redress whereof," and then goes on, "be it enacted, &c. that 25 Hen. 8. touching such offenders and such offences, remain in full force:" yet considering that the statute of 5 & 6 Edw. 6. begins with a recital of the whole clause of 23 Hen. 8. wherein there are several other offences contained, and that the words "such offenders and such offences" in the enacting clause of 5 and 6 Edw. 6. may properly enough refer to them, as well as to the offence of the felons mentioned next immediately before; and farther considering that the words, "such offenders and such offences," may properly enough be taken to include all such in mischief, and such in inconvenience, according to the received (l) construction of the word "such" in some other statutes, and *a fortiori* those in greater mischief and greater inconvenience, as almost all the other offences specified in 25 Hen. 8. are, as for instance, petit treason, murder, arson, &c.; and that it is a received (m) construction of penal statutes, to extend them to all cases that come within the meaning of the words; and (i) 11 Coke, 33. (k) Sum. 232 to 242. (l) Hale, 341. See Rastal's statutes, title Clergy, par. 16. (m) 11 Coke, 33, 34. Vide sup. s. 25.

that it would be absurd to imagine that the makers of the statute intended to put those who carried goods stolen into a different county, in a worse case in such county than in that wherein they stole them, as they must be, if 25 Hen. 8. were only revived against them where they carried the thing stolen into a different county, for by such a construction they would have been excluded from clergy, in the county wherein they committed the robbery, by 1 Edw. 6. c. 12. only, which not extending to those who challenge above the number of twenty, might easily be evaded, whereas in a different county they would be excluded from it in such case by 25 Hen. 8.; to which may be added, (n) that the first sentence of the purview of 5 & 6 Edw. 6. viz. "that the said act of 25 Hen. 8. touching the putting such offenders from their clergy," had been sufficient, if no more had been intended but the excluding those who rob in one county and fly into another, and therefore it is most natural to intend that it was the meaning of the makers of the statute, by adding those farther words, "that every article, clause and sentence in the same, touching clergy, shall, touching such offences, remain, &c." to revive the whole statute so far as it related to clergy: and since the whole statute of 25 Hen. 8. is revived, it follows by a necessary consequence, that so much of 23 Hen. 8. also as is expressly affirmed by it, is revived also.

See Foster, 375.

Sect. 44. And therefore since 25 Hen. 8. having recited the clause of 23 Hen. 8. concerning clergy, and the mischief that it extended only to those who are found guilty, expressly enacts, "That whoever shall be indicted of petit treason, wilful burning of houses, murder, robbery or burglary, or other felony, according to the tenor and meaning of the said statute, and stand mute, or challenge peremptorily above twenty, &c. shall lose the benefit of the clergy, in like manner as if he had pleaded, and been found guilty;" whereby it affirms and inforces the 23 Hen. 8. as to those found guilty of such crimes; it follows by a necessary consequence, that persons not in holy orders found guilty of petit treason, or (o) arson, which were omitted by 1 Edw. 6. are excluded from clergy by 23 Hen. 8. thus affirmed and enforced by 25 Hen. 8. and consequently revived by 5 & 6 Edward the Sixth.

(o) 11 Coke, 34, 35.
Sum. 232, 233.
1 Hale, 570,
571, &c.
2 Hale, 345,
346.
Con. Savil, 46.
S. P. C. 125.

(p) Vide sup.
sect. 33.

Sect. 45. But it is observable, that the said statute of 25 Hen. 8. wholly omits (p) accessaries, as well as 1 Edw. 6. But to remedy this defect, it is enacted by 4 and 5 Ph. & Mary, c. 4. "That every person that shall maliciously command, hire, or counsel any person or persons, to commit or do any petit treason, wilful murder, or to do any robbery in any dwelling house or houses, or to commit or do any robbery in or near the highway in the realm of England, or in any other the queen's dominions, or to commit or do any robbery in any place within the Marches of England against Scotland, or wilfully to burn any dwelling house, or any part thereof, or any barn then having corn or grain in the same; that then every such offender, being outlawed thereof, or being thereof arraigned and found guilty by the order of the law, or being otherwise lawfully attainted or convicted of the same offence, or being arraigned thereof,

“ thereof, do stand mute of malice or froward mind, or do challenge peremptorily above the number of twenty persons, or will not answer directly to such offence, shall not have the benefit of his clergy.”

It is observable,

Sect. 46. FIRST, That this statute is general as to all robberies in any dwelling-house, yet it seems to have been always taken as a (q) reasonable construction, that it shall be restrained to such robberies of this kind as were excluded from the benefit of clergy by some former statute: for it cannot be well imagined that the makers of this or any statute intended in any case to take away clergy from the accessory, where the principal is left to the full benefit of it.

(q) 11 Coke, 35, 36. 37. Summary, 235. 2 Hale, 342. Con. Savil, 46.

Sect. 47. SECONDLY, That an indictment or appeal, in order to oust an accessory of his clergy by force of this statute, must expressly pursue it, in substance (r) at least, as hath been already shewn, section twenty-five.

(r) Vide Dyer, 186. that the words wilful

murder in an indictment on the statute are sufficiently pursued by laying the murder done *ex malitia premeditata*.

Sect. 48. It is further enacted by 3 and 4 Will. & Mary, c. 9. s. 3. “ That if any person or persons whatsoever be indicted of any offence, for which by virtue of any former statute he or they are excluded from having the benefit of his or their clergy, if he or they had been thereof convicted by verdict or confession, if he or they stand mute, or will not answer directly to the felony, or shall challenge peremptorily above the number of twenty persons returned to be on the jury, or shall be outlawed thereupon, shall not be admitted to the benefit of his or their clergy.”

Sect. 49. But note, That this statute extends not to appeals, nor to offences made felonies by subsequent statutes.

And now I am in the second place more distinctly to consider the several statutes which take away the benefit of clergy, so far as they particularly relate to the several kinds of crimes.

For the better illustration whereof, having referred the reader, as to the felonies made such by statute, to the several chapters in the first book wherein such felonies are handled, I shall here consider the statutes which take away clergy from capital offences at the common law, under the follow heads—as they relate,

1. To petit treason.
2. To homicide.
3. To larceny.
4. To sacrilege.
5. To robbery.
6. To burglary.
7. To arson.

I. As to PETIT TREASON.

Sect. 50. It is certain that by force of 23 & 25 Hen. 8. revived (s) by 5 & 6 Edward 6. the principal, not being a (t) clerk in holy orders, is excluded from the benefit of clergy, upon a (u) conviction, (x) standing mute, or challenge of more than twenty upon an (y) indictment.

(z) Sup. s. 43.
44.
Summary, 232.
2 Hale, 311.
(t) Sup. s. 13.
(u) Sup. s. 30.
(x) Sup. section, 32, 33. (y) Sup. section 33.

(z) 2 Hale, 338, 339. 341. Summary, 232. **Sect. 51.** And Sir Matthew Hale (z) seems to be of opinion, that the principal is likewise ousted of his clergy by 23 Hen. 8. in appeal of petit treason, if he be convicted by verdict or confession, but not in other cases.

(a) Sup. sect. 43, 44. But *quare*, How this can be? For since so much (a) only of 23 Hen. 8. seems to be revived, as is affirmed and enforced by 25 Hen. 8. and that no way extends to appeals but only to indictments, it seems difficult to make out, that any part of 23 Hen. 8. so far as relates to appeals is revived by 25 Hen. 8.

Sect. 52. But I would rather incline to think, that the principal in an appeal of petit treason may be excluded from his clergy by (b) 1 Edw. 6. c. 12. in all cases except that of challenging above the number of twenty, under the words "murder of malice prepensed," in that statute; because all petit treason, in the very notion of it, necessarily (c) includes such murder and more.

(b) Sup. s. 34, 35.
(c) Bk. 1. c. 14. s. 6.
2 Hale, 310.

(d) Vide supra, section 45. **Sect. 53.** However, the makers of 4 (d) & 5 Ph. & Mary, c. 4. seem plainly to have been of opinion, that the principals in petit treason are excluded from clergy in all cases, as well upon an appeal as indictment; because they have in all cases expressly excluded the accessories maliciously before, as well upon an appeal as indictment; and (e) it cannot be well imagined that they intended to make the law more severe against them than against the principals.

(e) Vide 11 Co. 35.
2 Hale, 312. 346. and sup. sect. 46.

II. As to HOMICIDE.

Sect. 54. It is certain that wilful murder of malice prepensed is excluded from the benefit of clergy upon indictments in all cases by 23 and 25 Hen. 8. and 1 Edw. 6. c. 12. before recited (f).

(f) Ante.

(g) Sum. 232. 2 Hale, 343. **Sect. 55.** Also it seems (g) to be the opinion of Sir Matthew Hale, that it likewise is excluded from clergy in all cases as well upon appeals as indictments. But this seems questionable; for appeals are certainly not (h) within 25 Hen. 8. and therefore since so much only of 23 Hen. 8. is revived by 5 & 6 Edw. 6. as is affirmed and enforced by 25 Hen. 8. I do not see how it can be revived as to any appeal. From whence it seems to follow, that the only statute which expressly excludes them is 1 Edw. 6. c. 12. which (i) omits the case of challenging more than twenty. Neither is this defect supplied by 3 & 4 Will. & Mary, c. 9. for this extends (k) only to indictments.

(h) Vide sup. s. 42, 43. 51.
(i) Vide sup. s. 34, 36.
(k) Sup. sect. 48, 49.

Sect. 56. But accessories maliciously before to such murder are expressly excluded from clergy in all cases, as well upon appeals

appeals as indictments, by 4 and 5 Ph. & Mary, c. 4. and how far the principal may (*l*) hereby in like manner be implicitly excluded also in all cases, I shall leave to be considered.

(*l*) 11 Coke, 35. and sup. s. 46. 53. Vide 2 Hale, 342. 344.

as to accessaries after the fact in petty treason and murder.

Sect. 57. By 1 Jac. 1. c. 8. "He that shall be convicted by verdict of twelve men, or confession, or otherwise according to the laws of this realm, of homicide by stabbing," but not those who abet them, &c. (for which I shall refer to book the first, chapter 12. sect. 4, 5, &c.) "shall be excluded from the benefit of his clergy, &c."

See bk. 1. c. 12. s. 4 to 7.

Sect. 58. And this statute seems plainly to extend as well to appeals as indictments, but not to the case of standing mute, or challenging above twenty, &c. But those who are indicted of such manslaughter are excluded from clergy in all such cases, as well as on a conviction, by 3 & 4 Will. & Mary, c. 9.

III. LARCENY is excluded from the benefit of clergy in the following cases :

1. In that of a felonious secret taking from the person (1).
2. In that of horse-stealing.
3. In that of stealing from a shop or dwelling-house, (2) &c.
4. In that of stealing woollen manufactures from the tenters or linen from the place of manufacture. (3)
5. In that of stealing the king's naval stores. (4)
6. In that of stealing sheep and other cattle.
7. In that of thefts on navigable rivers above the value of forty shillings. (5)
8. In that of stealing from vessels in distress, or that have suffered shipwreck.

And FIRST, As to a felonious secret taking from the person.

Sect. 59. It was enacted by 8 Eliz. c. 4. "That no person who shall be indicted or appealed for felonious taking of any money, goods, or chattels, from the person of any other, privily without his knowledge, in any place whatsoever, and thereupon found guilty by verdict of twelve men, or shall confess the same upon his or their arraignment, or will not answer directly to the same, according to the laws of the realm, or shall stand wilfully or of malice or obstinately mute, or challenge peremptorily above the number of twenty, or shall be upon such indictment or appeal outlawed, shall be admitted to his clergy, &c."

See the first vol. "Larceny from the person," for the construction of this statute.

Sect. 60. This statute continued in force until the 48 Geo. 3. c. 129., by s. 2. of which it is enacted, that "after the passing of that

(1) Vide postea, et vol. i. p. 211.

(2) Vide postea, et vol. i. p. 209.

(3) Vide postea, et vol. i. p. 205, 206.

(4) Vide postea, et vol. i. p. 199.

(5) Vide postea, et vol. i. p. 204.

“ that act every person who shall at any time, or in any place
 “ whatever, feloniously steal, take, and carry away any money,
 “ goods, or chattels, from the person of any other, whether *privily*
 “ *without his knowledge, or not, but without such force or*
 “ *putting in fear as is sufficient to constitute the crime of robbery,*
 “ or who shall be present aiding and abetting therein, shall be
 “ liable to be transported beyond the seas for life, or for such
 “ term not less than seven years, as the judge or court before
 “ whom any such person shall be convicted, shall adjudge; or
 “ shall be liable in case the said judge or court shall think fit to
 “ be imprisoned only, or to be imprisoned and kept to hard
 “ labour in the common gaol, or house of correction, or peniten-
 “ tiary house, for any time not exceeding three years.”

SECONDLY, As to horse-stealers.

(a) Vide sect.
 34. 39.
 2 Hale, 364,
 365.

Sect. 61. It seems, that they are (a) ousted of their clergy in all cases, as well upon appeals as indictments, by 1 Edw. 6. c. 12. and 2 & 3 Edw. 6. c. 33. by the latter of which statutes it is enacted, “ That all persons feloniously taking or stealing any
 “ horse, gelding, or mare, shall not be admitted to the privilege
 “ of the clergy, but shall be put from the same, in like manner
 “ and form as though they had been indicted or appealed for
 “ felonious stealing of two horses, two geldings, or two mares of
 “ any other, and thereupon found guilty by verdict of twelve
 “ men, or confessed the same upon their arraignment, or stand
 “ wilfully or of malice mute.”

(b) S.P.C. 125.
 Summary, 238.
 2 Hale, 365.

Sect. 62. It seems a reasonable (b) construction of this statute to extend it as well to those who are outlawed, or challenge more than twenty, as to those who are found guilty by verdict, &c. because it is general, that all such persons “ shall be put from their
 “ clergy, &c. in such manner as if they had been found guilty,
 “ &c.” and if they had been found guilty, it is certain that they would have been ousted of their clergy by the express words of 1 Edw. 6. c. 12. s. 10.

Supra, 34, &c.

† **Sect. 63.** It is enacted by 31 Eliz. c. 12. s. 5. (which prescribes the manner in which horses shall be publicly bought and sold), “ That not only all accessaries before the fact, but also all
 “ accessaries after the fact in horse-stealing shall be deprived and
 “ put from all benefit of their clergy, as the principal, by statute
 “ heretofore made, is, or ought to be.”

THIRDLY, As to larceny from a dwelling-house, shop, &c.

Barrington
 upon the Sta-
 tutes, 177

Sect. 64. It is enacted by 10 & 11 Will. 3. c. 23. “ That all
 “ persons who by night or day shall in any shop, ware-house,
 “ coach-house, or stable, privately and feloniously steal any goods,
 “ wares, or merchandizes, of the value of 5s. or more, though
 “ such shop, &c. be not broke open, and though the owner or
 “ any other person be not in such shop, &c. or that shall assist,
 “ hire, or command any person to commit such offence, being
 “ thereof convict, or attainted by verdict or confession, or being
 “ indicted thereof shall stand mute, or challenge above twenty of
 “ the jury, shall be excluded from the benefit of the clergy.”

Sect.

Sect. 65. But by st. 1 Geo. 4. c. 117. s. 1. it is enacted, that so much of the said statute of 10 & 11 Will. 3. as relates to the privately stealing goods, &c. in any shop, &c. under £15. be repealed; and by sect. 2. it is enacted, "That from and after the passing this act, every person who shall privately and feloniously steal any goods, wares, or merchandizes of the value of five shillings or more, being under the value of fifteen pounds, in any shop, ware-house, coach-house, or stable, or who shall aid or assist any person to commit such offence, shall be liable to be transported beyond the seas for life, or for such term not less than seven years, as the court before which any such person shall be convicted, shall adjudge; or shall be liable, in case the said court shall think fit, to be imprisoned only, or to be imprisoned and kept to hard labour in the common gaol, house of correction, or penitentiary house, for any term not exceeding seven years." And by statute of 4 Geo. 4. c. 53. clergy is restored to those stealing in like manner to the amount of £15. and the same punishment directed as by the above stat. of 1 Geo. 4.

Sect. 66. By 12 Ann. c. 7. "Every person who shall feloniously steal any money, goods or chattels, wares or merchandizes, of the value of 40s. or more, being in a dwelling-house, or out-house thereunto belonging, although such house or out-house be not actually broken by such offender, and although the owner of such goods, or any other person or persons be or be not in such house or out-house, or shall assist, or aid any person or persons to commit any such offence, being thereof convicted or attainted by verdict or confession, or being indicted thereof shall stand mute, or will not directly answer to the indictment, or shall peremptorily challenge above the number of twenty returned to be of the jury, shall be absolutely debarred of and from the benefit of clergy, &c."

Sect. 67. But it is provided, "That nothing in this act shall extend to apprentices under the age of fifteen years who shall rob their masters as aforesaid."

Sect. 68. This statute seems also defective, like the former, as to persons outlawed, and accessaries. *Vide sect. 26, 27, 28. 64, 65.*

FOURTHLY, As to those who shall feloniously steal woollen manufactures from the tenters.

Sect. 69. It is enacted by 22 Car. 2. c. 5. "That no person who shall be indicted for feloniously cutting and taking, stealing or carrying away of any cloth or woollen manufactures from the rack or tenter in the night-time, and thereupon found guilty by verdict of twelve men, or shall confess the same on arraignment, or will not answer directly to the same, according to the laws of the realm, or shall stand wilfully of malice mute, or challenge peremptorily above the number of twenty, or shall be upon such indictment outlawed, shall be admitted to the benefit of clergy, &c."

But this, as far as relates to the taking away the benefit of clergy from the offender for this offence, is repealed by 4 Geo. 4. c. 53. and in lieu thereof substitutes the above punishment of trans-

transportation for life, or for any term not less than seven years, or imprisonment with or without hard labour, in the discretion of the court, not exceeding seven years, and this punishment is extended to aiders and abettors.

FIFTHLY, As to those who steal naval stores.

N. B. This statute extends neither to appeals nor to accessories.

Sect. 70. It is observable, That those who “ shall steal or embezzle any of his majesty’s sails, cordage, or any other his majesty’s naval stores, to the value of twenty shillings,” are in the like manner excluded from clergy by 22 Car. 2. c. 5. as those who steal woollen manufactures from the tenters, &c.

Clergy is also restored by the same statute, 4 Geo. 4. c. 53. to those who steal naval stores, and they, their aiders and abettors, are subjected to the same punishment of transportation, imprisonment, &c. as above set forth.

For the offence of having the custody of the king’s naval stores, vide book the first.

† *Sect. 71.* But it was provided by the said statute of 22 Car. 2. par. 4. “ That it should and might be lawful for the judges or justices of the court before whom such offender should be arraigned and condemned, to grant a reprieve for the staying execution, and to cause such offender to be transported for the space of seven years.”

† **SIXTHLY, As to stealing sheep and other cattle.**

Vide book 1. title “ Larceny,” p. 198.

It is enacted by 14 Geo. 2. c. 6. “ That if any person or persons shall feloniously drive away, or in any other manner feloniously steal one or more sheep, or other cattle of any other person or persons whatsoever, or shall wilfully kill one or more sheep, or other cattle of any other person or persons whatsoever, with a felonious intent to steal the whole carcase or carcasses, or any part or parts of the carcase or carcasses of any one or more sheep, or other cattle that shall be so killed, or shall assist or aid any person or persons to commit any such offence or offences, they shall be adjudged guilty of felony, and suffer death without benefit of clergy.”—But it is enacted by 15 Geo. 2. c. 34. “ That this act was meant and intended, and shall be construed, deemed, and taken to extend to any bull, cow, ox, steer, bullock, heifer, calf, and lamb, as well as sheep, and to no other cattle whatsoever.”

SEVENTHLY, As to thefts on navigable rivers.

It is enacted by 24 Geo. 2. c. 45. “ That all and every person and persons that shall feloniously steal any goods, wares, or merchandize of the value of forty shillings in any ship, barge, lighter, boat, or other vessel or craft upon any navigable river, or in any port of entry or discharge, or in any creek belonging to any navigable river, port of entry or discharge within the kingdom of Great Britain, or shall feloniously steal any goods, wares, or merchandize of the value of forty shillings upon any wharf or key adjacent to any navigable river, port of entry or discharge, or shall be present, aiding and assisting in the committing any of the offences aforesaid, being thereof convicted or attainted; or being indicted thereof, shall of malice stand mute, “ or

“ or will not directly answer to the indictment, or shall peremptorily challenge above the number of twenty persons returned to be of the jury, shall be excluded from the benefit of clergy.”

The 4 Geo. 4. c. 53. also restores clergy to this offence, and directs the same punishment both for principals and their aiders and abettors, *viz.* transportation and imprisonment with or without hard labour, at the discretion of the court.—(See ante, p. 487, 8.)

† EIGHTHLY, As to stealing from vessels in distress, or plundering goods that have been saved from the wreck.

The benefit of clergy is taken away by 12 Ann. stat. 2. ch. 18. and 26 Geo. 2. c. 19. the particulars of which are fully set forth in book the first, and to which I refer.

IV. As to SACRILEGE.

Sect. 72. It is observable, that all persons not in holy orders who shall be indicted, whether in the same county wherein the fact was committed, or in a (a) different county, of “ robbing any church, chapel, or other holy place,” are excluded from their clergy by (b) 23 Hen. 8. c. 1. and 25 (c) Hen. 8. c. 3. revived (d) by 5 & 6 Edw. 6. c. 10. upon a conviction, standing mute, or peremptory challenge of more than twenty; and by 3 & (e) 4 Will. and Mary, c. 9. upon an outlawry.

(a) *Infra*, 80, 81, 82.
(b) *Vide sup.* sect. 30, 31.
2 Hale, 365.
(c) *Vide sup.* sect. 32, 33.
(d) *Vide sup.* s. 43, 44.
(e) *Vide sup.* s. 48, 49.

Sect. 73. But the word “ robbing” (f) being always taken to carry with it some force, as shall be more fully shewn, sections 88. 92. 96. it seems, that no sacrilege is within any of these statutes, which is not accompanied with the actual breaking of a church, &c.

(f) *Kely*. 53. 69.
Dyer, 224.

Sect. 74. But by 1 Edw. 6. c. 12. (g) s. 10. all persons in general are ousted of their clergy for the “ felonious taking of any goods out of any parish church, or other church or chapel,” in all cases, except that of challenging more than twenty; and by 3 and (h) 4 Will. and Mary, c. 9. upon such a challenging as well as upon a conviction, &c. upon an indictment (i) whether in the same county wherein the sacrilege was committed, or in a different one.

(g) *Vide sup.* sect. 34, 35, 36.
(h) *Vide sup.* sect. 48, 49.
(i) *Infra*, 80, 82.
2 Hale, 365, 366.

Sect. 75. But it seems, that accessories to such a robbery or felonious taking are excluded from their clergy by no statute; for though they are expressly mentioned by 23 Hen. 8. c. 1. yet since they are omitted by 25 Hen. 8. c. 3. and so much only (k) of 23 Hen. 8. c. 1. is revived as is affirmed and enforced by 25 Hen. 8. c. 3. they seem to remain in the same case as if they had been wholly omitted by 23 Hen. 8. c. 1. which is the only statute I know of which extends to them, except the offence amount to burglary; in which case accessories before are ousted of their clergy by 3 and 4 Will. & Mary, c. 9.

(k) *Vide sup.* sect. 43, 44.
52. 55.

Sect. 76. But *quare* if there be need of any statute to exclude them, since the common law seems to have given no person whatsoever any right to demand the privilege of the clergy for sacrilege, but only at the discretion of the ordinary, as hath been more fully shewn, section the ninth.

2 Hale, 333.

V. As

V. As to ROBBERY, I shall particularly consider the statutes excluding it from clergy, as they relate,

1. To robbery in or near the highway.
2. To robbery in a dwelling-house, booth or tent.
3. To robbery in general.

And FIRST, As to robbery in or near the highway.

Sect. 77. It is observable, that all persons, not in holy orders, who shall be indicted (*l*) of “robbing any person or persons in “or near the highways,” are excluded from the clergy by 23 (*m*) Hen. 8. c. 1. and 25 (*n*) Hen. 8. c. 3. revived (*o*) by 5 and 6 Edw. 6. c. 10. upon a conviction, standing mute, or peremptory challenge of more than twenty; and by 3 & 4 (*p*) Will. & Mary, c. 9. upon an outlawry.

(*l*) Vide sup. sect. 30.

(*m*) Vide sup. sect. 30, 31.

(*n*) s. 32, 33.

(*o*) 42, 43, 44.

(*p*) Sect. 48, 49.

Sect. 78. And note, that all persons in general, “who shall be “guilty of robbing any person or persons in the highway, or near “to the highway,” are excluded from the clergy both upon an appeal and indictment by (*q*) 1 Edw. 6. c. 12. s. 10. in all cases except that of challenging more than twenty; and by 3 & 4 for Will. & Mary, c. 9. upon such a challenge upon an indictment.

(*q*) Vide sup. sect. 34, 35, 36, 37.

Sect. 79. Note, That no robbery is within these statutes, but such as is laid in the indictment to have been committed in or near the (*r*) highway, and to have (*s*) put the person robbed in fear.

(*r*) Vide ~~sup.~~ *sect. 35.*
(*s*) Sect. 73.
Dyer, 224.

(*t*) Vide supra, s. 43, 44.

Sect. 80. By 25 Hen. 8. c. 3. revived (*t*) by 5 and 6 Edw. 6. c. 10. it is recited, “That divers felons and robbers that had committed many heinous robberies and burglaries in one shire, and conveyed the spoil and robbery into another shire, and had been there taken, indicted and arraigned upon felony, and felonious taking of the same goods, and not upon the same robbery nor burglary, for that it was not committed nor done in the same shire where they had been so indicted and arraigned, and by reason thereof the same felons, robbers, and burglars had enjoyed the privilege of their clergy:” and thereupon it is enacted, “That if any person or persons be indicted of felony for stealing “of any goods or chattels, in any county within this realm of “England, and be thereupon arraigned and found guilty, or stand “mute of malice, or challenge peremptorily above the number of “twenty persons, or will not directly answer to the law, shall lose “and be put from the benefit of the clergy, in like manner and “form as they should have been if they had been indicted and “arraigned, and found guilty in the same county where the said “robbery or burglary was done or committed, if it shall appear “to the justices before whom any such felons or robbers be “arraigned by evidence given before them, or by examination, “that the same felonies whereupon they were so arraigned, had “been such robberies or burglaries, in the same shire wherein “such robberies or burglaries were committed or done, by reason “whereof they should have lost the benefit of their clergy by “force of 23 Hen. 8. in case they had been found guilty thereof
“ in

“in the same shire where such robberies or burglaries were so committed and done.”

Sect. 81. But note, that this statute extends (*u*) not to those who are outlawed; nor to those who are indicted out of the realm of England; nor to those who are indicted of such stealing as is excluded from clergy by subsequent statutes; nor to appellees; but the three first of these defects are supplied by 3 and 4 Will. & Mary, c. 9. by which it is enacted, “That if any person or persons be indicted of felony for stealing of any goods or chattels in any county within this realm of England, dominion of Wales, or town of Berwick-upon-Tweed, and thereof be convicted or attainted, or upon his or their arraignment shall stand mute, or will not directly answer to the indictment, or shall challenge peremptorily above the number of twenty persons returned to be of the jury, he or they shall be totally excluded from having the benefit of his or their clergy, if it appear upon evidence or examination before the justices, that the said goods or chattels were taken by robbery or burglary, or in any other manner, in any other county, whereof if such person or persons had been convicted by a jury of the said other county, he or they are excluded by virtue of this or any other act from having the benefit of his or their clergy.”

(*u*) 11 Co. 31.
1 Hale, 518.
2 Hale, 349.

Sect. 82. Note, that (*x*) the words, “if it shall appear upon evidence before the justices, &c.” are to be intended where the party pleads not guilty, and is found guilty by the jury; and the words “if it shall appear upon examination, &c.” are to be intended where he stands mute, or challenges peremptorily above the number of twenty, or is outlawed, or confesses, (*y*) &c.

(*x*) 11 Coke, 31.
(*y*) Vide sup.
s. 28. 31.
11 Coke, 31.
Con. 1. And.
114.

And it hath been (*z*) adjudged, that there is no need to make any entry on the record, that it appears by such evidence, or examination, that the felony was originally commenced in a different county, and was of such a nature that the offender could not have his clergy. But it is said, (*a*) that it is usual to write in the margin of the indictment, that it is for robbery, &c. in another county. (1)

(*z*) And. 114.
2 Hale, 518.

Sect.

(1) It is said that Eyre, C. J. was of opinion, that it was discretionary in the judge whether he would examine into the circumstances of the fact in the other county so as to oust the prisoner of clergy. But this is hardly consonant to the general principles of law, that a judge should have a discretionary power to receive or reject legal evidence as he pleases. The same judge was also of opinion, that in order to oust clergy on the statute, it ought to be by counter-plea to the prayer of clergy, (2 E. P. C. 777.)—This opinion deserves consideration, for by this mode the record would be perfect and would warrant the judgment of death, which otherwise it would not. If it be said that the judgment of death would be warranted, there being no prayer of clergy on the record, it may be answered, that Lord Hale says, the judge is bound to grant clergy without the prayer of the prisoner, if it be a clergyable offence, and it appear to the court that he is a clerk, or so named in the indictment. “And therefore,” he says, “the prisoner condemned shall in such case be allowed his

clergy under the gallows, if a judge come that way,” and for this he cites 34 H. 6. 49. a. b.—(2 H. P. C. 379.) It should seem, however, that there ought to be some other evidence than the mere finding the property stolen upon the prisoner, to infer that he was one of the parties committing the robbery in the other county, and thereby to oust him of his clergy. For in the case of one Evan Evans, who was indicted at the Old Bailey for a larceny, it appeared that the goods were taken from the owner by robbery in Essex; but there being no evidence that the prisoner was there present, beyond the finding of the goods upon him in Middlesex, upon deliberation, by Holt, C. J. and two other judges, he had his clergy. But in the case of one Butler, where there was the like evidence of possession of the goods, and also that the prisoner was the person who robbed them from the prosecutor in the other county, he received sentence of death and was executed.—(E. P. C. 776.)

(b) Moor, 550.
Summary, 241.
1 Hale, 536.
2 Hale, 349.

Sect. 83. It is said to (b) have been holden by all the justices, that if the felony, whereof a man is found guilty in the county wherein he is indicted, be such as doth not need the benefit of clergy, as amounting only to petit larceny, &c. the offender shall have only the proper judgment for such offence, and no other, in respect of the robbery, &c. proved upon the evidence, &c. in the first county; for being convicted of no offence which will warrant a judgment of death, and consequently having no need to demand his clergy, he cannot be hurt by being excluded from it.

(c) Vide sup.
s. 45, 46.
How such of-
fence must be
laid in the in-
dictment, vide
sup. s. 25.

Sect. 84. By 3 and 4 (c) Philip & Mary, c. 4. "Those who shall maliciously command, hire, or counsel any person or persons to commit or do any robbery in or near any highway in this realm of England, or in any other the queen's dominions, shall be ousted of their clergy, on a conviction, standing mute, peremptory challenge of more than twenty, or outlawry."

SECONDLY, As to robbery in a dwelling-house, booth, or tent, I shall consider the statutes concerning it as they relate,

1. To such robbery putting some person in fear.

2. To such robbery putting no person in fear.

FIRST, As to such robbery putting some person in fear.

2 Hale, 351,
352, &c.

(d) Vide sup.
sect. 30, 31, 32,
33, 42, 43, 44,
48, 49, 72, 77.

Sect. 85. It is observable, that all persons not in holy orders, "who shall rob any person or persons in their dwelling-houses, or dwelling-place, the owner or dweller in the same house, his wife, his children, or servants then being within, and put in fear and dread by the same, and indicted," (d) are excluded from their clergy by 23 Hen. 8. c. 1. and 25 Hen. 8. c. 3. revived by 5 and 6 Edw. 6. c. 10. upon a conviction, standing mute, or peremptory challenge of more than twenty, and by 3 and 4 Will. & Mary, c. 9. upon an outlawry.

(e) Vide sup.
sect. 80, 81, 82,
83.

(f) Vide sup.
sect. 45, 46.

Sect. 86. And note, (e) that by 24 Hen. 8. c. 3. and 3 and 4 Will. & Mary, c. 9. they are excluded from their clergy on an indictment in a foreign county. And their accessaries before are excluded in all cases by 3 and 4 (f) Philip & Mary, c. 4.

(g) Vide sup.
sect. 44, &c.

(h) Vide sup.
sect. 40.

11 Coke, 36.

(i) Vide infra,
sect. 93.

(k) Vide sup.
sect. 36.

(l) Vide sup.
sect. 48, 49.

(m) Vide sup.
sect. 80, 81, 82,
83.

(n) Sum. 236.
Sup. s. 45, 46.

(o) Vide sup.
s. 73.
and infra, sect.
82, 92, 96.

Sect. 87. By 1 (g) Edw. 6. c. 12. s. 10. all persons in general who shall break any house by day or by night, viz. "who shall break a house burglarly (h) if in the night, or shall break a house or commit a felony therein, if in the day, (i) any person being then in the same house where the same breaking shall be, and thereby put in fear or dread," are excluded from their clergy, as well upon an appeal as an indictment, in all cases, (k) except that of challenging more than twenty; and by 3 (l) and 4 Will. & Mary, c. 9. upon such a challenge, as well as upon a conviction, &c. upon an indictment, whether in the same county wherein the breaking and felony was committed, or in a (m) different county; and the accessaries before to such a breaking, if accompanied with stealing in a dwelling-house, are ousted of their clergy in all (n) cases by 4 and 5 Philip & Mary, c. 4. because the felonious taking being accompanied with a breaking, seems properly (o) enough to come under the notion of robbery in a dwelling-

ling-house, all accessories to which before the fact are expressly excluded from their clergy by that statute, as accessories before (p) Vide sup. sect. 48, 49. to robbery in general are by 3 and (p) 4 Will. & Mary, c. 9.

Sect. 88. But (q) no breaking is within the statute of 1 Edw. 6. which doth not amount to an actual breaking of an house, or of some part of it; as of a cupboard or door, &c. fixed to the freehold; and therefore the breaking of a trunk or box, &c. seems plainly not to be within the statute. (q) Kelynge, 58, 59. 70. Sup. s. 73. 87. infra, s. 92. 96. Vide Foster, 108, 109.

But by 3 and 4 Will. & Mary, c. 9. "Every person or persons " that shall feloniously take away any goods or chattels, being in " any dwelling-house, the owner, or any other person being " therein, and put in fear, or shall comfort, aid, abet, assist, " counsel, hire, or command any person to commit such offence, " being thereof convicted, or attainted, or indicted, and standing " mute, or peremptorily challenging above twenty, shall be ousted " of the benefit of their clergy."

SECONDLY, As to such robbery, putting no person in fear: I shall consider the statutes concerning it as they relate, 2 Hale, 354. 355, &c.

1. To such robbery in a house which some person is in at the time;

2. To such robbery in a house which no person is in at the time.

As to the first of these, viz. In what cases persons are ousted of their clergy for robbery in a house which some person is in at the time.

Sect. 89. By 5 and 6 Edw. 6. c. 9. it is enacted, "That if it " happen any person or persons to be found guilty according to " the laws of this realm, for robbing of any person or persons in " any part or parcel of their dwelling-houses, or dwelling-places, " the owner or dweller in the same house, or his wife, his children, " or servants being then within the same house, or place where it " shall happen the same robbery and felony shall be committed " and done, or in any other place within the precinct of the same " house or dwelling-place, that such offenders shall in no wise be " admitted to their clergy, whether the owner or dweller in the " same house, his wife, or children then and there being, shall be " waking or sleeping."

Sect. 90. And by 5 and 6 Edw. 6. c. 9. it is further enacted, "That no person or persons which shall happen to be found " guilty after the laws of this realm, of and for robbing any person " or persons, in any booth or tent in any fair or market, the " owner, his wife, his children, or servants or servant then being " within the booth or tent, shall be admitted to the benefit of his " or their clergy, but utterly be excluded thereof, &c. without " having any respect or consideration whether the owner or " dweller in such booths and tents, his wife, children, or servants " being in the same booths or tents at the time of such robberies " and felonies committed, shall be sleeping or waking."

Sect.

(r) Sum. 235,
237.
2 Hale, 355.

(s) Vide sect.
48, 49.

Sect. 91. This statute (r) seems plainly to extend to all who shall be convicted by verdict or confession, whether upon an appeal or indictment, but not to those who shall be outlawed, or stand mute, or challenge peremptorily above twenty jurors; but these defects are supplied as to indictments by 3 (s) and 4 Will. & Mary, c. 9.

Sect. 92. It seems to be generally agreed, that no robbery is within this statute which is not accompanied with an actual (t) breaking of an house, or of some part of it.

(t) For this, vide sup. s. 73, 87, 88, 96.
Summary, 237, 238. 2 Hale, 354. Yet in Popham, 84. there is a case seemingly contrary.

(u) Hetley, 64.
S. P. C. 129.
Summary, 236,
237.
11 Coke, 36.
(x) Folio, 237,
238.
1 Hale, 522,
523.
Kelynge, 27.

Sect. 93. Also it seems to be agreed, (u) that a sojourner's being in a house at the time of the robbery doth not bring it within this statute; for the words are, "The owner or dweller in the same house, or his wife, his children, or servants, being then within the same house, &c." Yet it is said in (x) Hale's Pleas of the Crown to have been ruled by advice of the justices, that where one entered into the lodging of Sir H. Hungate, being parcel of Whitehall, and broke open a chamber and took away his goods, his case was within this statute, and that the indictment ought to be for breaking the king's house, called Whitehall, and for stealing the goods of Sir H. Hungate, divers persons being in the house.

But note, This case is wholly omitted in the first edition of Hale's Pleas of the Crown, and I cannot but think that it is misprinted in the second; because such a robbery seems by no means within the purview of this statute, which extends only to such robberies as are done to a man in such a place as may be called his dwelling-house, or dwelling-place, his wife, children, or servants being at the same time within the same.

But in the state of this case it seems to be admitted, that Whitehall, wherein the felony was committed, could not properly be called, nor ought to be laid in the indictment as the dwelling-house or dwelling-place of the said Sir H. Hungate, who was the person robbed, but of the king.

(y) Vide Hetley, 64.
Summary, 235,
236.
11 Coke, 36.
S. P. C. 129.
Popham, 84.
(z) Vide sup. s. 87.
(a) Vide infra, s. 95, 96, 97.

Also it seems to be admitted, that it is sufficient to set forth generally in the indictment, that divers persons were in the house, without shewing that they were under any relation to the person robbed, as his children or servants, &c. which (y) seems to be necessarily required by 5 and 6 Edw. 6. c. 9. And therefore I take it, that the statute here intended is not 5 and 6 Edw. 6. c. 9. but rather 1 Edw. 6. (z) c. 12. s. 10. or 39 (a) Eliz. c. 15.—Yet *quare*, for neither of these statutes seem to extend to this case as it is here put.

However, 3 and 4 Will. & Mary, c. 9. seems fully to extend to it; by which it is enacted, "That all those who shall rob any dwelling-house in the day-time, any person being therein, or shall comfort, aid, abet, assist, counsel, hire, or command any person to commit such offence, being thereof convicted or attainted, or indicted, and standing mute, or challenging peremptorily above twenty, shall be ousted of their clergy."

But

But I do not (b) find that any statute excludes those from their clergy who are accessaries to a robbery in a booth or tent, except it be from the person of a man, in which case the accessaries before the fact seem to be excluded from their clergy by 3 and 4 Will. & Mary, c. 9. as shall be more fully shewn hereafter.

(b) See the statute of 3 & 4 Ph. & Mary, sup. p. 45, 46.

Sect. 94. It seems plain, that those who are guilty of a felony within these statutes, are excluded from their clergy by 3 and 4 Will. & Mary, c. 9. on an indictment in a foreign county, in the same manner as if they had been convicted in the first county, as hath been more fully shewn; sect. 80, 81, 82, 83.

SECONDLY, As to such robbery in a house which no person is in at the time.

Sect. 95. It is recited by 39 Eliz. c. 15. "That then of late divers lewd and felonious persons, understanding that the robbing of houses in the day-time, no person being therein at the time, is not so penal as where some person is therein, had been emboldened to take their opportunity to commit many heinous robberies in breaking and entering divers houses, &c." and thereupon it is enacted, "That if any person shall be found guilty, and convicted by verdict, confession, or otherwise, according to the laws of this realm, for the felonious taking away in the day-time, of any money, goods, or chattels, being of the value of 5s. or upwards, in any dwelling-house or houses, or any part thereof, or any out-house or out-houses, belonging and used to and with any dwelling-house or houses, although no person shall be in the said house or out-houses at the time of such felony committed, then such person shall not be admitted to the benefit of his clergy."

2 Hale, 356.

Sect. 92. Notwithstanding the words of the purview of this statute seem plainly to include all felonious takings to the value of five shillings out of an house, &c. whether with or without force; yet since the mischief complained of in the preamble, and intended to be redressed, is the frequent committing of many "heinous robberies in breaking and entering, &c." and since all "other (c) statutes, excluding the benefit of clergy from robberies in houses, have been construed to extend to such larcenies only as are accompanied with a breaking of a house, or of some part of it, it seems agreed, (d) that this statute also shall extend only to such a felonious taking as is accompanied with the like breaking.

(c) Sup. s. 73. 87, 88. 92. 96.
(d) Kelynge, 30. 58. 69, 70. Sum. 237, 238. 2 Hale, 256. 11 Coke, 36. Cro. Car. 473, 474.

Sect. 97. It seems agreed, (e) that a chamber in one of the Inns of Court, wherein a person usually lodges, is properly a dwelling-house within this statute, and may be so called in an indictment, because every owner of such a chamber hath a separate interest in it. But that a lodging in Whitehall or Somerset House is not (f) a dwelling-house within this statute; from whence it seems to follow, that a robbery in such a lodging is not excluded from the clergy by this statute, if any person were at the time in any other part of the palace, because the whole is but one dwelling-house.

(e) C. Car. 473. 1 Jones, 394. Summary, 83. 237. 2 Hale, 338. Kelynge, 27. 52. Cooper, 5. See 1. c. 19. p. 210.
(f) Kelynge, 27. 52. Vide Sup. s. 93.

(g) Sum. 237.

2 Hale, 357.

1 Hale, 527. 521.
1 Sup. s. 45, 46.(h) C. O. 2.
473, 474.

2 Hale, 358.

Note, That the
same case is in
1 Jones, 394.
but this point is
not taken
notice of.(i) Vide sup.
c. 29, s. 7, 8. 13.
Vide Foster,
357.

(k) 1 Jac. 1. 8.

(l) Aleyn, 44.
Sum. 58.

Bk. 1. c. 12.

Aleyn, 43.

Stiles, 86.

Foster, 356.

1 Hale, 468.

Salkeld, 542.

Farresly, 129.

2 Ld. Raym.
842.

Sect. 98. It seems agreed, (g) that no accessory is ousted of his clergy by this statute.

Also it hath been adjudged, (h) that he who stands by and abets another while he breaks and enters the house, and afterwards divides the money with him, but doth not actually enter the house himself, is not within the statute. The reason whereof seems to be this, that the words, "If any person shall be convicted, &c. of a felonious taking, &c. in a dwelling-house, &c." shall, in so penal a law, be intended only of an actual taking, and not of a constructive one. But this seems an extremely nice case, and if it were a new point, and not confirmed by experience, the authority of it might perhaps be justly questioned; for if the person who only stood by and entered not the house, had actually entered it, and the other only had taken the money, and had not given him any part of it till both had gone out of the house, in this case as well as in the other, it might be said, that he who actually received not any part of the money till he was gone out of the house, was guilty only of a constructive taking in the house, and consequently not within this statute. But I cannot easily persuade myself but that in such a case both must be adjudged equally within the statute; and why not as well in the other, it seeming an uncontroverted (i) rule, that where divers are present and abet one another in committing any felony, the act of one shall be looked on as the act of all.

And upon this ground, as I take it, it hath been always agreed, that those who are present, and abetting, when a murder or robbery is committed, are all of them equally excluded from their clergy, whether they actually gave the stroke or took the money, or not; and yet the statutes to this purpose mention only those who shall be found guilty of murder, robbing, &c. Nor do I find any resolution to the contrary on any other statute concerning clergy, except only the (k) statute of stabbing, whereon it hath been adjudged, (l) that the person only who gives the stab is within the purview of it: but this seems plainly to depend on the particular circumstances of this offence, which is excluded from clergy in respect of the cruelty and bloody mind of him who gives the stab, which certainly is peculiar to himself.

Sect. 99. However, it is certain at this day, that by the express words of 3 and 4 Will. & Mary, c. 9. "Whoever shall comfort, aid, abet, assist, counsel, hire, or command any person or persons to break any dwelling-house, shop, or warehouse thereunto belonging, or therewith used, in the day-time, and feloniously take away any money, goods, or chattel of the value of 5s. or upwards therein being, although no person shall be within such dwelling-house, shop, or warehouse, being convicted or attainted, or being indicted and standing mute, or challenging peremptorily above twenty, shall be excluded from their clergy."

Sect. 100. But note, That this clause, mentioning only a felonious taking in a dwelling-house, shop, or warehouse thereunto belonging, and not mentioning out-houses in general, as 39 Eliz. doth, seems to have prevailed before; and therefore I take it that

that an assistant to such a felony in an out-house, not being such a shop or warehouse, without entering into it, is clearly intitled to the benefit of his clergy since this statute, however it might be disputed before. Supra, s. 98.

Sect. 101. Note also, That the accessaries before to such a felony in any out-house, not being such a shop or warehouse, are still intitled to the benefit of their clergy, because the only (m) law which excludes them is the (n) above-cited clause of 3 & 4 Will. & Mary, c. 9. which extends only to such felonies "in a dwelling-house, shop, or warehouse thereto belonging." (m) Sum. 227.
(n) Supra, s. 99.

Sect. 102. But all principals in any felony within the said statute of 39 Eliz. are excluded from their clergy by the same statute upon any conviction, whether upon an indictment or appeal; and by the said statute of 3 (o) & 4 Will. & Mary, upon an outlawry, standing mute, or peremptory challenge of more than twenty, upon an indictment, whether in the same county in which the felony was first committed, or in a different (p) county. (o) Sup. s. 48,
49.
(p) Supra, sect.
81, 82, 83.

THIRDLY, As to robbery in general.

Sect. 103. It is enacted by 3 & 4 Will. & Mary, c. 9. "That all and every person or persons that shall rob any other person, or shall comfort, aid, abet, assist, counsel, hire, or command any person or persons to commit such offence, being thereof convicted or attainted, or being indicted and standing mute, or challenging peremptorily above twenty, shall not have the benefit of his clergy."

VI. As to BURGLARY.

Sect. 104. If any person be in the house at the time of the breaking, (q) and thereby put in fear, the principal is excluded from his clergy by 1 Edw. 6. c. 12. s. 10. in all cases except that of challenging more than twenty, and by 25 Hen. 8. revived (r) by 5 & 6 Edw. 6. or at least by 3 & 4 Will. & Mary, c. 9. upon such a challenge, upon an indictment. (q) Vide 11
Coke, 35, 36.
2 Hale, 360, 361.
Sup. s. 34, 36, 40.
(r) Vide sup.
sect. 42, 43, 44.

Sect. 105. Also the principal in every burglary, whether (s) any person were in the house at the time or not, is excluded from his clergy by 18 Eliz. c. 7. upon a (t) conviction by verdict, outlawry, or confession; and by 3 & 4 Will. & Mary, upon standing mute, or challenging peremptorily more than twenty upon an indictment. (s) Popham,
42, 52.
1 Anderson,
302.
Moor, 660.
4 Coke, 40.
Bk. 1. c. 17.
p. 136.
(t) 11 Coke, 35, Summary, 233.

Sect. 106. Also by (u) the same statute of 3 & 4 Will. & Mary, c. 9. "Every person who shall counsel, hire, or command any person to commit any burglary, being thereof convicted, or attainted, or being indicted, and standing mute, or challenging peremptorily above twenty, shall not have his clergy." (u) 11 Coke, 36.
Summary, 233,
234.

VII. As to ARSON.

Sect. 107. It hath been clearly (v) settled, since Poulter's case, that the principal (w) not being in holy orders, is excluded from clergy upon an indictment in all cases, except outlawry, by 23 Hen. (v) Sum. 233.
2 Hale, 345, 346.
11 Coke, 29. &c.
(w) Supra, s. 10,
11, 12, 13, 30, 32.

(x) *Supra*, sect. 43, 44.

Hen. 8. and 25 Hen. 8. as (x) revived by 5 & 6 Edw. 6. c. 10. And it is certain that he is excluded upon an outlawry on an indictment by 3 & 4 Will. & Mary, c. 9.

(y) *Sup.* sect. 25. 45.

Sect. 108. Also accessories to the fact before, maliciously, are excluded in all cases by 4 & (y) 5 Ph. & Mary, c. 4.

(z) S. P. C. 130.

2 Hale, 376.

(a) *Sup* sect.

42, 43, 44.

For the other offences which have been excluded from clergy by the statutes which created them, vide *Index*, "Felonies, without Clergy."

Sect. 109. Note, That by 1 Edw. 6. c. 12. s. 14. (2) Every lord of parliament is allowed his clergy in all cases wherein others are excluded by that act, except wilful murder, and consequently cannot be denied his clergy for any other felony wherein it was grantable at common law, unless it be ousted by some statute made since the first year of Edw. 6. or (a) revived by 5 & 6 Edw. 6. c. 10. (1)

As to the THIRD GENERAL POINT of this chapter, viz. At what time the benefit of clergy is demandable.

(b) See the stat.

of Marl. c. 28.

Westm. 1. c. 2.

Art. Cler. c. 15.

2 Inst. 150.

163, 164. 633.

S. P. C. 123.

130, 131. 185.

2 Hale, 377,

378, &c.

Bracton, l. 3.

c. 9.

Sup. c. 15 s. 84.

Hobart, 288,

289.

Yet in *Kelynge*,

100. the con-

trary seems to

be holden.

(c) Vide Bract.

l. 3. c. 9.

Art. Cleri, c. 15.

S. P. C. 136,

139, 140.

Supra, sect. 1, 2.

F. Corone, 118.

(d) S. P. C.

131, 185.

2 Institute,

164. 633, 634.

Summary, 239.

Finch, 463.

F. Corone, 232.

376. 382. 386.

417. but this

seems to be

doubtful. F. Corone, 233. (e) S. P. C. 131. 185. 5 Coke, 110. Regi. 68. Plowden, 262. Con-

tra, 40 Assize, 42, 23. Ab. F. Corone, 91. B. Fort. 5. Hobart, 289. it is holden, that the goods

are not forfeit without a conviction. (f) H. P. C. 240. Hobart, 288, 289. S. P. C. 139. 5 Coke,

109. (g) Vide F. Cor. 109. 417. Summary, 240. Rastal, 121. Hobart, 288, 289. Kelynge, 100.

(h) *Sup.* 239. 2 Summary, 378. 2 Inst. 164. F. Corone, 53. 58. S. P. C. 131. Salkeld, 61.

Finch, 463. Hobart, 288. (i) F. Cor. 58. so said in a note of a case in 3 H. 7. 1. But I do not find

it made out by the books at large. But this clearly holden, 3 H. 7. 12. Ab. F. Cor. 53.

(1) By these statutes clergy is taken away from the several offences described by legal technical terms of well-known signification, murder, robbery, rape, and burglary; and where clergy is taken away from the offence generally, without other circumstance, it is taken away from the offender under every circumstance in which his case may be considered; but in the cases above-mentioned aiders and abettors are not once named, nor are they described by any terms importing that the legislature intended to oust them. Foster, 357, 358.

forfeit their goods (*k*) without any inquiry concerning their crime; but yet (*l*) cannot be denied their clergy, where they should be entitled to it in case they were convicted, unless they be specially excluded by some statute. But after a clerk hath put himself upon his trial, and the inquest are charged with him, it is said that he (*m*) may, if he desire it, be admitted to his clergy, before the jury come back; but shall not forfeit his goods unless they find him guilty.

(*k*) Sup. c. 30.
s. 19.
(*l*) 8 H. 4. 3.
Ab. F. Corone,
72.
Sup. c. 30.
s. 24.
(*m*) S. P. C.
131.
Finch, 463.

Sect. 111. Also I take it to be generally agreed in the later (*n*) books, that a person may demand his clergy after a *non legit* recorded; and also after judgment given against him, whether of (*o*) death, or of (*p*) *peine forte et dure*, or of (*q*) outlawry, &c. as well as before judgment, and even (*r*) under the gallows, if there be a judge there who has power to allow it; as a justice of the king's bench, if the party were condemned there; or a justice of gaol-delivery, if he were condemned before him, and the commission of gaol-delivery be not (*s*) yet adjourned, and according to some (*t*) opinions, even though the commission were adjourned.

(*n*) Sum. 239,
240.
2 Hale, 378,
379, 380.
S. P. C. 132.
Finch, 363, 364.
F. Corone, 99.
109.
Dyer, 205.
This seems
doubtful, 12
Assize, 15.
Ab. F. Cor. 117.
Con. F. Co. 233.
(*o*) 40 Assize, 12.

42. 23. F. Cor. 91. Dyer, 183. 34 H. 6. 49. F. Corone, 20. B. Clergy, 1. (*p*) Summary, 239.
1 Hale, 380. Sup. c. 30. sect. 24. (*q*) 9 E. 4. 28. 8 H. 4. 2. F. Corone, 72. (*r*) 34 H. 6. 49.
Ab. F. Cor. 20. B. Clergy, 1. Summary, 239, 240. Dyer, 205. S. P. C. 132. Crompton Jur. 126.
(*s*) S. P. C. 132. Summary, 240. Cor. Juris. 126. (*t*) As it seems from Dyer, 205. 2 Hale, 379.

As to the FOURTH GENERAL POINT of this chapter, viz. Whether the benefit of clergy shall be allowed where it is not demanded.

Sect. 112. I take it to be generally agreed, that notwithstanding it was anciently the (*u*) usual method for the ordinary to demand the criminal as his clerk, before the court allowed him the benefit of his clergy, yet there was no (*x*) necessity that any such demand should be made by the ordinary, but that the court might without it admit a person to the benefit of his clergy upon sufficient evidence of his being a clerk, as upon his producing letters of orders, or reading as a clerk, &c. except he appeared to have been guilty of sacrilege, or of breaking the prison of the ordinary, in which case it is said to have been in a great measure left to the (*y*) discretion of the ordinary, whether he should have his clergy or not. And as there is no necessity that the ordinary should demand the benefit of clergy for a clerk; so (*z*) neither doth there seem to be any that the prisoner himself should demand it, where it sufficiently appears to the court that he has a right to it in respect of his being in orders, &c.; in which case, if the prisoner do not demand it, it seems to be left to the discretion of the judge, whether he will allow it him or not.

(*u*) Bract. b. 3.
c. 9. West. 1.
ch. 2.
2 Inst. 163, 164.
S. P. C. 130.
9 E. 4. 28.
12 Assize, 15.
34 H. 6. 49.
Kelynge, 99.
(*x*) S. P. C.
131, 132, 133.
Hobart, 289,
290.
F. Corone, 117.
B. Clergy, 1. 9.
See the following
section.
But this matter
seems to be left
doubtful,
12 Assize, 15.
Ab. B. Clergy, 9.
34 H. 6. 49.
Kelynge, 99.

F. Cor. 44. 120. 191. 9 E. 4. 28. F. N. B. 66. (*y*) Vide sup. sect. 9. F. Cor. 112. 120. S. P. C. 133. 27 Assize, 42. Ab. F. Cor. 205. (*z*) S. P. C. 131. F. Cor. 191. 254. 26 Assize, 19. Summary, 239. 2 Hale, 321. 378, 379. B. Clergy, 1. 9. B. Corone, 73. Hobart, 289.

As to the FIFTH GENERAL POINT of this chapter, viz. Who is to judge whether a person who demands the benefit of clergy, have a right to it or not.

Sect. 113. I take it, that in all cases the temporal judge is to determine both whether the crime be within the benefit of clergy, and

(a) Sup. s. 2. Hobart, 238.
 (b) Sup. s. 2. 110. Hobart, 288.
 (c) Vide 1 E. 3. 13. 1 Assize, 4. F. Corone, 155. B. Clergy, 8. Where the court refused to deliver to the ordinary a clerk who had abjured, till he should get the king's pardon of his return into the land without licence. See Kelynge, 28.
 (d) S. P. C. 133. Sup. s. 9.
 (e) S. P. C. 153. But 21 E. 4. 21. Ab. B. Clergy, 18. 9 E. 4. 28. Ab. B. Clergy, 7. seem to be contrary, where the ordinary assigns no particular cause of refusal.
 (f) Hobart, 200. See the notes to the other parts of this and the foregoing section; yet 9 E. 4. 28. this matter seems to be left doubtful. Vide F. Corone, 44. Ab. B. Cler. 7. F. N. B. 66. (g) 7 E. 4. 29. Ab. F. Fines, 24. B. Clergy, 17. B. Ordinary, 16. 34 H. 6. 49. Ab. F. Fines, 19. B. Clergy, 1. 7 H. 4. 41. Ab. B. Clergy, 2. Ordinary, 20. 15 H. 7. 9. Ab. F. Impr. 28. B. Ordinary, 11. Kelynge, 51. 89. Finch, 463, 464. S. P. C. 131, 132, 133. 141. Summary, 240. 2 Hale, 378. 381. 21 E. 4. 21. Ab. B. Clergy, 18. (h) Kelynge, 28. 51. 9 E. 4. 28. Ab. F. Corone, 32. B. Ordinary, 12. See the cases cited to the precedent letter.

and also whether the person who demands it be qualified to demand it or not. For notwithstanding it had its (a) original commencement from the canon law, yet it being no (b) otherwise to be allowed here than as it hath been received by, and is agreeable to the common or statute law, whereof the temporal courts are the judges, it seems very reasonable that all questions (c) of this kind be determined by those courts. And therefore even in those cases wherein by the old books the ordinary seems to have been allowed a discretionary power of demanding or refusing a clerk, as where he hath been guilty of (d) sacrilege, and also in cases wherein it is said generally, that a prisoner hath no right to his clergy, as where he is convict of (e) heresy, &c. it seems to be taken as a ground by Staundforde, that the temporal judge, where the ordinary refuses a prisoner, has a power to determine whether still he may be allowed his clergy or not. And this seems to be grounded on good reason; for otherwise in such cases the ordinary by such pretences might have an absolute power of controlling the temporal courts in a matter properly determinable by such courts. And therefore whatever point it may turn upon, whether a prisoner ought to have his clergy or not, as the validity of his letters of orders, or his being a heretic convict, &c. howsoever the temporal courts may pay the highest regard to the certificate of the ordinary; yet I take it to be generally (f) holden, that they only are finally to determine whether upon the whole the prisoner be well intitled to his clergy, or not, because the ordinary is not in this respect esteemed as a judge, but (g) only as a minister to the court. However it was certainly the (h) settled practice (while the method of trying the prisoner's capacity of receiving orders was by putting him to read a verse), for the judges of the common law to over-rule the ordinary as to the point, whether the prisoner read as a clerk or not; and to record a *legit* or *non legit*, according to their own judgment.

(i) Sup. sect. 109. S. P. C. 129, 130.

Sect. 114. But the necessity of such an ability to read in the case of a peer, was taken away by 1 Edw. 6. (i) c. 12. s. 15. by which it is enacted, "That in every case where any of the king's subjects shall upon his prayer have the privilege of his clergy, &c. every lord having place and voice in parliament, shall by virtue of that act of common grace, upon his request or prayer, alleging that he is a lord or peer of this realm, and claiming the benefit of this act, though he cannot read, without any burning in the hand, loss of inheritance, or corruption of blood, be adjudged, deemed, taken, and used for the first time only, to all intents, constructions, and purposes, as a clerk convict, and shall be in case of a clerk convict, which may make purgation, without any further or other benefit or privilege of clergy, to any such lord or peer from thenceforth, at any time after, for any cause to be allowed, &c."

Sect. 115. The necessity of such reading is also taken away, as to every common person, by 5 Ann. c. 6. by which it is enacted, "That if any person convict of such felony for which he ought to have the benefit of clergy, pray the benefit of that act, he shall not be required to read, but shall be punished as a clerk convict."

As to the **SIXTH GENERAL POINT** of this chapter, *viz.* How far the ordinary was punishable at law for demanding or refusing a clerk against law.

Sect. 116. It seems agreed, (*k*) that anciently this was such a contempt for which his temporalities might be seized; but since the statute of 25 Edw. 3. c. 6. which provides, "That prelates shall be admitted to pay a reasonable fine for contempts to writs of *quare non admisit*, and such like," it seems to have been generally (*l*) agreed, that the ordinary is liable only to be fined, but to no such seizure for a contempt of this kind, as in obstinately (*m*) persisting to return that a prisoner reads as a clerk, or the contrary, &c. against the declared sense of the court.

(*k*) 9 E. 4. 28. Ab. F. Cor. 32. Bro. Clergy, 7. 7 E. 4. 29. Ab. F. Fines, 24. B. Clergy, 17. Ordinary, 16. 34 H. 6. 49. Ab. F. Fines, 19. B. Clergy, 1. 15 H. 7. 9. Ab. F. Impris, 28. B. Ordinary, 11. Kelynge, 28. 51. Finch, 463. 2 Inst. 164. Yet see the contrary holden the very next year. 26 Assize, 19. Ab. F. Corone, 191. and also 7 H. 4. 41. Ab. B. Clergy, 2. Ordinary, 20. And S. P. C. 132. (*m*) See the books cited to the other parts of this section.

As to the **SEVENTH GENERAL POINT** of this chapter, *viz.* In what manner a clerk was to be delivered to the ordinary, and afterwards demesned by the common law.

Sect. 117. It seems (*n*) plain, that anciently wherever a clerk was delivered to the ordinary by a temporal judge, his person ought to be kept in the ordinary's prison, till (*o*) he had been tried before him by a jury of twelve clerks. For the clergy never pretended to an absolute exemption from all kind of punishment for their crimes, but only to a privilege of being tried only by ecclesiastical judges; and this was anciently so far indulged them, that after they had once been delivered to the ordinary, they could not afterwards be remanded to any temporal court, before the statute of 8 Eliz. c. 4., set forth more at large section 122, &c., either for the same crime wherewith they had been charged in such court, or for any other (*p*) committed before the time when the benefit of clergy was allowed them, whether such other crimes were within the benefit of clergy, or not. And if they could acquit themselves on their trial before the ordinary of the crimes for which they had been arraigned in the temporal courts, which acquittal was called a purgation, (*q*) they anciently claimed a right not only to be delivered out of prison, but also to be restored (*r*) to their goods, &c. But to render such purgation the more difficult, and also to delay the delivery of great offenders as much as possible, the judges anciently often refused (*s*) to deliver them to the ordinary till they had been arraigned of all the crimes wherewith they stood indicted. But after the statute of (*t*)

(*k*) F. Corone, 32. 191. 233. 9 E. 4. 28. 21 E. 3. 3. B. Con. 19. S. P. C. 132. Hobart, 290. 2 Inst. 164. See the notes under the next letter.

2 Hale, 382, 383, &c.

(*n*) Br. l. 3. c. 9. S. P. C. 137.

(*o*) See the Stat. of West. 1. c. 2. 2 Inst. 163, 164. S. P. C. 137, 138. if the ordinary suffered a clerk to go at large without making such purgation, he might be fined by the temporal courts.

15 H. 7. 9.

9 E. 4. 28.

(*p*) And this privilege was expressly confirmed, 25 E. 3. c. 5. and appears from the recital of 8 Eliz. c. 4. Vide Dyer, 214, 215, Sum. 213. 249. Anderson, 114. S. P. C. 108. Finch, 464. Popham, 107.

(*q*) Finch, 464, 465. (*r*) Sum. 213. 5 Coke, 110. S. P. C. 185. In the Register, 68. there are three writs to this purpose. S. P. C. 52. 185. 192, 193. Register, 68. Vide 1 Rich. 3. c. 3. (*s*) F. Cor. 394. 461. B. Cler. 24. 30. S. P. C. 56, 108. Summary, 213. B. Cor. 11. (*t*) S. P. C. 108. 142. Dyer, 214, 215.

25 Edw. 3. the judges could not refuse the delivery of clerks convict in respect of any crime whereof they had not been actually arraigned; and therefore they used to arraign them at once for all the crimes whereof they stood indicted.

Sect. 118. And if such clerks could not purge themselves upon such a trial, I do not (u) find that they were anciently liable to any greater punishment than degradation, and the (x) loss of their goods, and the profits of their lands, unless they had been guilty of apostacy, &c. But afterwards (y) by a provincial constitution, if they were notoriously scandalous, they were to be kept in a perpetual prison, on slender diet, &c.

(u) Bract. l. 3. c. 9. s. 2.
S. P. C. 138.
(x) Sum. 241.
5 Coke, 110.
Bracton and Staundforde in the places cited to the precedent
letter seem to hold generally, that degradation was the only punishment; but I suppose that they mean the only punishment to the person. (y) S. P. C. 140, 141. See C. Jac. 431.

Sect. 119. If the ordinary had refused to admit a clerk delivered to him to make his purgation, he might be compelled (z) by a special writ for that purpose.

(z) Bract. l. 3. c. 9. sect. 3.
S. P. C. 137, 138.
15 H. 7. 9. Cro. Jac. 431. B. Corone, 223.

Sect. 120. But this privilege was often very much abused; and therefore after the statute of Westminster 1. c. 2. which requires that no clerk shall be delivered without due purgation, the courts of common law would never deliver over a clerk to the ordinary, without a (a) previous inquiry into, or trial of his crime; whereupon if the clerk were found guilty, he absolutely forfeited his goods, and the judges would (b) often, in their discretion make a special delivery *absque purgatione facienda*; as where it appeared that a prisoner was a common (c) thief, &c. or where in an appeal of robbery a restitution of the goods stolen had been awarded (d) to the appellant, which judgment they would not suffer to be contradicted by a purgation. And both in such a case, and also, *à fortiori*, where a clerk is admitted to his clergy after an attainder, whether by an express judgment or by outlawry, &c. or even after a confession, (e) though he were not specially delivered *absque purgatione facienda*, the ordinary seems, by the stronger (f) opinion, to have been liable to an escape, if he had admitted him to his purgation, because it could not but contradict a judgment, or the party's own confession, which is the highest conviction. Neither was any purgation thought lawful without a previous notice to the (g) king of the time when it was intended to be made.

(a) Sup. s. 117.
(b) Sum. 240.
2 Inst. 195.
Hobart, 289.
(c) S. P. C. 139.
Hobart, 289.
F. Corone, 247.
(d) Finch, 464.
S. P. C. 139.
F. Corone, 109.
247.
(e) Qu. S. P. C. 138, 139.
But it seems agreed, that a clerk might be admitted to his purgation after a conviction by verdict.
F. Corone, 393.
5 Assize, 5.
Ab. F. 145.
Con. F. Corone, 417.

(f) S. P. C. 48. 138. 27 H. 6. 7. Ab. F. Corone, 16. 13 E. 4. 3. Ab. B. Cor. 158. F. Cor. 38. 3 H. 7. 12. Ab. F. Corone, 56. 136. 9 E. 4. 28. Ab. B. Corone, 55. B. Corone, 4. Finch, 464. 465. Con. Hobart, 289. F. Corone, 109. 128. 247. 450. 18 Ass. 13. Ab. F. Corone, 176. Utl. 2. Thelwall, b. 1. c. 15. s. 26. (g) Finch, 464. S. P. C. 138. F. Corone, 152.

As to the EIGHTH GENERAL POINT of this chapter, viz. What shall be done to one who is allowed the privilege of clergy at this day, and how far it shall be for his benefit.

Sect. 121. It is enacted by 4 Hen. 7. c. 13. "That if any person not in orders, shall be convict of murder, he shall be marked with an M. and if of any other felony, with a T. on the brawn of the left thumb, in open court, before he shall be delivered to
" the

"the ordinary." And it is said by (h) Hale, that by 3 Hen. 7. (h) Sum. 940. c. 1. a clerk convicted of manslaughter shall be committed, or bailed at discretion till the year be passed. But the contrary hath been (i) adjudged; for the said statute mentions only those who are acquitted of murder at the king's suit within the year and day; in which case it directs that they shall be committed or bailed till the year and day be passed, that they may be forthcoming, in order to answer to an appeal, if brought within that time. But it admits the clergy once had to be a good bar to an appeal, even after an attainder, and therefore cannot be thought to have intended to make provision in any case for the parties being forthcoming to answer an appeal after clergy hath been allowed them, which makes it ineffectual. But it is certain, that any person who hath his clergy may be committed for any time within a year by 18 Eliz. c. 7. s. 3. set forth more at large section 125. (i) Kely. 25.

Sect. 122. By 8 Eliz. c. 4. s. 3. it is recited, "That divers persons had oft-times committed sundry detestable felonies, for the which clergy is not allowable, and afterwards had fled to places remote where they were not known, and committed some other felony within the benefit of clergy, and being arraigned for the same had had their clergy allowed them, and thereupon been committed to the custody of the ordinary, the former offence being then not known, and so by that means could not after be impeached for the same, to the great encouraging of offenders using such practices of foreknowledge and set purpose for their discharge of the same."

Sect. 123. For reformation whereof it is enacted, "That every person or persons who shall hereafter, upon his or their arraignment for any felony, be admitted to the benefit of his clergy, and delivered to the ordinary for the same, and shall make his due purgation for the same offence or offences whereupon he was so admitted to his clergy, and shall, before the same admission to his clergy, have committed any other such offence, whereupon clergy is not allowable, and not being thereof indicted and acquitted, convicted or attainted, or pardoned, shall and may be indicted or appealed for the same, and thereupon put to answer, and ordered and used in all things according to the laws and statutes of this realm, in such like manner and form as though no such admission of clergy had been; any law, custom, or usage to the contrary notwithstanding."

Sect. 124. And for the avoiding of sundry perjuries and other abuses in and about the purgation of clerks convict delivered to the ordinaries, it is enacted by 18 Eliz. c. 7. "That every person who shall be admitted to his clergy shall not thereupon be delivered to the ordinary, but after such clergy allowed, and burning in the hand, according to the (k) statute in that behalf provided, shall forthwith be enlarged and delivered out of prison by the justices before whom such clergy shall be granted, that cause notwithstanding." (k) 4 H. 7. 13. for which see sect. 121. 3 Peer. Wms 448 to 451.

Sect. 125. But by 18 Eliz. c. 7. s. 3. it is provided, "That the justices before whom any such allowance of clergy shall be had, shall and may for the further correction of such persons to whom

(l) 2 Bulst. 137. "whom clergy shall be allowed, detain and keep them in prison for such convenient (l) time as the same justices in their discretions shall think convenient, so as the same do not exceed one year's imprisonment."

Sect. 126. And by 18 Eliz. c. 7. s. 5. it is further provided, "That all persons admitted to their clergy shall, notwithstanding such admission, be put to answer to all other felonies whereof they shall be indicted or appealed, and not being thereof before acquitted, convicted, attainted, or pardoned, and shall in such manner and form be arraigned, tried, adjudged, and suffer such execution for the same, as they should have done, if, as clerks convict, they had been delivered to the ordinary, and there had made their purgations: any thing in this act contained to the contrary notwithstanding."

Upon these statutes the following points seem most remarkable.

Sect. 127. FIRST, Inasmuch as it plainly appears, not only from the preamble, but also from the express words of the above recited clause of 8 Eliz. c. 4. that it had nothing else in view but only to prevent the inconvenience that offenders should be discharged of crimes not within the benefit of clergy, by being admitted to their clergy for crimes within the benefit of it, as they were (m) before this statute; and inasmuch as the above recited proviso of 18 Eliz. c. 7. though it be more largely worded than 8 Eliz. c. 4. hath a plain relation to it, and therefore may reasonably receive the same construction; it seems to have been agreed, (n) ever since these statutes, that a conviction for a felony within the benefit of clergy, and an allowance of clergy thereon, is as much a discharge of all precedent felonies within the benefit of clergy (though not of any others) as it was before these statutes.

(m) Sup. s. 117.

(n) Sum. 213.

219.

2 Hale, 388.

1 Ander. 114.

Popham, 107.

Sect. 128. SECONDLY, Inasmuch as the statute of 18 Eliz. c. 7. is express, "That every person admitted to his clergy shall not be delivered to the ordinary, but after such clergy allowed, and burning in the hand, shall forthwith be enlarged and delivered out of prison, &c. with a proviso nevertheless, that for further correction he may be kept in prison, &c. and also with a further proviso that he shall answer to all former felonies, in the same manner as if he had made his purgation;" it seems to be the more prevailing opinion, (o) that a clerk convict being admitted to his clergy, may either be taken to have a kind of a statute-pardon, or else to be in the same case as if he had made his purgation at the common law.

(o) Kelynge, 37. 102.

And both these constructions seem reasonable. For as to the first it may be said, that the statute, by ordaining that the party shall be forthwith enlarged and delivered out of prison, under certain provisos, seems plainly to imply that he shall be liable to no other punishment, and consequently in effect pardons him. And as to the second it may be said, that the statute seems only to intend to take away the practice of making purgation, which had been so much abused, but not the benefit accruing to the subject by it, but rather to make it more universal, by giving the same

same advantage to all by a direct and express law, attended with no inconvenience, which before some only gained by an usurped practice, very frequently abused, and highly derogatory from the honour of the common law. But (p) Sir Edward Coke is of opinion, that it shall enure by way of purgation in respect of such persons only who might be admitted to make their purgation before the statute, and in respect of others by way of pardon. And (q) Hobart argues, that because many offenders before the statute might have their clergy, who yet could not be discharged by making their purgation, and the statute intends that all in general who are admitted to their clergy, shall be discharged, &c. and also because all purgations discredited a trial at law, therefore it is not reasonable to intend that the statute meant that such a discharge should enure by way of a purgation, but only by way of a statute-pardon. But to this it seems a reasonable answer, that it doth by no means follow, that because the statute intended that such discharge should extend to persons who could not have the benefit of a purgation, therefore it did not intend that it should have the effect of a purgation; neither doth it seem to follow, that because a purgation discredited the acts of a jury, therefore such a discharge, if it have to some purposes the same effect as a purgation, must discredit them likewise.

Sect. 129. THIRDLY, Taking the statute to enure either by way of a statute-pardon, or purgation, it seems that it restores (r) the party to his credit, and consequently enables (s) him to be a good witness; which it hath been questioned whether a pardon by the king can do, as shall be set forth more at large in the chapter of Pardon. Also it seems agreed, that it gives him a capacity to purchase (t) goods, and to retain the (u) profits of his land, but gives him no right to be restored to those which he had at the time of the conviction, which, being vested in the king by the forfeiture upon the conviction, (v) shall not be divested either by a (y) pardon or (z) purgation. For it is certain that a pardon never avoids (a) any precedent legal act, as shall be more fully shewn in the chapter of Pardon. Neither would the common law endure that purgation, which was introduced by a connivance, or rather tolerated than allowed, should so far control its proceedings.

306. 305. 393. F. Forfeiture, 23. 34. B. Forfeiture, 11. 8 H. 4. 2. Plowden, 262. S. P. C. 185. 20 E. 4. 5. B. Corone, 166. But it is holden 40 Ed. 3. 42. Ab. F. Corone, 91. and B. Forfeit. 5. that nothing is forfeited unless there be an attainder. Also it is said, that the profits of lands are not forfeited. 20 E. 4. 5. pl. 3. B. Cor. 166. (y) 1 Saund. 362. 1 Lev. 8. 20. (z) Vide supra, s. 110. F. Corone, 356. Finch, 464. Con. F. Corone, 365. B. Forfeit. 113. F. N. B. 66. B. Clergy, 28. (a) 1 Saund. 362. 1 Levinz, 8. 120.

Sect. 130. FOURTHLY, Whether the statute enure as a pardon or purgation, it (b) seems to take from the spiritual court the power of depriving the party for the crime for which he has had his clergy; for if it enure as a pardon, surely it cannot be doubted but that it frees the party from all subsequent punishment, and consequently from a deprivation; and if it enure as a purgation, which is admitted (c) to have been a good bar to a deprivation before the statute, why should it not have the same effect as a purgation had formerly, in this as well as in other respects? Yet (d) Watson, in his Clergyman's Law, holds an opinion on the authority

(p) 5 Coke, 110. but see 3 Peer. Wms. 452. where the opinion of Lord Coke is contradicted. (q) Hobart, 292, 293.

(r) Sum. 941. (s) Kely. 37. Raymond, 369, 370, 380. Siderfin, 222. 2 Stat. Tr. 523. 4 Stat. Tr. 379 to 386. 5 Modern, 15. (t) Sum. 241. 5 Coke, 110. Hobart, 293. (u) 5 Coke, 210. F. Corone, 393. Forfeit. 34. (v) 12 Co. 121. 5 Coke, 110. Summary, 241. Co. Lit. 391. 3 H. 7. 12. F. Corone, 53.

(b) Hobart, 292, 293. 2 R. Abr. 305.

(c) C. Jac. 431.

(d) C. 6. f. 35, 36, in the folio edition.

(e) C. Jac. 430, 461. authority of (e) Croke's Second Report, that a clergyman may be deprived for manslaughter after he has had his clergy; not observing, as I suppose, that what is said in this book was only on the sudden, on a motion for a prohibition in the king's bench, and that in the same case a prohibition was afterwards actually brought and declared on in the (f) common pleas, and judgment thereupon solemnly given for the plaintiff upon open argument by all the judges.

(f) Hob. 288.
2 Hale, 389.
2 R. Abr. 305.
Also a prohibition was granted in the like case, 27 and 28 Eliz. Rotulo, 2574. cited Hobart, 294.

Sect. 131. FIFTHLY, It seems agreed, that where a person exempt from burning in the hand, either in respect of his (g) peerage or (h) orders, or a (i) special pardon, is admitted to the benefit of his clergy, he shall have the same advantage of the statute without being burnt in the hand as others shall have upon such burning; for the words of the statute, that the party, "after such clergy allowed, and burning in the hand, shall be enlarged, &c." shall have this construction, that he shall be enlarged, &c. upon burning where burning ought to be.

(g) 1 Lev. 180.
(h) Hob. 294.
(i) 5 Coke, 110.

(k) Hob. 67. 81. 294.
5 State Tr. 168.
1 Danv. 163. pl. 6. and the chapter of Pardon.
(l) See Thomas Reilly's Case, Cases in Crown Law, 360.

Sect. 132. It is holden, that after a man is admitted to his clergy, it is (k) actionable to call him felon, &c. because his offence being pardoned by the statute, all the infamy and other consequences of it are discharged (l). And how far a person convicted of a crime within the clergy, and praying or being ready to pray it, but not actually admitted to it, shall be within these statutes, shall be considered chapter thirty-seven.

Persons liable to be burned in the hand shall be burned in the left cheek.

† **Sect. 133.** But as burning in the hand afforded the offender an opportunity of concealing the punishment, it was conceived that, by rendering this mark more visible, many evil-disposed persons might be deterred from offending; and accordingly by 10 & 11 Will. 3. c. 23. it was enacted, "That persons convicted of larceny within the benefit of clergy, who were liable to be burnt in the hand, should, instead thereof, be burnt with the usual mark in the most visible part of the left cheek nearest the nose, in open court, and in the presence of the judge." But very short experience evinced the necessity of repealing this clause, and that the desired effect of this stigma was rendered abortive by exposing the objects of it to public jealousy, and, by rendering them unfit to be entrusted in any service or employment to get their living in an honest and lawful way, made them more desperate.

Sect. 134. By 5 Anne, c. 6. therefore it is enacted, "That in all cases where any person or persons shall be convicted of any theft or larceny who shall be liable to be burnt in the hand, they shall be burnt in the hand as formerly (1) they ought or should have been before the making the said act, and the judge or justices before whom such offender or offenders shall be tried and convicted, shall also at his or their discretion award and give judgment that such offender and offenders shall be committed to some house of correction or public work-house within the county or place where such conviction shall be, there to remain without bail or mainprize for such time as such judge or justices

Burning in the hand restored, and an additional punishment inflicted.

(1) See post, 19 Geo. 3. c. 74. made perpetual by 59 Geo. 3. by which burning in the hand is abolished, and a moderate fine substituted in lieu thereof.

"justices shall then judge and award, not less than six months and not exceeding two years from the time of such conviction; an entry whereof is to be made of record, &c.: and if such offender escape, he shall be committed to some house of correction or public work-house within the county or place where he shall be retaken and kept to hard labour, &c. not less than twelve months, and not exceeding four years."

† *Sect. 135.* But it is recited by 19 Geo. 3. c. 74. s. 3. "That the punishment of burning in the hand, when any person is convicted of felony within the benefit of clergy, is often disregarded and ineffectual, and sometimes may fix a lasting mark of disgrace and infamy on offenders, who might otherwise become good subjects and profitable members of the commonwealth;" and therefore it is enacted, "That when any person shall be lawfully convicted at any session of oyer and terminer, or gaol-delivery, or at any general or quarter-sessions, of any felony within the benefit of clergy, for which he or she is liable to be burnt in the hand, the court before which any person shall be so convicted, or any court holden at the same place with the like authority, if such court shall think fit, instead of such burning, may impose upon such offender such a moderate pecuniary fine as to the court in its discretion shall seem meet. Or otherwise it shall be lawful instead of such burning in any of the cases aforesaid, except in the case of manslaughter, to order and adjudge that such offender shall be once or oftener, but not more than three times, either publicly or privately whipped; such private whipping to be inflicted in the presence of no less than two persons besides the offender and the officer who inflicts the same; and in case of female offenders, (1) in the presence of females only. And such fine or whipping so imposed or inflicted, instead of such burning in the hand, shall have the like effects and consequences to the party, with respect to any discharge from the same, or other felonies, or any restitution to his or her estates, capacities, and credits, as if he or she had been burned or marked as aforesaid."

Burning in the hand abolished, except manslaughter, and in lieu of such burning, the offenders shall be whipped, &c.

† *Sect. 136.* But it is provided, par. 4. "That nothing in this act shall abridge the said courts from detaining and keeping in prison for any time not exceeding one year, or of committing to the house of correction for any time not less than six months, or exceeding two years, any offender as aforesaid; but that such offender may, if such court shall think fit, after such burning or marking, or after such whipping or fine imposed by this act in lieu thereof, be so detained or committed, and with such accumulated punishment in case of escape as before-mentioned."

This statute shall not take away the imprisonment and whipping inflicted by 5 Anne, c. 6.

Sect. 137. But as transportation has now become a common mode of punishment in clergyable felonies, it may be proper here to consider the statutes upon which that punishment is such case depends.

Transportation.

† Exile or transportation is a species of punishment unknown to the common law of England; and where it is now inflicted it

3Peer.Williams, 37. and 460.

(1) The punishment of whipping female offenders is now abolished by stat. 57 Geo. 3. c. 75. See postea, tit. "Judgment."

it is either by the choice of the criminal himself, in order to escape capital punishment, or it is imposed by the express direction of some modern act of parliament: for no power on earth, except the authority of parliament, can send a subject of England, not even a criminal, out of the land against his will. The first introduction of it into our laws was in the reign of queen Elizabeth (b). But it seems to have taken place more nearly as now practised, about the time of the Restoration (c). After the establishment of English colonies in America, therefore, it became in this country, as in all others which have had colonies, the most common sentence of criminals (c).

(b) 39 Eliz. c. 4.
Rastal's statutes,
429.
Rymer, par. 2.
page 36.
(c) Kelynge, 45.
(d) Barrington,
445.

4 Geo. 1. c. 11.
For felonies
within clergy.

† Sect. 138. Accordingly, it is enacted by 4 Geo. 1. c. 11.
“ That where any person shall be convicted of grand or petit
“ larceny, or any felonious stealing or taking of money, or goods
“ and chattels, either from the person or the house of any other,
“ or in any other manner, and who by the law shall be entitled
“ to the benefit of clergy, and liable only to the penalties of
“ burning in the hand, or whipping (except persons convicted of
“ buying or receiving stolen goods, knowing them to have been
“ stolen), it shall and may be lawful for the court before whom
“ they were convicted, or any court held at the same place with
“ the like authority, if they think fit, instead of ordering any such
“ offenders to be burned in the hand, or whipped, to order and
“ direct that they shall be sent to America for the space of seven
“ years.”

For felonies ex-
cluded from
clergy.

† Sect. 139. And it is further enacted, “ That where any per-
“ son shall be convicted of any offence for which death by law
“ ought to be inflicted, or where any offenders shall be convicted
“ of crimes excluded from the benefit of clergy, and the king shall
“ extend mercy to such offender upon the condition of transpor-
“ tation to any part of America, and such intention of mercy be
“ signified by one of his majesty's principal secretaries of state,
“ it shall and may be lawful to and for any court having proper
“ authority to allow such offenders the benefit of a pardon under
“ the great seal.”

Receivers of
stolen goods.

† Sect. 140. And it is further enacted, “ That it shall and
“ may be lawful for the court as aforesaid to order and direct
“ any person convicted of buying or receiving stolen goods,
“ knowing them to be stolen, to be transported as aforesaid for
“ the term of fourteen years, in case such condition of transpor-
“ tation be general, or else for such other term as shall be made
“ part of such condition, if any time be specified by his majesty
“ as aforesaid.”

The king may
dispense with
sentence.

† Sect. 141. Provided nevertheless, “ That his majesty may
“ at any time pardon and dispense with any such transportation,
“ and allow of the return of any such offender or offenders from
“ America.”

To have the ef-
fect of pardon.

† Sect. 142. And it is further enacted, “ That where any such
“ offenders shall be transported, and shall have served their re-
“ spective terms according to the order of any such court as
“ aforesaid, such services shall have the effect of a pardon to all
“ intents

“ intents and purposes as for that crime or crimes for which they
 “ were so transported, and shall have so served as aforesaid.”

† *Sect. 143.* And it is further enacted by 6 Geo. 1. c. 23. 6 Geo. 1. c. 23.
The power given
to subsequent
courts.
 “ That all the powers and authorities given by the above act to
 “ any court before whom any felons or offenders tried for and
 “ convicted of any offences for which they may be transported to
 “ America, shall and may be observed and executed by any other
 “ subsequent court with the like authority held for the same
 “ county, riding, division, or liberty, where such felons or offenders
 “ were tried and convicted, notwithstanding such subsequent
 “ court shall happen to be held at or in any other term or place
 “ than that wherein such trials or conviction were or shall be.”

† *Sect. 144.* But the judges of assize, according to the circum- 8 Geo. 3. c. 15.
Power of subse-
quent court in
felonies ex-
cluded clergy.
 stances of the case, frequently reprieved convicts tried before
 them, for the purpose of applying to the crown for a pardon on
 condition that such convicts should be transported to America ;
 in which case such convicts were obliged to lie in gaol until the
 coming of the judges at the subsequent assize. To remedy this
 inconvenience it was enacted by 8 Geo. 3. c. 15. “ That where any
 “ offender shall be convicted of any crimes excluded from the
 “ benefit of clergy, and the judge before whom such offender
 “ shall be convicted or condemned shall grant a reprieve for stay-
 “ ing the execution of such offender, and recommend him to the
 “ crown as an object of mercy ; if his majesty shall be pleased
 “ to extend his mercy to such offender on condition of transpor-
 “ tation to any part of America, and such intention of mercy
 “ shall be signified by one or more principal secretary of state
 “ to the judge so recommending ; it shall and may be lawful for
 “ every such judge of oyer and terminer, or gaol-delivery, to
 “ make an order for immediate transportation of every such of-
 “ fender, in the same manner as if such intention of mercy had
 “ been signified to him by a principal secretary of state during
 “ the continuance of the assizes at which such offender was con-
 “ demned : and such order shall be considered as an order made
 “ at such assizes or place, and shall be as effectual to every in-
 “ tent and purpose, and shall have all the same consequences in
 “ every respect, as any order for the transportation of any of-
 “ fender made by any justice of oyer and terminer, and gaol-de-
 “ livery, as aforesaid.”

† *Sect. 145.* But the English colonies in America having se- 19 Geo. 3. c. 74.
Of transporta-
tion to parts be-
yond the seas.
 parated from their connection with Great Britain, the transpor-
 tation of felons to that country became impracticable ; and it
 was therefore enacted by 19 Geo. 3. c. 74. “ That when any
 “ person at any session of oyer and terminer or gaol-delivery, or
 “ at any quarter or other general session of the peace in England
 “ or Wales, shall be lawfully convicted of any grand or petit lar-
 “ ceny or any other crime for which he or she shall be liable by
 “ law to be transported to America, the court may order and
 “ adjudge, that such person shall be transported to any parts
 “ beyond the seas, whether the same be situated in America or
 “ elsewhere, in such and the like manner and for any term of
 “ years, not exceeding such and the same term as and for which
 “ such person was liable to be transported to America.”

Sect.

The former laws confirmed.

(a) This statute only relates to the offence of returning from transportation.

Punishment in lieu of transportation.

(b) Therefore on conviction, the age of the offender is always inquired of, and recorded by the clerk of the assizes, &c.

Hard labour on board the hulks.

Sect. 146. And it is further enacted, par. 2. "That where any person so convicted, shall, in consequence thereof, be ordered to be transported beyond the seas;—or if his majesty shall extend the royal mercy to any offender convicted or attainted of any felony, by which he or she is excluded from the benefit of clergy, or of such statutes as are equivalent thereunto, upon the condition of transportation to any parts beyond the seas as aforesaid; then, and in any such cases, all laws now in force with regard to the transportation of criminals to America, and, particularly, the 4 Geo. 1. c. 11. the 6 Geo. 1. c. 23. the 16 Geo. 2. c. 15. (a) and the 8 Geo. 3. c. 15. shall be in force, take place, and enure, as if the same had been specially recited in this act."

† **Sect. 147.** By the above statute the king was empowered to appoint three supervisors for the purposes of purchasing ground, and to erect thereon two substantial houses, to be called Penitentiary Houses, for confining and employing convicts.

† **Sect. 148.** But it is further enacted by the said statute, par. 27. "That where any male person, at any session of oyer and terminer or gaol delivery in England, or great session in Wales, shall be lawfully convicted of grand larceny, or any other crime, except petty larceny, for which he shall be liable by law to be transported to any parts beyond the seas, the court before whom any such person shall be so convicted, or any other court holden at the same place with the like authority, may in the place of such punishment by transportation order and adjudge that such person, appearing to be of competent age (b), and free from any bodily infirmity, shall be punished by being kept on board ships or vessels properly accommodated, for the security, employment, and health of the persons to be confined therein; and by being employed in hard labour in the raising sand, soil, and gravel from, and cleansing the river Thames, or any other river navigable for ships of burthen, or any port, harbour, or haven in England, such river, port, harbour, or haven, being previously approved and appointed for that purpose by an order of privy council, or any other service for the benefit of the navigation of the said rivers, ports, harbours, or havens, or in any other public works upon the banks or the shores of the same, under the management and direction of such superintendent as shall be appointed for the Thames by the justices of Middlesex, and for other rivers, &c. by the justices of the county where they are situated, or of such counties adjoining the same as the council shall direct, at their quarter-session, for such term, not less than one year, nor exceeding five years; or in case such offender shall be liable to be transported for fourteen years, not exceeding seven years, as such court of oyer and terminer, and gaol-delivery, shall think fit to order and adjudge."

† **Sect. 149.** And it is further enacted, par. 28. "That where any person shall, at any session of oyer and terminer, or gaol-delivery, or great session of England or Wales, be lawfully convicted of any robbery or other felony for which he or she shall, by law, either under this statute, or under any other statute

"tute now in force, or hereafter to be made, be liable to suffer death without benefit of clergy, and his majesty shall extend the royal mercy to any such offender upon condition of being kept to hard labour, during any specified term, in any Penitentiary House to be erected pursuant to this act, or such offenders being males, upon condition of being kept to hard labour during any specified term, in the custody of such superintendent as aforesaid, for the benefit of the said navigation; and such intencion of mercy shall be notified in writing by one of the principal secretaries of state to the court in which such offender shall be convicted, or to any other court of the same place with the like authority; or if no such court shall be sitting, then to any justice of oyer and terminer, or gaol-delivery, or justice of great sessions, by or before whom such offender shall have been convicted or condemned; such court of justice may and shall, immediately on receiving such notification, allow to every such offender the benefit of a conditional pardon, in the same manner as if there was a conditional pardon under the great seal; and may and shall order that every such offender shall be kept to hard labour in such Penitentiary House as aforesaid, or in the custody of such superintendent as aforesaid, for the time specified in the notification from such secretary of state." (1)

The statute of 56 Geo. 3. c. 27. entitled, "An act to amend the general laws relative to the transportation of offenders," recites a former statute 55 Geo. 3. c. 156. (which repealed a stat. 24 Geo. 3. c. 56.) and that "it is expedient that the regulations and provisions of the said act, and that certain of the provisions of two several acts, passed in the nineteenth and twenty-fifth years respectively of the reign of his late majesty, [19 Geo. 3. c. 74. 25 Geo. 3. c. 46.] relating to the transportation and removal of offenders, should be continued;" and then enacts, "that the said recited act of the last session of parliament shall be and the same is hereby continued, so far as relates to the repeal of the said therein recited act of the twenty-fourth year of his late majesty, 24 Geo. 3. st. 2. c. 56; and from and after the passing of this act, it shall be lawful for the court before which any person or persons shall have been or shall be convicted at any session of oyer and terminer, or gaol-delivery, or at any quarter or other general session of the peace to be holden for any county, riding, division, city, town, borough, liberty or place, within that part of Great Britain called England, or at any great session to be holden for the county-palatine of Chester, or within the principality of Wales, of grand or petit larceny, or any other offence for which such person or persons shall have been or be subject to be transported, to order and adjudge, or any subsequent court holden at any place for the same county, riding, division, city, town, borough, liberty, or place respectively, with like authority, to order and adjudge, that such person or persons

56 Geo. 3. c. 27.

(a) This act relates to the transportation of offenders in Scotland.

It shall be lawful for the court before which offender is tried who shall be liable to transportation to adjudge such person to transportation, &c.

" 80

(1) This statute was temporary and continued in force until the 1st of June, 1799. It was subsequently to its enactment continued by stat. 24 Geo. 3. c. 2. s. 56. 28 Geo. 3. c. 24. and 34 Geo. 3. c. 6. until June, 1799. The provisions respecting trans-

portation, however, were again re-enacted by statute of 56 Geo. 3. c. 27. which last act was to be in force until the month of May, 1821; and by stat. 1 Geo. 4. c. 6. was further continued for two years, and until the end of the next session of parliament.

" so convicted as aforesaid, shall be transported beyond the seas
 " for any term not exceeding the number of years or term
 " for which such person or persons is or are or shall be liable
 " by any law to be transported; and in every such case it shall
 " and may be lawful for his majesty, by and with the advice of
 " his privy council, to declare and appoint any other place or
 " places, part or parts beyond the seas, in addition to such as
 " shall have been heretofore declared and appointed by his ma-
 " jesty for that purpose, either within his majesty's dominions,
 " or elsewhere out of his majesty's dominions, to which any
 " such felons or other offenders shall be conveyed or trans-
 " ported; and such court as aforesaid is hereby authorized
 " and required to order such offenders to be transferred to the
 " use of any person or persons, and his or their assigns, who
 " shall contract for the due performance of such transportation;
 " and when his majesty, his heirs and successors, shall be pleased
 " to extend mercy to any offender or offenders, who hath or have
 " been or shall be convicted of any crime or crimes for which he,
 " she, or they is, are, or shall be by law excluded from the be-
 " nefit of clergy, upon condition of transportation to any place
 " or places, part or parts beyond the seas, either for a term of
 " life or any number of years, and such intention of mercy shall
 " be signified by one of his majesty's principal secretaries of
 " state, it shall be lawful for any court, having proper authority,
 " to allow such offender or offenders the benefit of a conditional
 " pardon, and to order such offender or offenders to be trans-
 " ported for such term of life or years as shall be specified in
 " such condition of transportation as aforesaid, and to make such
 " order of transfer as aforesaid; and when any offender or of-
 " fenders hath or have been or shall be convicted of any crime
 " or crimes for which he, she, or they is or are by law excluded
 " the benefit of clergy, the judge before whom such offender or
 " offenders shall be convicted, or any justice of the king's bench,
 " common pleas, or baron of the exchequer of the degree of the
 " coif, in case the said offender or offenders shall have been
 " tried in any court of oyer and terminer or gaol delivery in
 " England, or any justice of Chester or Wales, in case the said
 " offender or offenders shall be tried and convicted within any
 " of their respective jurisdictions, shall, on such intention of
 " mercy as aforesaid being signified to him by one of the said
 " principal secretaries of state, make an order for the immediate
 " transportation of such offender or offenders, and for such offender
 " or offenders to be transferred as aforesaid, in the same manner
 " as if such intention of mercy had been signified by one of the said
 " principal secretaries of state during the continuance of the assizes
 " or sessions at which such offender or offenders was or were con-
 " demned, and such order shall be considered as an order made
 " at such assizes or sessions as aforesaid, and shall be as effectual
 " and have all the same consequences as any order for the
 " transportation of any offender or offenders made by any jus-
 " tice of oyer and terminer, great session, or gaol delivery, for
 " any county, city, liberty, borough, or place, during the continu-
 " ance of the assizes or sessions; and such person or persons so
 " contracting as aforesaid, his or their assigns, by virtue of such
 " order

“ order of transfer as aforesaid, shall have a property in the service of such offender or offenders, for such term of life or years for which such offender or offenders shall have been ordered to be transported.”—Sect. 3.

By the above acts the punishment of transportation was inflicted only in cases of larceny or receiving stolen goods. In two other cases of felony, where the parties were entitled to clergy, and liable only to imprisonment, and in larcenies, &c. since the abolition of burning in the hand, to a small fine, the legislature has thought proper to interfere and inflict transportation; for it is enacted by stat. 3 Geo. 4. c. 38. “ That from and after the passing of this act, whenever any person shall be lawfully convicted of the offence of manslaughter, such person shall not be liable to be burned or marked in the hand, or in any part thereof, but such person shall be liable to be transported beyond the seas for the term of his or her natural life, or for any term of years, as the court before which any such person shall be convicted shall adjudge; or shall be liable, in case the said court shall think fit, to be imprisoned only, or to be imprisoned and kept to hard labour in the common gaol, house of correction, or penitentiary-house, for any term not exceeding three years; or shall be liable to such a pecuniary fine, as to the said court, in its discretion, shall seem meet; and such fine or other punishment imposed by virtue of this act, shall have the like effects and consequences to the party on whom such fine or other punishment shall be so imposed, with respect to any discharge from the same or other felonies, or any restitution to his or her estates, capacities, and credits, as if he or she had continued liable to the former punishment of burning or marking in the hand, and had suffered such former punishment.”

Persons convicted of manslaughter liable to be transported for life, &c.

And in the case of polygamy it is enacted by stat. 35 Geo. 3. c. 67. intituled, “ An Act for rendering more effectual an act passed in the first year of the reign of King James the First,” (1 James 1. c. 11.) recites that, “ the punishment of persons convicted of felony under or by virtue of that act, has not proved effectual to deter wicked and evil-disposed persons from being guilty of the offence therein described;” and then enacts, “ That if any person or persons within his Majesty’s dominions of England and Wales being married, or which hereafter shall marry, do at any time, from and after the passing of this act, marry any person or persons, the former husband or wife being alive, and shall be in due manner convicted thereof under the said act, shall be subject and liable to the same penalties, pains, and punishments, as by the laws now in force persons are subject and liable to, who are convicted of grand or petit larceny.”—Sect. 1.

Persons convicted of bigamy liable to same punishment as those who are convicted of grand or petit larceny.

CHAP. XXXIV.

OF PLEAS IN ABATEMENT.

AND now I come to Pleas in Abatement.

Having already considered them so far as they particularly relate to appeals, indictments, and informations, in the several chapters concerning them; and having shewn what pleas are good in abatement of an appeal (*a*); and, that an appellee may plead as many of them as he pleases, unless they be repugnant to one another, and afterwards take the general issue (*b*); and, that the same matters may be pleaded to an appeal on an arraignment thereon at the suit of the king, as on an arraignment at the suit of the party (*c*); and in the same chapter, what misnomers, &c. may be pleaded in abatement of an indictment (*d*); and, what pleas are good in abatement of an information (*e*); and having also considered demurrers in abatement (*f*); I shall in this place take notice only of the following particulars.

(*a*) Chap. 23.
sect. 102 to 128.

(*b*) Sect. 128.
137.

(*c*) Chap. 25.
sect. 12.

(*d*) Sect. 68. to
71.

(*e*) Chap. 26.
sect. 63 to 65.

(*f*) Chap. 31.
sect. 5 to 7.

(*g*) 1 Jones,
199.

C. Car. 147.
(*h*) Ch. 23.

sect. 126.

(*i*) Ch. 26. 63.

(*k*) C. Car. 147.
3 Burr. 1468.

1 Jones, 199. Vide the case of John Swan and Elizabeth Jefferies, Foster, 105, 106. Also *Rex v. Stratton*, Douglas, 240.

(*l*) Vide c. 23.
sect. 70, 71.

(*m*) Sum. 243.
2 Hale, 176.

238.

C. Car. 371,
372.

(*n*) Vide c. 23.
sect. 4. 133.

c. 23. sec. 9, 10.

11 Con. 11 H. 4. 41. Fitz. Misno. 18. Corone, 88. B. Misno. 23. State Tr. 51. the Earl of Banbury's case. See the books cited c. 23. sect. 11. 4 Comm. 329.

(*o*) Adj. Trin.
4 Geo. 1. King
and Westby.

Sect. 1. FIRST, That it hath been holden (*g*), that it is no good plea in abatement of an indictment, as it is of an appeal (*h*) or information (*i*), that there is another indictment against the defendant for the same offence. But in such (*k*) a case the court in discretion will quash the first indictment, if any fault can be found it.

Sect. 2. SECONDLY, That where an indictment of a capital crime is abated, for a misnomer of the defendant's (*l*) Christian name, the court will not dismiss him, but cause him to be indicted *de novo* (*m*) by his true name, and arraign him again on such new indictment. For I take it to be settled (*n*) at this day, that regularly a defendant shall not be dismissed for an insufficiency in an indictment or an appeal for a capital crime.

Sect. 3. THIRDLY, That a defendant appearing gratis, and by attorney to an information, may (*o*) plead a misnomer in abatement, as well as if he had appeared in proper person; for if he be not the person intended, the attorney-general may reject the plea and sign judgment on a *nihil dicit*. But if he accept the plea, he thereby admits him that pleads it to be the person concerned to make a defence, and therefore shall not afterwards say that it doth not appear but that the plea might be put in by a stranger.

Foster, 16.

Sect. 4. FOURTHLY, That a plea in abatement of the jurisdiction must be pleaded before the general issue.

Sect. 5. By 4 & 5 Ann. c. 16. s. 11. " No dilatory plea shall
" be received in any court of record unless the party offering such
" plea

“plea do, by affidavit, prove the truth thereof, or shew some probable matter to the court to induce them to believe that the fact of such dilatory plea is true.”

Sect. 6. And therefore it seems that a plea in abatement in an information *quo warranto* ought to be verified. Stra. 1161.

Sect. 7. It seems also that it is not necessary to verify a plea in abatement of an indictment of high treason on a trial at bar, but that on an indictment in the ordinary course it must be verified. 3 Burr. 1617.

CHAP. XXXV.

OF THE PLEA OF AUTREFOITS ACQUIT.

PLEAS in chief are either, in bar; or, the general issue.

As to Pleas in Bar, having shewn already, what pleas of this kind to an appeal are good, which shew that the plaintiff had never any right to bring it (*a*): and where a retraxit, nonsuit, discontinuance, or abatement, of one appeal may be pleaded in bar of another (*b*): and where the bringing of an appeal against one person will be a bar to a subsequent one against another person not named in the first (*c*): and where a release will bar an appeal (*d*): and where an appellant may be barred as to one appellee, and continue his suit against the rest (*e*): and what pleas of this kind are consistent with the general issue (*f*): and what is a good plea in bar to an information (*g*):

(*a*) Ch. 23
sect. 130.

(*b*) Sect. 131 to
133.

(*c*) Sect. 134.

(*d*) Sect. 135.

(*e*) Sect. 136.

(*f*) Sect. 137.

(*g*) Ch. 26.
ss. 64, 65.

I shall in this place only consider,

1. The plea of *autrefoits acquit*.
2. The plea of *autrefoits attaint, or convict*.
3. The plea of a pardon.

And **FIRST** of the plea of *autrefoits acquit*.

Sect. 1. The plea of *autrefoits acquit* is grounded on this maxim, (*h*) that a man shall not be brought into danger of his life for one and the same offence, more than once. From whence it is generally taken, by all the books, (*i*) as an undoubted consequence, that where a man is once found “not guilty” on an indictment or appeal free (*k*) from error, and (*l*) well commenced before any (*m*) court which hath jurisdiction of the cause, he may, by the common law, in all (*n*) cases whatsoever plead such acquittal

(*h*) S. P. C.
105.

4 Coke, 40. 45
to 47.

9 H. 7. 19.

F. Pard. 3.

B. Appeal, 9.

12. 89.

B. Corone, 11.

Crompton, 111.

(*i*) See the authorities cited to.

all the other parts of this chapter, and 5 E. 3. 25. (*k*) *Infra*, sect. 8. (*l*) *Infra*, 9. (*m*) 25 E. 3. 44. Ab. F. Corone, 136. 41 Assize, 9. Ab. F. Corone, 220. B. Corone, 120. 2 Leonard, 161. *Infra*, sect. 14, 15. 47 E. 3. 16. Ab. F. Corone, 104. B. Appeal, 14.

quittal in bar of any subsequent indictment or appeal for the same crime.

The several heads under which this title is considered.

But for the more distinct understanding hereof I shall particularly consider,

1. How far he who pleads this plea must be ready to produce the record of his former acquittal.

2. Where a variance between the record of the former acquittal and the indictment or appeal to which it is pleaded, may be helped.

3. How far other discharges of a former prosecution have the same effect as an acquittal by verdict.

4. How far it is necessary that the indictment or appeal in the record of acquittal be free from error and well commenced.

5. Whether an acquittal in any court which has a jurisdiction be sufficient for this purpose.

6. How far an acquittal of a person as principal will bar a subsequent prosecution against him as accessory; *et à converso*, how far an acquittal of a man as accessory will bar a prosecution against him as principal.

7. How far the law is altered in these respects as to an indictment of death, by 3 Hen. 7. chap. 1.

As to the first particular, *viz.* How far he who pleads this plea must be ready to produce the record of his former acquittal.

(o) S. P. C. 105. Sum. 245.
2 Hale, 241. 243.
F. Corone, 33.
F. Mon. de Faits, 33.
Rustal, 385.
seems contrary.
(p) Co. Litt. 128.
See the chapter of Pardon.
(q) Co. Litt. 128. F. Corone, 232. (r) B. Corone, 218. But 26 Assize, 15. Ab. F. Corone, 189. 11 H. 4. 41. Ab. F. Mon. de Faits, 128. B. Cor. 29. 9 H. 7. 19. Ab. B. App. 89. seem contrary.

Sect. 2. I take it to be (o) agreed, that such plea being a plea in bar, and the record not in the custody of, nor the property of, him that pleads it, there is no need to plead with a *profert sub pede* (1) *sigilli*; (p) but the defendant shall have a (q) day given him to bring it in. And there is in Brook a note of a (r) case in the time of Edward the Third wherein a plea of *autrefoits acquit* was disallowed, because the defendant shewed forth the record when he pleaded it; and the book gives this reason, "That the record ought to come before the court by writ."

(s) 2 Keble, 705.

As to the second particular, *viz.* Where a (s) variance between the record of the former acquittal, and the indictment or appeal to which it is pleaded, may be helped.

(t) 14 H. 7. 2. S. P. C. 168.
(u) S. P. C. 105. Summary, 246.
See Cogan's case, Cases Crown Law, 355.

Sect. 3. I take it to be clear, that if the nature of the crime be in (t) substance the same, a variance may generally be helped by proper (u) averments. And therefore if a man be named in the first

(1) The *Pes Sigilli* is thus described by Lord Hale. "The great seal," he says, "ordinarily consists of two impressions, the one the very great seal itself, with the king's effigies enstamp on it, the other is commonly called *pes sigilli*, and some-

times, in our old books, *le targe*, which is the impression of the king's arms in the figure of a target, which is used in matters of smaller moment as certificates, which are usually pleaded *sub pede Sigilli*."—(H. P. C. p. 171.)

first record yeoman, and in the second gentlemen, yet it seems (x) clear, that he may make good the variance, with an averment that he only was meant under each addition. (x) Kellway, 58.

Also if a man be acquitted of an indictment or murder or robbery *cujusdam* (y) *ignoti*, and afterwards arraigned on an indictment for the same fact, describing the person killed or robbed by his proper name, yet it hath been holden, (z) that he may plead the acquittal in bar, averring that both the indictments are for the very same felony. (y) Sup. c. 25. s. 73. (z) Keilw. 25. Dyer, 285. F. Corone, 159.

Also if the person killed be described by his proper name and surname in the first indictment, and by the same christian but by a different surname in the second, yet it hath been (a) adjudged, that he may plead an acquittal on the first in bar of the second indictment averring that the person so differently named was one and the same person. But it seems (b) adviseable in such case to add a further averment, that the person killed was known as well by the name in the first, as by that in the second indictment, for if he were never known by the name in the first indictment, I much question whether the defendant could be found guilty upon it; and if he could not, it seems plain that his life having never been in danger by it, the acquittal upon it (c) cannot be any bar to a subsequent indictment. (a) 26 Ass. 15. Ab. B. Cor. 98. F. Corone, 98. Cromp. 112. S. P. C. 105. 2 Hale, 244. 11 H. 4. 41. Ab. F. Mon. de Faits, 128. B. Variance, 31. B. Corone, 29. 1 Roll, 368. (b) Sum. 246. S. P. C. 105. Crompton, 112. (c) Sub. sect. 1. & infra, s. 8, 9, 10.

But if there be no other variance between the first and second indictment but only as to the (d) times when the crime is alleged to have been committed, or as to the (e) places being both in the same county, there is no doubt but that regularly it may be helped by an averment that the felony in both is one and the same, because neither the time nor place laid in an indictment, &c. are material upon evidence, so that the defendant be proved guilty at any other (f) time before the indictment, or at any other place (g) within the county. And it is holden by (h) Staundford, that an acquittal of murder in one county may be pleaded in bar of a subsequent indictment in another county for the same murder. (d) Dyer, 285. Summary, 246. 2 Hale, 244. 29 Assize, 55. Ab. F. Cor. 179. S. P. C. 105. 11 H. 4. 41. Ab. B. Cor. 29. Variance, 31. F. Mon. de Faits, 128. 25 Edw. 3. 44. Ab. F. Cor. 136. 3 Assize, 15. Ab. F. Cor. 166. Crompton, 112.

(e) Sum. 246. 2 Hale, 245. S. P. C. 105, 106. (f) Summary, 264. Salkeld, 288. (g) See the chapter of Evidence; and Summary, 264. (h) S. P. C. 105. See Cromp. 12.

But this seems questionable, because all indictments are local; and therefore if the first were laid in an improper county, the defendant could not be found guilty upon it, and consequently was in no danger of his life, and therefore (i) cannot plead an acquittal upon it in bar of a subsequent indictment in the proper county. But if the first indictment were in the proper county, the second cannot but be in an improper one, and consequently the defendant, not being liable to be found guilty upon it, cannot be said to be reduced by it to the inconvenience of being twice brought into danger of his life for one and the same offence, the avoiding of which inconvenience (k) seems the chief inducement for which the law allows the plea of *autrefoits acquit*. (i) Vide sect. 1. 8, 9, 10. (k) Sup. sect. 1. 8, 9, 10.

Sect. 4. But if a man steal goods in one county, and then carry them into another, in which case it is certain (l) that he may be indicted and found guilty in either, it seems very reasonable, that (l) Sup. c. 23, sect. 47. c. 25. sect. 38. and B. 1. c. 19. an p. 151.

(*m*) 41 Assize, 9.
F. Corone, 220.
But this is left
doubtful, S. P.
C. 105, 106.
Summary, 246.
Crompton, 112.
B. Corone, 139.
4 H. 7. 5.
F. Corone, 62.
(*n*) Sup. c. 18.
sect. 13. and
c. 19. sect. 25.
and c. 29. s. 35.
(*o*) 4 H. 7. 5.
F. Corone, 26.

(*p*) 26 Ass. 15.
Ab. F. Cor. 109.
B. Cor. 98.
41 Assize, 9.
Ab. F. Cor. 220.
(*q*) 3 Ass. 15.
Ab. F. Cor. 166.
See sect. 6.
(*r*) 9 H. 7. 19.
Ab. B. App. 89.

(*s*) Vide B. Cor.
139. or 110.
F. Corone, 62.
S. P. C. 106.
Summary, 246.
2 Hale, 245.

(*t*) Vide sup.
c. 23. sect. 55,
56.

(*u*) 2 Rich. 3.
14. a.
B. Appeal, 121.
Vide infra,
c. 36. sect. 7.

(*x*) Co. Litt. 146.
2 Rich. 3. 14,
15.

(*y*) 3 Inst. 213.
Summary, 246.
2 Hale, 246.
Foster, 325.

(*z*) S. P. C. 105.
Summary, 244.
B. Corone, 11.

an acquittal in the one county for such stealing may (*m*) be pleaded in bar of a subsequent prosecution for the same stealing in another county, because the defendant may be altogether as well convicted in the one county as in the other; and therefore if he could not bar the second prosecution by the acquittal on the first, his life would be twice in danger from that which is in truth but one and the same offence, and only considered as a new one by a mere fiction or construction of law, which shall hardly (*n*) take place against a maxim made in favour of life. And as to the (*o*) objection, that the jurors of the one county can take no manner of conusance of what is done in the other, and consequently cannot try whether the felony whereof the party is indicted in the second county be the very same with that of which he is acquitted in the first, it may be answered, that it appears from the old books, that anciently the judges often satisfied themselves of the truth of an averment that the offences in both indictments were the same, by (*p*) witnesses, or by an (*q*) inquest of office, without putting it to a trial by jury, upon an issue joined, on the denial thereof by the prosecutor, which seems (*r*) to have been of later years the usual method. But granting that it is to be tried by such jury, I do not see how it follows, that because they cannot convict a defendant upon evidence of a fact done out of their own county, therefore they cannot collaterally inquire whether an offence laid in their own county be in substance the same with that done in another, since it cannot be denied but that in abundance of cases a jury of one county may receive evidence of facts done in another. To which may be added, that in the Year-book of 4 Hen. 7. pl. 5. which is the (*s*) chief authority for the contrary opinion, it is admitted that an acquittal of an appeal of larceny in the one county, may be pleaded in bar of a subsequent appeal in the other; because such an appeal intitles the plaintiff to a restitution of the goods, whereof being once barred he is barred for ever. But granting this to be a good reason, which yet it seems difficult to make out, the very same may be said at this day as to an indictment, which, since (*t*) 21 Hen. 8. c. 11. intitles the prosecutor to a restitution also. Besides, taking the law as it stood formerly, why may not a jury of one county try whether a felony therein indicted be the same whereon the party was before acquitted in another county, in the case of a second indictment, as well as of a second appeal?

Sect. 5. It seems (*u*), that it is no plea to an appeal of larceny, that the defendant hath been found not guilty in an action of trespass brought against him by the same plaintiff for the same goods; for larceny and trespass are entirely different.

Also it seems a general (*x*) rule, that a bar in action of an inferior nature will not bar another of a superior.

Yet it seems, (*y*) that an acquittal in an indictment of murder will be a good bar of an indictment of petit treason, because both offences are in substance the same.

But it is clear, that an acquittal of one felony is (*z*) no manner of bar to a prosecution for another in substance different, whether committed before or at the same time with that of which he is acquitted;

acquitted; and therefore if a man commit a burglary, and steal the goods of A. and B. and be indicted for the burglary and stealing the goods of A. and acquitted, it hath been adjudged, (a) that he cannot plead such acquittal to an indictment for stealing the goods of B. But it seems agreed, that he may plead it to a second indictment for the burglary (1).

As

(1) The cases, however, in which this doctrine was established have been since denied to be law in a case of *Vandercom and Abbott*. The prisoners were indicted for burglariously breaking and entering the dwelling-house of Merial Nevill and Ann Nevill, &c. with intent to steal their goods therein being; to which they pleaded *autrefoits* acquit upon a former indictment, charging the same facts, with this difference, that instead of the breaking, &c. being laid with intent to steal, &c. the indictment charged an actual stealing of certain goods of Merial Nevill, and certain other goods of Ann Nevill, and certain other goods of one Susanna Gibbs, and concluding with an averment of the identity of the persons, and that the two indictments were for the same burglary. The case was argued upon demurrer before all the judges, and they unanimously held the plea bad: the grounds of which judgment were afterwards stated by Buller, J. at the Old Bailey, in June, 1796. He began by observing that on the part of the prisoners it was contended, that as the dwelling-house mentioned in the two indictments, and the times mentioned in each when the offence was committed, were the same, therefore the offence was the same, and the acquittal on the former indictment a bar to the present. And further, that burglary was defined to be a felonious breaking and entering of a mansion-house in the night-time, to be completed by felony or an intention to commit it; and that two cases in *Kelynge* were relied on in support of the plea of *autrefoits* acquit. (After stating the two indictments he proceeded): The question is, Whether the several offences described in the two indictments can be said to be the same? That there was only one act of breaking the house, and a felony committed only at one time, must on this record be taken to be clear; but that does not decide the question.

The crime of burglary is of two sorts, 1st, breaking and entering a dwelling-house in the night-time, and stealing goods there: 2d, breaking and entering a dwelling-house in the night-time with an intent to commit a felony, though that felony be not committed. The circumstance of breaking and entering the dwelling-house is common and essential to both, but it does not of itself constitute the crime in either; for there must be a felony committed or intended, without one of which the crime of burglary does not exist: and these offences are so distinct in their nature, that evidence of one will not support an indictment for the other. For example, if a man be indicted for breaking and entering a house in the night and stealing goods there, evidence that he broke, &c. and intended to steal goods, or to commit any other felony, would not support the indictment. In the case of the present prisoners, the evidence applicable to the indictment now depending, which is for breaking, &c. with intent to steal, was not evidence to prove the first indictment for breaking, &c. and stealing goods. Then if the crimes are so distinct that evidence of

one will not support the other, it is inconsistent with reason to say that they are so far the same, that an acquittal of one shall be a bar to a prosecution for the other. Neither do legal authorities support such a proposition. The two cases quoted on behalf of the prisoners were *Turner's Case*, *Kel.* 30. and *Jones and Beaver's case*, *Kel.* 52. William and James Turner were indicted for burglary in breaking and entering the dwelling-house of Mr. Tryon in the night, and stealing therein a large sum of money; on which James was found guilty, but William was acquitted. Afterwards, there being strong evidence that William was concerned in the same burglary, and there being £47. of the money of one Hill, a servant of Mr. Tryon, stolen at the same time, which was not laid in the former indictment, it was intended to indict him a second time for the burglary in breaking, &c. the house of Mr. Tryon, and stealing the £47. of the money of Hill. But it was agreed, says the reporter, that William Turner could not be indicted again for the same burglary, though he might be indicted for felony for stealing the money of Hill.

That case was no solemn judgment; for the prisoner was not indicted a second time for the burglary. It was merely a direction from the judges to the officer of the court how to draw the second indictment; and it proceeded upon a mistake, as I shall presently shew. If the judges in that case exercised a little lenity before the indictment, which might more properly have been done after a conviction, much censure could not fall on them. But they proceeded on the ground that the prisoner having been indicted for burglary in breaking the house of Mr. Tryon, and stealing his goods, and acquitted thereof, he could not be indicted again for the same burglary, for breaking the house; though he might be indicted for felony for stealing the money of Hill; for they were several felonies, and he was not indicted for that felony before. And he was indicted accordingly. In that case the judges went on the idea that the breaking the house and the stealing the goods were distinct offences, and that breaking the house only constituted the crime of burglary; which was a manifest mistake. The burglary consisted of breaking the house and stealing the goods; and if the stealing the goods of Hill were a distinct felony from that of stealing the goods of Tryon (which they admitted it to be,) the burglaries from necessity could not be the same. In that case the fact was, that the prisoner broke the house of Tryon, and stole the money both of Tryon and of Hill at the same time. He had been tried for breaking the house and stealing the money of Tryon, and might have been convicted if the prosecutor had used due diligence about his evidence; so that the prisoner's life had been in jeopardy; but still the judges held that he might be tried for the other part of the same act, viz. stealing the money of Hill. If no money of Tryon's had been in the house or been stolen, probably the question never would have arisen in *Turner's case*; for then the

As to the third particular, viz. How far other discharges of a legal prosecution have the same effect as an acquittal by verdict.

(b) C. 23. s. 129, 130, 131. Sect. 6. Having shewn already in the (b) chapter of Appeals how far the discharge of one appeal will bar another, I shall only add in this place, that notwithstanding the (c) allowance of a pardon, or any other bar of one indictment, seems to be pleadable in bar of another, and by the like reason whatever hath been allowed a good bar of one appeal may be pleaded in bar of another: (c) 11 H. 4. 41. Ab. F. Mon. de Falta, 128. B. Corone, 29. B. Appeal, 33. B. Variance, 31. Vide S.P.C. 106.

Yet it seems, that no other discharge of an indictment will bar an appeal, and no other discharge of an appeal will bar an indictment, but only an (d) acquittal by battle, or an acquittal by verdict on the general issue, finding the defendant's (e) innocence; as where it finds him not guilty on such an issue, on an indictment or appeal of any felony whatsoever; or where it finds him (f) guilty of homicide *se defendendo*, or *per infortunium*, on an indictment of murder.

(d) 2 Hale, 246. Infra, s. 7. (e) S. P. C. 169.

(f) 3 Inst. 213. Crompton, 111. 4 Coke, 46.

(g) Dyer, 120. Crompton, 112. But it hath been adjudged, (g) that where a demurrer by an appellant to a tender of battle of a plea, hath been adjudged against him, yet the appellee may be afterwards arraigned at the suit of the king.

Sect.

first indictment would have been wholly inapplicable to the facts of the case, and the prisoner in no danger at all upon it: but that circumstance could not vary the law of the case; and the opinion certainly proceeded from the want of adverting to what was necessary to constitute the crime of burglary. The case of Jones and Beaver proceeded wholly on that of Turner: and if the foundation fail, that case must also fail.

There the prisoners were indicted for burglary and stealing the goods of Lord Cornbury; and being acquitted, were afterwards indicted for the same burglary in breaking, &c. and stealing the goods of Mr. Nunsey: and it was agreed, that being acquitted once, they could not be indicted again for the same burglary; but that they might be indicted for stealing the goods of N. (according to Turner's case). But authorities are not wanting to shew the principle and foundation on which a plea of autrefoits acquit is to be sustained. (He then referred to 2 Hawk. c. 35. s. 3. Fost. 361. 2. and Rex v. Pedley, B. R. Tr. 1782.) These establish the principle, that unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second. To apply that principle to the present case; the first indictment was for breaking and entering the house and stealing the goods: if it were proved on that indictment that the prisoners broke and entered the house with intent to steal the goods, but had not stolen them, (which are the facts contained in the present indictment,) they could not have been convicted on that indictment by such evidence. They have not been tried, nor were their lives ever in jeopardy for this offence, which is for breaking the house with intent to steal the goods. For these reasons the judges are unanimously of opinion that the plea is bad; that there must be judgment for the crown on the

demurrer; and that the prisoners must take their trial upon the indictment now depending. (2 E. P. C. 519.) To this case Mr. E. in a note, adds a *quere* upon the definition of burglary as stated by Mr. J. Buller, namely, whether the definition of the crime be not solely resolvable into the breaking and with intent to commit felony, of which the actual commission is such strong presumptive evidence, that the law has adopted it and admits it to be equivalent to a charge of the intent in an indictment; if this reasoning be correct, then the plea of autrefoits acquit ought in the above case to have availed the prisoners. And indeed it does seem that they were twice tried, against the principle of law, for what was substantially the same burglary: the definition of burglary being the breaking and entering the dwelling-house in the night-time, with intent to commit a felony therein. It is sufficient in the indictment, and the practice now is, to charge the breaking to be with intent to steal the goods then there being: and if goods are actually stolen, to add a further charge of stealing them. If the first indictment in the above case had been so framed, it is presumed it would have been a bar to the second, for the burglary; though it would have been no bar to a second indictment for the larceny, agreeable to the above dictum of Hawkins. It may be here remarked that there is this anomaly in an indictment for burglary, that it may in one count contain two distinct common law felonies, namely, burglary and larceny; and a prisoner may be acquitted of the one and found guilty of the other. Thus he may be acquitted of the burglary and found guilty of the larceny, or if no larceny be committed, he may be acquitted of that charge and found guilty of the burglary, if the breaking and entering, &c. be charged and proved to be with the felonious intent to steal, although no actual larceny took place.—See 2 East, tit. "Burglary." And 1 H. P. C. 560.

Sect. 7. It is said by Sir Matthew Hale in the (h) chapter of Autrefoits acquit, that an acquittal by battle in an appeal is no bar of an indictment. But I find no other authority to this point but a note in Fitzherbert (i) of a case to this purpose in the time of king Edward the Second. To which it may be answered, that this matter is only spoken of incidentally, and not adjudged; and that Staundforde in the same place (k) where he cites it, makes a *quare*, whether it be law or not. And it is expressly holden by Bracton, (l) that an appellee who vanquishes the appellant in battle, shall go quit not only from all other appeals, "but also from the suit of the king; because by this he clears his innocence against all, in the same manner as if he had put himself upon his country, and his country had acquitted him." Also it is admitted by Sir Matthew Hale in the (m) chapter of Indictments that if an approver be vanquished in battle joined on his appeal, he shall be hanged, and the appellee discharged without being arraigned at the suit of the king. Also it hath been (n) adjudged, that upon such a vanquishment, the appellee is intitled to his damages against the appellant, as being *legitimo modo acquietatus*, which seems (o) necessarily to imply that he is finally acquitted as well against the king as against the party.

(h) Sum. 245.
2 Hale, 249.
(i) F. Cor. 37.
(k) S. P. C. 106.
(l) Lib. 3. c. 19. sect. 8.
(m) Sum. 200.
2 Hale, 233, 234.
Vide sup. c. 25. sect. 10.
21 H. 6. 34.
S. P. C. 168.
(n) F. Cor. 98.
S. P. C. 168.
Sup. c. 23. sect. 140.
(o) S. P. C. 169.
Sup. c. 23. s. 140.

As to the fourth particular, *viz.* How far it is necessary that the indictment or appeal in the record of acquittal be free from error and well commenced.

Sect. 8. I take it to be settled (p) at this day, that (q) wherever the indictment, or appeal, whereon a man is acquitted, is so far erroneous (either for want of substance in setting out the crime, or of authority in the (r) judge before whom it was taken), that no good judgment could have been given upon it against the defendant, the acquittal can be no bar of a subsequent indictment or appeal, because in judgment of law the defendant was never in danger of his life from the first; for the law will presume *prima facie*, that the judges would not have given a judgment which would have been liable to have been reversed. But if there be no error in the indictment or appeal, but (s) only in the process, it seems agreed, that the acquittal will be a good bar of a subsequent prosecution, notwithstanding such error, the best reason whereof seems to be this, that such error is (t) salved by the appearance.

(p) 4 Coke, 45.
47.
Summary, 244, 245.
2 Hale, 248.
251.
3 Inst. 214.
F. Corone, 444.
Sup. c. 23. s. 140.
Crompton, 112.
20 H. 7. 11, 12.
9 H. 5. 2.
Ab. B. App. 39.
B. Corone, 35.
F. Corone, 68.
confirmed by
Ld. Hardwicke,
3 Peer. Wms.
480.

(q) But Staundforde seems to be of opinion, that an acquittal on an erroneous appeal, is a good bar to an indictment till it be reversed by error. S. P. C. 106. cited in Crompton, 112. But this seems repugnant to all other books, and to what is said by Staundforde himself in the very same page. Indeed in the second edition of Hale's Pleas of the Crown, there is a note to the same effect with what is said in Staundforde; but this is manifestly misprinted, and the word acquit put for attain. (r) Crompton, 111. Sup. c. 9. s. 15, 16. 4 Coke, 46. (s) F. Corone, 444. 9 H. 5. 2. Ab. B. Appeal, 39. Corone, 35. F. Cor. 68. S. P. C. 106, 162. Crompton, 112. 2 Hale, 248. (t) Sup. c. 27. sect. 107.

Sect. 9. It seems agreed, (u) that an acquittal on an appeal brought by one who had no right to bring it, as by any other woman (x) except the wife of the deceased, or by any other man (y) except the next heir, is no more a bar to an appeal by another appellant,

(u) 20 H. 7. 11, 12.
21 H. 6. 28, 29.
Ab. B. App. 41.
Crompton, 112.
S. P. C. 106.
Summary, 245.

2 Hale, 249. (x) Sup. c. 23. sect. 36, 37, 38. (y) Sup. c. 23. s. 39, 40, 41, 42.

appellant, or to an indictment, than an acquittal on an insufficient appeal or indictment would have been.

As to the fifth particular, *viz.* Whether an acquittal in any court which has a jurisdiction be sufficient for this purpose.

(z) 9 Ass. 15.
(a) 4 Coke, 45.
Rastal, 385.
11 H. 4. 41.
Ab. F. Mons. de
Faits, 128.
25 E. 3. 44.
Ab. F. Corone,
136.
41 Assize, 9.
Ab. B. Corone,
120 or 121.
Crompton, 112.
F. Corone, 220.
(b) 1 Lev. 118.
1 Sidefin, 179.

Sect. 10. Notwithstanding the (z) opinion in the Book of Assizes, that no acquittal in any other court can be any bar to a prosecution in the court of king's bench, because that is the highest court, I take it to be settled (a) at this day, that an acquittal in any court whatsoever which has a jurisdiction of the cause, is as good a bar of any subsequent prosecution for the same crime as an acquittal in the highest court. And therefore it hath been adjudged (b), that an acquittal of murder at a grand session in Wales, may be pleaded to an indictment for the same murder in England. For the (c) rule is, that a man's life shall not be brought into danger for the same offence more than once.

(c) Sup. & 25. s. 41, 42.

As to the sixth particular, *viz.* How far an acquittal of a person as principal will bar a subsequent prosecution against him as accessory, and *è converso*, how far an acquittal of a man as accessory will bar a prosecution against him as principal.

(d) Kelynge, 25.
26.
Vide Foster, 362.
Summary, 244.
2 Hale, 244.
S. P. C. 105.
Crompton, 42.
112.
27 Assize, 10.
Ab. F. Corone,
200.
B. Corone, 105.

Sect. 11. It seems to be (d) settled at this (e) day, that an acquittal of a man as principal is no bar of a subsequent prosecution against him as accessory after the fact, because such acquittal clears him only of the charge of having committed the fact; which being a crime entirely different from that of receiving him that hath committed it, there seems no more reason that the acquittal of it should bar a prosecution for the receipt, than if they were offences that bore no manner of relation to one another.

Lamb. b. 2. c. 7. (e) Con. F. Cor. 282.

(f) S. P. C. 44.
105.
Kelynge, 25, 26.
Lamb. b. 2. c. 7.
Summary, 224.
244.
1 Hale, 626.
2 Hale, 244.
Crompton, 42.
112.

But it is (f) holden in many books of good authority (contrary to what is admitted (g) to have been the ancient law), that the acquittal of a man as principal is a good bar of a subsequent prosecution against him as accessory before; for it is said, that such an accessory is in some measure (h) guilty of the fact, and therefore that an acquittal which clears a man from being guilty of the fact, doth by consequence clear him from being such an accessory.

But the principal authority in the old book is 2 E. 3. 20. Ab. F. Corone, 150. which seems inconsistent with itself; for the words are for an example, that a man may in such a case be twice put to answer, We award that you go quit. And F. Corone, 282. is contradicted by all other books; for it says, that a man acquitted as principal cannot be so much as arraigned as an accessory after. And 27 Assize, 10. Ab. B. Corone, 105. and F. Corone, 200. extend only to the case of an accessory after. And 8 H. 5. 6. Ab. F. Corone, 463. expressly goes upon the supposition, that a man may be found guilty as principal, upon evidence which only proves him accessory. (g) S. P. C. 105. F. Cor. 424. 2 Hale, 244. (h) Vide sup. c. 29. s. 13, 14. 1 Hale, 626. 2 Hale, 244. Kelynge, 25, 26.

And this seems reasonable upon the supposition that a man may be found guilty of an indictment against him as principal, upon evidence which only proves him to have been an accessory before. But if a man cannot be found guilty of such an indictment upon such evidence, as it is (i) strongly holden that he cannot, it may with great reason be said, that the acquittal of him as principal

(i) Som. 266.
Railway, 107.
Dalison, 14.

principal no way acquits him as accessary before; for if so, he might save himself by a mere slip in the indictment, and bar all other prosecutions by an acquittal on a trial, which in truth never brought him into (k) danger of his life. And it is upon this supposition, as I suppose, that it is holden in some (l) books, contrary to those above cited, that one who has been acquitted as principal may be tried again as accessary before, as well as after. (1)

(k) Vide sup. s. 1. 8, 9, 10.
(l) Keilw. 107.
Dalison, 14.
Lamb. b. 2. c. 7.
Foster, 362.

Sect. 12. But it seems (m) agreed, that an acquittal of a man as accessary before, or after, is no bar to a subsequent prosecution against him as principal.

(m) Crompton, 43.
B. Corone, 186.
1 Hale, 622.
625. 2 Hale, 244.

Sect. 13. Also it hath been holden, that an acquittal of a man as accessary to one principal, will not save him from being arraigned afterwards as accessary to another in the same fact. But for this I shall refer to Chapter 29. section 46.

1 Hale, 624.
Foster, 361.

As to the seventh particular, viz. How far the law is altered in these respects as to an indictment by 3 Hen. 7. c. 1.

Sect. 14. It seems agreed, (n) that by the common law an acquittal on an indictment might be pleaded in bar of an appeal of death, in the same manner as an acquittal of any other felony might be pleaded in bar of a subsequent prosecution; and therefore in favour of appeals a general practice was introduced, (o) not to try any person on an indictment of death till after the year and day had been passed, by which time it often happened that all was forgotten. For reformation thereof it is enacted, "That if any man be slain or murdered, and thereof the slayers, murderers, abettors, maintainers and comforters of the same, be indicted, that the same slayers and murderers, and all other accessaries of the same, be arraigned and determined of the same felony and murder at any time at the king's suit, within the year after the same felony and murder done, and not tarry the year and day for any appeal to be taken for the same felony or murder. And if it happened any person named as principal or accessary to be acquitted of any such murder at the king's suit within the year and day, that then the same justices afore whom he is acquitted, shall not suffer him to go at large, but (p) either to remit him again to the prison, or else to let him to bail after their discretion till that year and day be passed. And if it fortune the same felons or murderers, and accessaries so arraigned, or any of them to be acquit, or the principal of the said felony, or any of them to be attainted, the wife or next heir to him so slain, as shall require, may take and have their appeal of the same death and murder, within the year and day after the same felony and murder done, against the said persons so arraigned and acquit, and all other their accessaries, or against the accessaries of the said principal, or any of them so attainted, or against the said principal so attainted, if they be on live, and the benefit of

(n) Sup. c. 25.
s. 15.
21 H. 6. 28, 29.
Ab. B. App. 41.
44 E. 3. 25.
Ab. B. App. 12.
Sum. 244, 245.
47 E. 3. 16.
Ab. F. Cor. 104.
B. Appeal, 53.
35. 103.
2 Leon. 161.
But this is made a *quære*.
17 Assize, 1.
(o) Vide sup. c. 25. s. 15.
Crompton, 111.
Kelynge, 95, 96, 97, 98.
2 Leon. 161.
Sum. 244, 245.
S. P. C. 407.
B. Appeal, 9.
32 Assize, 8.
Ab. B. Appeal, 119. 45. 25.
Ab. Br. App. 15.
11 H. 4. 94.
Ab. B. Appeal, 361.
41 Assize, 14.
Ab. B. App. 75.
(p) Vide supra, c. 33. s. 121.
F. N. B. 251.
Crompton, 111.

(1) Mr. Justice Foster contends with some warmth for the opinion of our author, that the acquittal of a principal is no bar to a subsequent prosecution against him as an accessary before the fact in the same offence. 3 Discourse, 362. And in February, 1668, Samuel Atkins was tried on two several indictments; first, as principal, next as accessary in the murder of Sir Edmondbury Godfrey. 2 State Trials, 798.

(g) Vide S. P. C. 107. and Rastal's Statutes, tit. "Murder," 2. "his clergy thereof before not had; and that the appellant shall have such and like advantage, as if the said acquittal or attainder had not been, the said acquittal or attainder notwithstanding" (g).

(r) Sum. 244.
Hale, 250.
S. P. C. 107.

(s) Sum. 244.
S. P. C. 107.

(t) Sum. 244.
Crompton, 111.
S. P. C. 107.

Sect. 15. It seems (r) agreed, that this statute shall not be construed to extend to any other appeal but that of death, nor to any other acquittal but upon an indictment; from whence it follows, that an acquittal on an indictment, or appeal, for any other (s) felony except death, may still be pleaded in bar of an appeal for the same crime, and that an acquittal on an appeal of death (t) may still be pleaded in bar of an indictment, in the same manner as by the common law.

Sect. 16. How far a person found guilty of manslaughter, or of homicide *se defendendo*, on an indictment of murder, is liable to be tried again upon an appeal by force of this statute, shall be considered in the next chapter.

CHAP. XXXVI.

OF AUTREFOITS ATTAINDER, OR CONVICT.

(a) Sum. 247.
Hale, 251, 252.
S. P. C. 107.
12 Coke, 100.
6 Coke, 13.
3 Inst. 213, 214.
Sup. c. 23, s. 36.

(b) Yet this is made a *quare*, 28 E. 3. 90. but no notice is taken of the *quare* in the abridgment of the case in F. Corone, 136. Vide 18 H. 8. 2. 12 Coke 100.

IT seems to be generally agreed, (a) that wherever a man is attainted of felony, either by judgment upon a verdict, or by (b) outlawry, or abjuration, whether upon an indictment or appeal, he may plead such attainder to any subsequent indictment or appeal, for the same or any other felony.

And two reasons are given for such plea to a second prosecution for the same felony.

(c) 9 H. 7. 19.
Ab. B. App. 89.
B. Corone, 11.

FIRST, (c) because the life of the defendant was in danger by the first; and it is against a maxim of law to bring a man into such danger more than once for one and the same offence.

(d) S. P. C. 107.
Summary, 247.
12 Coke, 100.
C. Eliz. 316.
Crompton, 113.
(e) B. Appeal, 9.
44 E. 3. 44.
Ab. F. Cor. 95.
6 H. 4. 6.
Ab. F. Cor. 217.
B. Appeal, 10.
Popham, 107.
F. Corone, 27.

SECONDLY, (d) because, generally, the proceeding in such second prosecution cannot be to any purpose, because the party is dead in law by the first attainder, and hath forfeited all that he can forfeit, and therefore it is said, that it is equally absurd to attain him a (e) second time, as to attempt to kill one who is already dead. And that is the only (f) reason I find any where given for the plea of autrefoits attainder of one felony to a prosecution for another.

7 H. 4. 31. F. Escheat, 11. B. Corone, 11. F. Corone, 81. 95. Contra, 4 E. 4. 11. See the Chapter of Judgment. (f) See the books cited to the precedent letter.

But where both of these reasons fail in the first case, and the latter of them in the second, and also in some other cases, for special

special reasons; the plea of autrefois attaint seems to be of little effect.

As in the following instances:

Sect. 2. FIRST, Where the first attainder is reversed for error, after which it can neither be pleaded to a prosecution for the same or any other felony; because by such reversal the attainder is of no (g) more force than if it had never been; and if an acquittal on an erroneous indictment or appeal will not bar a subsequent prosecution, surely *à fortiori* an attainder reversed will not do it. But it is agreed to be a good bar while it stands unreversed, because it is not void but voidable only.

(g) S. P. C. 106.
12 Coke, 100.
Summary, 247.
4 Coke, 45.

Sect. 3. SECOND, Where the attainder was at the suit of the king and (h) pardoned, and after the party is prosecuted upon an appeal. For it is an allowed maxim, that "the king cannot bar the suit of the subject;" and if he cannot bar an appeal by pardoning the offender before it appears whether he be guilty or innocent, there cannot but be much less reason that he should bar it after the guilt appears by a judgment upon record.

(h) B. Cor. 11.
28 E. 3. 90.
Ab. F. Cor. 139.
S. P. C. 107.
3 Inst. 213.
Crompton, 113.
6 H. 4. 6.
Ab. F. Cor. 227.
B. Appeal, 10.
Con. 12 Coke,
100.

Sect. 4. THIRDLY, Where a person attainted of felony is afterwards indicted of high treason, whether before or after his (i) attainder. For the judgment of death in high treason is not only different from that in felony, but the forfeiture is also more general (extending to land in tail as well as to land in fee-simple, since (k) the statutes of 26 Hen. 8. c. 13. and 33 Hen. 8. c. 20.). But if the felony were first committed, it seems (l) agreed, that the title of escheat to the felon's lands in fee-simple, vested in the lords of whom they are holden from the time of the felony, shall not be devested by the subsequent attainder for the treason, as it would be if the treason had been first committed.

(i) 1 H. 6. 5.
22.
Ab. B. Treas. 11.
F. Corone, 2.
3 Inst. 213.
Popham, 107.
Summary, 213,
214.
2 Hale, 252.
and the observa-
tion to the con-
trary in 2 Inst.
590. and
S. P. C. 107.

Crompt. 113. on the above cited Year-Book of H. 6. 5. to the plain purport of it (k) Co. 372. 392. See the chapter of Forfeiture. (l) 3 Inst. 213. S. P. C. 137.

Sect. 5. FOURTHLY, Where an appellee of larceny hath a second appeal brought against him, hanging the first, and afterwards is attainted in the first.—In which case, according to some (m) opinions, the court may, in order to entitle the second appellant to a restitution, inquire by an inquest of office, and according to others (n) by an inquest taken at the mise of the parties, whether such appellee be guilty of the larceny, or not.

(m) Sup. c. 23.
s. 53. and c. 28.
s. 7.
2 Hale, 252.
F. Corone, 379.
7 H. 4. 31.

Ab. F. Cor. 81. B. App. 21. Vide 44 E. 3. 44. Ab. B. App. 11. F. Cor. 95. S. P. C. 66. Summary, 212. 248. B. Appeal, 93. F. Corone, 26. 6 Ed. 4. 4. Ab. B. Cor. 147.

(n) 4 E. 4. 11.
Ab. B. Cor. 147.

And the law seems to be the same in relation to an indictment of (o) larceny since the statute of 21 Hen. 8. c. 11. which intitles the prosecutor to a restitution of his goods, upon the offender's being found guilty, &c. in the same manner as upon an appeal.

(o) Sup. c. 23.
s. 55, 56.
Sum. 212. 248.

Also it hath been (p) adjudged, that a person attainted is as liable to answer a personal action, as if he had not been attainted. For otherwise his attainder would give him a privilege and protection, which the law is far from intending in allowing the plea of autrefois attaint to a second prosecution for a new crime, which is chiefly grounded on this reason, that the law will not suffer

(p) 3 Inst. 213.
215.
C. Eliz. 516.
Con. C. Eliz.
213.

suffer an absurd and vain thing in attainting one who is attainted already.

Sect. 6. FIFTHLY, Where a person attainted of one felony is afterwards prosecuted as a principal in another, and others are also prosecuted together with him as his accessaries. In which case it is said, (q) that for the benefit of public justice he is compellable to plead, &c. to the second prosecution in the same manner as if he had not been attainted, because otherwise the accessaries to such second felonies could not (r) be brought to their trials for want of a conviction of their principals.

Sect. 7. It seems (s) clear, that a judgment against a man on an indictment or action of trespass, is no bar to an indictment or appeal of larceny for the same taking, because trespass and larceny are offences of a different nature, and the judgment for the one entirely differs from that for the other.

Also I take it to be in a great measure (t) agreed, that the judgment of *peine forte et dure* in one felony is no bar to a prosecution for another, because such judgment neither corrupts the blood, nor forfeits the lands, as an attainder doth. But it seems questionable, whether it may not bar a second prosecution for the same felony, because the life of the party was brought into danger by the first.

Sect. 8. It is (u) said, that autrefoits attain or convict was no plea for one who had broken the prison of the ordinary.—But for this I shall refer to the books cited Chapter the thirty-third (x).

Sect. 9. It is certain, that an attainder on an indictment of death is no bar to an appeal, by reason of 3 Hen. 7. c. 1., set forth more at large in the precedent chapter, which gives an appeal against persons attainted of death, the benefit of clergy thereof being not had, as it is certain that it cannot at this day. But it seems (y) agreed, that in all other cases the plea of autrefoits attain is still of the same force as it was by the common law.

Autrefoits Convict.

The Plea of Autrefoits Convict seems chiefly to depend on this reason, (a) That the party ought (b) not to be brought twice into danger of his life for the same crime.

Sect. 10. Upon which ground it seems (c) agreed, that a conviction on an appeal or indictment of burglary, or other felony, may be pleaded to an indictment or appeal for the same felony; and that a conviction of manslaughter in an appeal of death may be pleaded in bar of a subsequent indictment or appeal of the same death; and that the reason why such a conviction on an indictment of death cannot be pleaded to an appeal as well as to an indictment (unless the person so convicted be admitted to his clergy, or at least have prayed it), (d) depends entirely on 3 Hen. 7. c. 1. which expressly giving an appeal against a person attainted on an indictment of death, who hath not had his clergy, cannot but be thought to give it as well against a person convicted, since every

every attainder includes a conviction or more; and it is wholly owing to the default of the court, which shall not prejudice any one, that a person convicted is not attainted (e). But I do not find any authority that a conviction of one felony may be pleaded in bar of another; on the contrary, it is plain, that it was anciently the usual (f) practice, where a clerk was indicted of several felonies, and tried and convicted of one of them, and demanded by the ordinary, not to deliver him upon such demand, but to detain him in prison till he had been arraigned of all the felonies whereof he stood indicted. Also it seems (g) agreed, that even after the statute of 25 Edw. 3. c. 5. *de Clero*, a clerk convict of one felony might immediately, while he stood at the bar, be arraigned of any other.

Sect. 11. But it seems to be admitted (h) as a general rule, that after a clerk convict was once delivered to the ordinary, he could not afterwards be impeached either for the same, or any other felony committed before such delivery to the ordinary, whether it were within the benefit of clergy or not: and though this be so far remedied (i) by 8 Eliz. c. 4. and 18 Eliz. c. 7. that a person admitted to his clergy for any felony shall not in respect thereof bar a subsequent prosecution for another felony not within the benefit of clergy; yet, as I take it, the law generally still continues as it was, as to the felony whereof the party who is admitted to his clergy is convicted, and also as to other felonies within the benefit of clergy committed before such admittance, whereof it seems agreed, that regularly one admitted to his clergy shall not be afterwards arraigned.

Sect. 12. It seems to have been long settled, that not only he who hath been admitted (k) to his clergy on a conviction of manslaughter, upon an indictment of murder, but also that he who, being called to judgment on such conviction, hath (l) prayed his clergy, but hath not been actually admitted to it, may bar any subsequent appeal for the same death, as he might by the common law. And so to the objection from the seeming absurdity, that if the law be so, he that hath his clergy on a conviction of manslaughter will be in a better case than if he had been wholly acquitted, it may be answered, that this doth not depend on any reasoning from the nature of the thing, but from the statute of 3 Hen. 7. c. 1. which expressly takes away the plea of *autrefoits acquit* in this case, but by suffering even persons attainted on an indictment of death who have been admitted to their clergy to plead such admission in bar of an appeal, plainly seems to have intended to leave the benefit of clergy as it stood before.

Sect. 13. Also it hath been adjudged, (m) that it is not material whether the appeal, in bar whereof such conviction and clergy are pleaded were depending at the time of such conviction, or not; since the judges (n) may, if they think fit in their discretion, proceed on an indictment of death, notwithstanding an appeal thereof be depending; and therefore as on the one side the party is liable to be hanged, if found guilty of murder on a verdict against him on such an indictment, pending an appeal,

(e) S. P. C. 180. Sum. 247, 248. Crompton, 115.

(f) F. Corone, 394. 461.

S. P. C. 108.

Svp. c. 33. s.

117.

Pre. 25 E. 3. 5.

(g) S. P. C. 108. Dyer, 215.

(h) Dyer, 214, 215.

Sum. 248, 249.

Sup. c. 33. s.

117 to 121.

18 II. 8. 2.

3 Inst. 131.

Kely. 93, 103.

Crompton, 113.

F. Cor. 232.

(i) See these statutes more at large, c. 33. s. 121 to 130.

(k) 4 Coke, 40. Wetherell's case, 45, 46.

Crompton, 101.

C. Jac. 282.

Yelv. 204, 205.

1 Bulst. 241.

See the cases cited to the next letter.

(l) 2 Leon. 160.

1 And. 68.

4 Coke, 45, 46.

Kely. 93, &c.

3 Institute, 161.

Coke Ent. 55.

Salkeld, 63.

2 Hale, 250.

399.

This is left doubtful, 2 Roll. 478.

(m) Salkeld, 63.

Kelynge, 91, 92.

94. 104. 107,

108.

But the contrary seems to be holden in 3 Inst. 131.

(n) Sup. c. 25.

s. 15. and the

notes to c. 35. s.

14.

Kely. 94, 95,

96, 97, 98.

peal, it cannot but be equitable, that on the other side he should have the full benefit of the verdict, if found in his favour.

(e) 1 Sid. 316.
Carth. 7. 18.
Kelynge, 106.
Vide Dyer, 214,
215. 296.

Sect. 14. But there have been many (e) opinions, that unless the court call a man to judgment, on a conviction of manslaughter, on an indictment of murder, he cannot demand the privilege of his clergy, and consequently cannot plead such conviction and clergy thereon had or prayed in bar of an appeal.

(p) 3 Modern,
156, 157, 158.
Kelynge, 106.

And accordingly it was solemnly resolved (p) by all the judges except one, in the latter end of the reign of king James the Second, that the court might delay the calling a convict to judgment, to hinder him from praying his clergy, (especially if an appeal be depending,) in order to make him liable to an appeal.—

(q) Skin. 670,
671. v.
Carth. 394, 395.
Kely. 93. 103,
104, 105. 107.
Salkeld, 62, 63.

But the contrary (q) seems to be fully settled in the case of *Armstrong v. Lisle*, wherein it was adjudged upon great deliberation, that a conviction of manslaughter, on an indictment of murder, and the (r) prayer of clergy thereupon, may be pleaded in bar of an appeal of the same death, whether such prayer were made upon the party being called to judgment, or not. For it seems to be

(r) But note, that in this case the party was actually admitted to his clergy in the king's bench.

(s) Vide sup. s. 12.

1 And. 68.
4 Coke, 45, 46.
Kelynge, 105.
Salkeld, 63.

(s) admitted, even by those of the contrary opinion, that the delay of the court in not admitting a man to his clergy who prays it when called to judgment, shall no way prejudice him, but that he may bar an appeal by pleading a conviction and prayer of clergy as much as if he had been actually admitted to it. And why should it be more reasonable that the delay of the court in not calling a man to judgment, shall put it in the power of the court to make so high a privilege in favour of life wholly precarious and discretionary? To which may be added, that a demand of clergy by a convict before he is called to judgment, seems in strictness to be as legal as a demand after a call to judgment; since whenever a person appears to have a right to his clergy, as he seems plainly to do when his crime is found to be such as is within the benefit of it, it seems a necessary consequence that he has a right to pray it. And it seems (t) agreed, that by the ancient common law, clergy might be demanded upon the prisoner's first arraignment. And though afterwards for special reasons, the judges made it a rule not to admit any one to it till after he had pleaded; yet I find it no where holden in the old books, that a man could not legally demand it till called to judgment. Neither doth the (u) opinion to the contrary in the report of the case of *Armstrong v. Lisle*, grounded upon the authority of (x) *Searl's Case*, seem to be at all made out by that case. (1)

(t) Sup. c. 53.
s. 110, 111.

(u) 1 Salk. 63.
Kelynge, 105.
(a) Hob. 389.

Sect. 15. But it seems clearly settled, that whenever the record on which a man is convicted of manslaughter, and admitted to his clergy, on an indictment or appeal of murder, is erroneous, either in respect of insufficiency (y) in the indictment or appeal, or for a (z) mis-trial, &c. so that his life was not in danger at the trial, &c. he cannot plead such conviction and clergy thereon had in bar of a second indictment or appeal.

(y) 4 Coke, 39,
40. 47.
Crompt. 111.
(z) 6 Coke, 14.

Sect.

(1) See the case of the *Widow Smith v. Taylor*, Trinity Term, 11 Geo. 3. B. R. upon an appeal for the murder of her husband, where the decision in the case of *Armstrong v. Lisle* is confirmed as good

law, and the reasoning of Mr. Serjeant Hawkins upon the subject approved of by Lord Mansfield, 5 Burr. 2801.

Sect. 16. It hath been adjudged, (a) that the conclusion of a plea of *autrefois convict* of manslaughter, and clergy thereon, &c. may be either, "*petit judicium si prædict' A. B. iterum de eadem morte, de qua semel convictus est, respondere compelli debeat;*" or thus, (b) "*petit judicium si prædict' A. B. appellum suum prædict' versus eum de morte prædict' habere seu manutene- nere debeat.*"

(a) 3 Inst. 131.
(b) Coke's Ent. 55.
3 Inst. 131.

Sect. 17. It is said (c) to have been adjudged in Holcroft's case, that a verdict finding a man guilty of homicide *se defendendo* on an indictment of murder, may be pleaded to an appeal of the same death; but this was certainly not the very point in question in that case; neither do I find it expressly taken notice of in any report of it.

(c) Crom. 111.
(d) Co. Ent. 55.
4 Coke, 45, 46.
3 Leonard, 160, 161.
3 Institute, 131.
1 Ander. 68.

However, since it seems clear, that such a conviction would be a good bar of an appeal at the common law, and since it is not within the letter of 3 Hen. 7. c. 1. which mentions only persons acquitted or attainted, it shall not be easily construed to be within the meaning of it, (f) being in this respect a penal statute, and derogatory from a maxim of the common law in favour of life.

(e) Sup. s. 10.
(f) 3 Inst. 131.
Kelynge, 104.

And though it be in a great measure (g) agreed, that the statute in giving an appeal against a person attainted of murder doth by necessary consequence give it as well against one convict of murder, because every person attainted is convict and more; and if an appeal should not lie against a person convicted until he were attainted, it would be wholly in the power of the court, by delaying to give judgment on a person convicted, to bar an appeal; yet since these reasons hold not in the case of one convict of *homicide se defendendo* only, it may well be argued, that a conviction thereof may still be a good bar of an appeal.

(g) 1 And. 68.
4 Coke, 16.
Sup. s. 10.

CHAP. XXXVII. OF PARDON.

BEFORE I proceed to consider in what manner a pardon is to be taken advantage of, it may not be improper to premise some things concerning the nature of pardon in general.

1. By whom a pardon is grantable.
2. Where it is grantable of right.
3. What is the nature of a pardon of grace.

As to the FIRST POINT, viz. By whom a pardon is grantable

Sect. 1. It seems, that anciently the right of pardoning offence
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(a) See the statute of 27 H. 8. c. 24.

Co. Litt. 114.
Crompton, 116.
S. P. C. 104.
3 Inst. 233.

within certain districts was claimed by the lords marchers and others, who had *jura regalia*, by ancient grants (a) from the crown, or by prescription. But it is enacted by 27 Hen. 8. c. 24. s. 1. "That no person or persons, of what estate or degree soever they be, shall have power to pardon or remit any treasons or felonies whatsoever, nor any accessaries to the same, nor any outlawries for such offences, whether committed in England or Wales, or the marches of the same; but that the king shall have the whole and sole power and authority thereof united and knit to the imperial crown of this realm, as of good right and equity it appertaineth."

(b) Vide the case of Margaret Carolina Rudd, Cowper, 331.

As to the SECOND POINT, viz. Where a pardon is grantable of right (b), I shall endeavour to shew where it is to be so granted.

1. To persons found guilty of excusable homicide.
2. To robbers, clippers, burglars, &c. who shall discover two or more guilty of robbery, &c.
3. To an approver who hath convicted an appellee.

And FIRST, as to persons found guilty of excusable homicide.

Sect. 2. It is enacted by the statute of Gloucester, c. 9. "That in case it be found by the country, that a person tried for the death of a man, did it in his defence or by misfortune, then by the report (c) of the justices to the king, the king shall take him to his grace, if it please him." By which, at first sight, it seems to be implied, that it is left to the discretion of the king, whether he will grant a pardon in such a case or not. And agreeably hereto it is said in four several notes (d) in Fitzherbert's Abridgment of Cases in the time of Edward the Third, that a person found guilty of homicide *se defendendo* is to be remitted to prison in order to attend the king's grace: and yet in two other notes of (e) cases in the very same year, it is said, that in such a case, if the prisoner cause the record to come into the chancery, the chancellor will make him a charter of pardon, without speaking to the king; and this seems to be (f) settled at this day, and agreeable to the ancient (g) common law, which shall not without express words be restrained by a statute which seems to be made in affirmance of it. And therefore these words in the statute, "if it shall please the king," shall be taken as spoken only out of reverence to him, and not as intended to make the right of the subject to such a pardon precarious. And the cases above cited, which seem to be contrary, may be reconciled with the others, by intending them to mean only the grant of the king's pardon to a person represented to him as guilty of homicide *se defendendo* only, without any certificate of the verdict upon record. For none of those cases make any mention of such certificate, as the others do; and if there be no such certificate, it seems plain that the grant of a pardon is a mere matter of favour. (1)

However it seems to have been always (h) agreed, that the forfeiture of goods by such homicide may be saved by a pardon (which

(h) See the books cited to the other parts

of this sect. and 4 H. 7. 2. Ab. F. Corone, 61. B. Corone, 138 or 139. B. Forfeit, 51. 2 H. 4. 18. Ab. F. Cor. 69. B. Forfeit, 9. (1) Vide vol. 1. p. 77. note.

(c) For the form of a certiorari in such case, and a pardon thereon, see Reg. 190.
(d) F. Cor. 284. 286, 287. 354. Also F. Cor. 305. and 44 E. 3. 44. Ab. F. Cor. 94. and 2 H. 4. 18. Ab. B. Forf. 9. are to the same purpose.

(e) F. Cor. 297. 361.

(f) S. P. C. 15, 16.

2 Inst. 316, 317. Summary, 250. R. 1. c. 29. s. 24. B. Ch. de Pard, 65.

Keilway, 108.

(g) Kelynge, 122, 123.

Bract. 1. 3. c. 29.

B. 1. c. 29. s. 19. to the end of the chapter.

(which in this *particular* case seems to purge the offence *ab initio*). And it hath been (i) adjudged, that such a pardon is as necessary for one who is indicted only of homicide *se defendendo* and confesses it, as for one who is found guilty of homicide *se defendendo* on an indictment of murder. And if he were found guilty of having fled (k), &c. I question whether the pardon will save the forfeiture of the goods by reason of the flight; for that is grounded not on the homicide, but on the contempt of the law in not standing to its judgment.

(i) Keilw. 53.
4 H. 7. 2.
Ab. F. Cor. 61

(k) Vide F. Cor.
286, 287. and
infra, in the
chapter of "Fal-
sifying Attain-
ders."
A pardon offered to robbers.

SECONDLY, As to robbers, clippers and coiners, and burglars, &c. who shall discover two or more guilty of robbery, &c.

Sect. 3. It is enacted by 4 and 5 Will. & Mary, c. 8. "That if any person or persons, being out of prison, shall commit any robbery, and afterwards discover two or more, who then had, or afterwards shall commit any robbery, so as two or more of the persons discovered shall be convicted of such robbery; any such discoverer shall himself have, and is hereby entitled to the gracious pardon of their majesties, their heirs, and successors, for all robberies which he or they shall have committed at any time or times before such discovery made, which pardon shall be likewise a good bar to any appeal brought for any such robbery."

Sect. 4. Also it is enacted by 6 and 7 Will. 3. c. 17. "That if any person or persons, being out of prison, shall be guilty of clipping, counterfeiting, washing, filing, or otherwise diminishing the coin of this realm, and afterwards discover two or more who then had, or afterwards shall commit any of the said crimes, so as two or more of the persons discovered shall be convicted of the same; any such discoverer shall himself have, and is hereby intitled to the gracious pardon of his majesty, his heirs, and successors, for all such his crimes, which he or they have committed at any time or times before such discovery made."

A pardon offered to clippers of the coin.

Sect. 5. Also it is enacted by 10 and 11 Will. 3. c. 23. (which excludes (l) all persons from their clergy who shall by night or day, in any shop, warehouse, coach-house, or stable, privately and feloniously steal any goods, wares, or merchandizes, being of the value of 5s. (1) or more, although such shop, &c. be not actually broken open, and although no person be therein, or shall assist, hire, or command any person to commit such offence), "That if any person or persons shall commit any burglary, house-breaking, or felony, in stealing of any horse or horses, or any money, wares, or goods, from whom the benefit of clergy is by the said act taken away, and being out of prison, shall discover two or more, who then had, or after shall commit any such burglary, horse-stealing, or felony, as aforesaid, and shall be convicted thereof, or cause to be discovered and apprehended two or more, who shall be convicted as aforesaid; every such discoverer shall have, and is hereby intitled to his majesty's most gracious pardon for the burglaries, house-breakings, horse-stealings, or felonies as aforesaid, which he or she or they shall have committed at any time or times before such discovery made;

(l) Vide sup. c.
33. s. 64, 65.

A pardon offered to burglars house-breakers, horse-stealers, and shop-lifters.

(1) Vide vol. 1. p. 201.

M M 2

"which

"which pardon shall be likewise a good bar to an appeal for any such burglary, &c."

Sect. 6. And it is further enacted by 5 Anne, c. 31. sect. 4.

(m) Vide c. 33.
s. 85 to s. 106.

"That every person who shall be guilty of burglary, or of the felonious breaking and entering any house in the day-time, and after shall discover two who shall have committed such burglary or felony, so as they be convicted, &c. shall have 40*l*. (1) and be entitled to a pardon of all burglaries and felonies, except murder and treason; which pardon shall be a bar to appeal, &c."

A pardon offered to smugglers.

By 25 Geo. 3. c. 57. Accomplices discovering an offender in counterfeiting lottery orders, &c. are entitled to a pardon.

† It is enacted by 8 Geo. 1. c. 18. s. 7. "That if any runner of foreign goods shall within two months after his offence, and before his conviction, discover two or more of his accomplices therein to the commissioners of the customs or excise in England or Scotland so as they or two of them at least be convicted of such offence (as described in the act), the offender or offenders so discovering shall receive the sum of forty pounds for every such offender so discovered and convicted, so as the value of the goods recovered by such discovery shall exceed fifty pounds; and such person so discovering shall be clearly acquitted and discharged of such his or her offence." And the like is enacted by 9 Geo. 2. c. 35. upon the same subject. (2)

Sect. 7. THIRDLY, In what manner an approver who convicts the appellee is intitled to a pardon. This hath been shewn Chapter 24, section 27. (3) (4)

Pardon of grace.

As to the **THIRD POINT**, viz. What is the nature of a pardon of grace, I shall consider the following particulars:

1. Where a pardon of grace is good in law.
2. What is the effect of a pardon of grace.
3. Whether it may be waived.

As to the **FIRST POINT**, viz. Where such a pardon is good in law; I shall consider,

1. What

(1) The act of 5 Anne, c. 31. is repealed so far as relates to the reward of £40. by Stat. 58 Geo. 3. c. 70.

(2) Persons to whom the king has, by special proclamation in the Gazette, or otherwise, promised his pardon, are also entitled to it of legal right. Cowp. 333.

(3) Great inconvenience arose from the practice of approvement. A mode has therefore been adopted in analogy to that law, by which an accomplice may be entitled to a recommendation to the king's mercy, but not to a pardon as of legal right, which he may plead in bar, or avail himself of on his trial. It is where an accomplice, having made a full and fair confession of the whole truth, is in consequence thereof admitted evidence for the crown, and that evidence is afterwards made use of to convict the other offenders. If he act fairly and openly, and discover the whole truth, though he is not intitled of right to a pardon, yet the usage, the practice, and the lenity of the court is to stop the prosecution against him; and he has an equitable title to a recommendation from the king's

mercy.—It holds out a kind of hope, that accomplices who behave fairly, and disclose the whole truth, and bring others to justice, should themselves escape punishment and be pardoned.

(4) But a justice of the peace cannot pardon the offender, and tell him he shall be a witness against others. He cannot select whom he pleases to pardon or prosecute, and the prosecutor has even a less pretence to select than the justice of peace. However, although the justices deceive the accomplice under a promise, or assurance, or hope of pardon from them, which in strictness they had no right to make, yet if he make a full and fair disclosure, at the time of his examination, of all he knows, he will be intitled to a recommendation to mercy, and the king's bench will in this case bail him in order that he may apply for the king's pardon. Or the justices of gaol-delivery, on all the circumstances relative to the prisoner's claim of indemnity being laid before them, will exercise their discretion in deferring the trial accordingly. Lord Mansfield, Cowper, 331.

1. What is required to make a good pardon of felony in general.

2. What is particularly required in a pardon of treason, murder, or rape.

3. How far the pardon of one man may discharge another.

4. How far it is necessary that the pardon of several persons for felony be several.

5. Whether the king's grant of a protection, or a place of trust to a traitor or felon, carry with it an implied pardon of his crime.

6. What is required to make a good pardon of offences not capital.

7. Whether any offence can be pardoned before it is committed.

8. Whether there be any offence which cannot be pardoned after it is committed.

9. How far a pardon may be of force against the private interest of the subject.

10. Whether it may be conditional.

11. Where a pardon is void in respect of a wrong recital.

As to the first particular, *viz.* What is required to make a good pardon of felony in general.

Sect. 8. It seems to be laid down as a general rule in many books, that wherever it may be reasonably intended that the king, when he granted such pardon, was not fully (*n*) apprised both of the heinousness of the crime, and also how far the party stands convicted thereof upon record, the pardon is void, as being gained by imposition upon the king. And this is very agreeable to the reason of the law, which seems to have intrusted the king with this high prerogative, upon the special confidence that he will spare those only whose case, could it have been foreseen, the law itself may be presumed willing to have excepted out of its general rules, which the wit of man cannot possibly make so perfect as to suit every particular case. And upon this ground it hath been holden, (*o*) "that if one be indicted by these words, "that he had slain a man for having sued him in the king's court," and the king make him a charter of all manner of felonies; this charter shall not be allowed, because it shall be intended that the king was not acquainted with the heinousness of the crime, but deceived in his grant. Also where one outlawed in an appeal of felony prayed his clergy, which was counterpleaded on the account of bigamy, &c. and afterwards purchased a pardon, and sued a *scire facias* against the appellant, &c. it is (*p*) said, that the

(*n*) 8 H. 6. 20.
Ab. B. Char. of
Pardon, 19.
8 H. 6. 21.
Ab. B. Patents,
15.
6 Coke, 13.
3 Inst. 238.

(*o*) 8 H. 6. 20.
but note, that
Brook in abridg-
ing this case in
the title of
Charter of Par-
don, 19. omits
the words, "be-
cause he sued
him in the king's
court."
(*p*) F. Charter,
16.
the S. P. C. 109.

Crompton, 115. from the authority of the Year Book of 11 H. 4. 11. pl. 24. and 48. pl. 23. whereon the debate of this case it seems admitted, that the pardon was not good because it made no mention of the bigamy; and yet it is said that upon the non-appearance of any one to maintain the appeal, the pardon was afterwards allowed. *Ergo quere.*

the pardon was not allowed, because it made no mention of the bigamy.

(*q*) 8 H. 6. 21. Also it seems agreed by all the (*q*) books, that if a man be attainted of any felony, whether by abjurati^on, or outlawry, or otherwise, and afterwards get a pardon which doth not expressly mention the attainder, the pardon will not avail him, (*r*) because it shall be intended that the king had not cons^usance of the attainder, but was deceived in his grant, which shall not grieve him when he has true notice of the matter.

Ab. B. Patents, 15.
9 Ed. 4. 28. Ab. F. Char. 23.
B. Charter, 23.
6 Ed. 4. 4.
1 Ed. 3. 13.
1 Assize, 4.
Ab. F. Cor. 155. Same point admitted, 36 H. 6. 25, 26. Ab. B. Charter, 25. 6 Coke, 13. F. Cor. 124. Crompton, 115. 3 Inst. 238. Sum. 251. S. P. C. 102. 123. Dalton, c. 94. Kelynge, 28.
(*r*) These are the very words of 8 H. 6. 21. Ab. B. Patent, 15.

(*s*) 1 Sid. 366. And upon the like ground it hath been holden (*s*), that the
430. pardon of one who is convicted, by verdict, of a felony is not
2 Keble, 363. good, unless it recite the indictment and conviction.
3 Keble, 694.

(*t*) 2 Jones, 56. Also it hath been (*t*) questioned, whether the pardon of one
3 Keble, 30. who is barely indicted of felony be good, if it do not mention
(*u*) 2 Jones, 56. the indictment. But this hath been (*u*) adjudged to be helped
3 Keble, 30. 36. by the words "*sive indictatus sive non.*"
Crompt. 115.

(*x*) 10 Ed. 4. 10. Sect. 9. It hath been holden, that anciently (*x*) a pardon of
Co. Litt. 391. "all felonies" included all treasons, as well as all felonies what-
3 Inst. 236. soever, and might be pleaded to an indictment for them.
Vide 22 Ass. 49. S. P. C. 2. 102.
F. Charter, 13. Dyer, 124. March, 214, &c.

(*x*) Keilw. 91. And it seems to be taken for granted, in many (*x*) books, that
B. Cor. 147. a pardon of all felonies in general, without describing any one
Coke Litt. 391. particular felony, may even at this day, if the party be neither (*y*)
S. P. C. 2. 102. attainted nor indicted, be pleaded in bar of any felony whatsoever,
3 Inst. 236. coming within the general limitations of the pardon, except murder
22 E. 4. 7. or rape; and that the only (*z*) reason why it cannot be also
See the books pleaded to murder or rape, is, because the statute of 13 Rich. 2.,
cited to the other parts of this section. set forth more at large under the next point, requires an express
(*y*) 8 H. 6. 21. mention of them. But I find this point no (*a*) where solemnly
Ab. B. Pat. 15. debated. Neither doth it seem easy to reconcile it with
F. Corone, 24. the general rules concerning pardons, agreed to be good in other
2 Keble, 574. cases; for if a felony cannot be well (*b*) pardoned where it may
10 Ed. 4. 10. be reasonably intended that the king, when he granted the par-
36 H. 6. 25. don, was not fully apprised of the state of the case, much less
26 Sum. 251. doth it seem reasonable that it should be pardoned where it may
2 Jones, 56. be well intended that he was not apprised of it at all. And if a
6 Ed. 4. 4. felony whereof a person be attainted cannot be well pardoned,
B. Charter F. even though it appear that the king was informed of all the cir-
Pardon, 10. cumstances of the fact, unless it also appear that he was in-
(*z*) Keilway, 91. formed of the attainder; much less doth it seem reasonable that
9 Ed. 4. 26. a felony should be well pardoned, where it doth not appear that
Crompton, 115. he knew any thing of it: for by this means, where the king in
(*a*) 2 Keb. 363. truth intends only to pardon one felony, which may be very pro-
415. 574. per for his mercy, he may by consequence pardon the greatest
(*b*) See the pre- number of the most heinous crimes, the least of which, had he
cedent section. been apprised of it, he would not have pardoned. And for these
(*c*) Vide 2. Keb. reasons, as I suppose, general pardons are commonly made by
575. act of parliament; and have been of late years (*c*) very rarely
granted

granted by the crown, without a particular description of the offence intended to be pardoned. As to the (d) precedents of such general pardons in Rastal's Entries, it may be answered, that their authority seems to be of less weight when compared with those many precedents of pardons in the Register (e), every one of which particularly describes the offence which is pardoned, and even those which relate to (f) homicide by lunatics, or infants, or in self-defence, &c. except only one which pardons escapes, but expressly excepts all voluntary ones. And therefore where the books speak of pardons of all felonies in general as good, perhaps it may be reasonable for the most part to intend that they either speak of a pardon by parliament, or that they suppose (g) that the particular crime is mentioned in the pardon, though they do not express it.

(d) Rast. 455.
459.

(e) Register of
original writs, f.
308 to 313.

(f) Register of
original writs,
309.

(g) Dyer, 124.
Vide 22 Ass. 47.
Ab. F. Charter,
14.

Sect. 10. By 23 Edw. 3. c. 2. it is enacted, "That in every charter of pardon of felony which shall be granted at any man's suggestion, the said suggestion and the name of him that makes it shall be compromised; and if after the same suggestion be found untrue, the charter shall be disallowed. And the justices before whom such charters shall be alleged, shall enquire of the same (h) suggestion, and if they find it untrue, shall disallow the charters so alleged."

(h) Vide Raym.
13.
1 Siderfin, 41.

And by 5 Hen. 4. c. 2. it is enacted, "That if an approver become a felon again after a pardon, he who procured the pardon shall forfeit £100."

Sect. 11. It is certain that a general pardon of felonies extends not to piracy, as hath been fully shewn, book 1. ch. 20. s. 12.

Sect. 12. It seems a settled rule, that no pardon of felony shall be carried farther than the express purport of it; and therefore where a man was attainted on an appeal of robbery, and the king, reciting the attainder, pardoned the execution, it is said, (i) that because the pardon did not expressly mention the felony, it was disallowed: but it does not appear how it was pleaded, nor to what purpose it was attempted to be made use of, nor how far, or in what respect it was disallowed; and therefore, though (k) some books seem to hold generally, on the authority of this case, that such a pardon is no way good, I do not well see how any more can be proved from it than this, that it shall neither amount to a pardon of the felony itself, nor of any other consequence of the attainder besides the execution. But it seems difficult to give a reason why it should not well pardon the execution, since the king doth not appear to have been any way deceived; and (l) it hath been clearly adjudged, that the king may, if he think fit, pardon the execution, and no more.

(i) 8 H. 4. 21.
Ab. F. Chart. 26.
A. App. 27.
Chart. de Par.
13.
B. Corone, 24.
6 Coke, 13.
S. P. C. 102.
(k) Crompton,
115.
Summary, 251.
(l) 6 H. 4. 6.
Ab. F. Cor. 227.
See the chapter
of execution and
reprieve.
1 Stat. Tr. 261.

Sect. 13. It seems (m) agreed, that where a general act of pardon excepts some particular kinds of felony, such exception extends as well to those whereof any persons are attainted as others; for if those whose guilt appears not on record are excepted, much greater reason is there that those whose guilt appears in so high a manner should be excepted; and therefore being within the letter of the exception, they cannot but be intended to be within the meaning of it also. Neither doth it fol-

(m) 6 Coke, 13.
Summary, 251.
3 Inst. 238.

low,

(n) Vide sup.
sect. 8, 9.

low, that because the pardon of a felony whereof a person is attainted is not (n) good without mentioning the attainder, therefore such a general exception of "all felonies" shall not extend to those whereon there hath been an attainder; for the case of such a pardon depends on this special reason, that the king ought to be fully apprised of the proceedings against the party before he pardons him, as hath been more fully shewn, section the eighth.

As to the second particular, viz. What is particularly required in a pardon of treason, murder or rape.

(o) Sup. sect. 9.
Moor, 752.
3 Modern, 37, 38.
F. Chart. 13.
F. Corone, 25.
Keilway, 91.
(p) 4 Ed. 3. c. 13.
10 Ed. 3. 2.
(q) Regi. 309.
(r) S. P. C. 101.
3 Inst. 236.
Style, 375, 377.
March, 217.
Bracton, 133.
Shower, 283, 284.
1 Keble, 67.
1 Levinz, 8.
(s) 11 H. 4. 11.
Ab. F. Char. 16.
4 Ed. 4. 10.
Ab. F. Cor. 25.
9 H. 7. 5.
Ab. F. Scire Fac. 56.
9 H. 4. 1.
Ab. F. Scire Fac. 63.
13 H. 4. 6.
Ab. F. Cor. 266.
Dyer, 34. In all which books it is clearly admitted, that an outlawry in an appeal of death may be pardoned by the king so far as the public justice is concerned in it. See also Shower, 283, 284. 2 Jones, 56. Kely. 24, 25. 1 Sider. 366. Moor, 752. Raym. 13. 2 Keb. 363. 415. 574. 3 Keb. 30. 694. 3 Mod. 37. (t) See Bracton, 133. See Rex v. Parsons, Salk. 499.

Sect. 14. I do not (o) find that the common law required any thing particular in the form of pardons of such crimes, which was not equally requisite in the pardon of any felony whatever. But it being enacted by the statute of 2 Edw. 3. c. 2. which is confirmed by several (p) subsequent statutes, "that charters of pardon of manslaughters shall not be granted, but only where the king may do it by his oath, that is to say, where a man slayeth another in his own defence, or by misfortune;" and there being no precedent in the Register (q) of a pardon of any other homicide but such as is done either in self-defence or by misadventure, or by infants or madmen, (r) some have gone so far as to hold, that the king's pardon of any other homicide is not good, unless it be confirmed by parliament, or at least have a (1) *non obstante* of these statutes. But this seems contrary not only to the general tenour of the books, which clearly (s) admit the king's power to pardon any homicide in general, but also to the express purport of 13 Rich. 1. which, by shewing in what form the king shall make a pardon of murder, plainly allows that he has a power to make it. Besides, the same reasons hold as strongly against the king's power to pardon manslaughter as murder, which yet I never knew disputed. However, it seems reasonable that thus much at least be allowed to follow from the arguments above-mentioned, that too great caution cannot well be (t) taken in the grant of pardons of any homicide: that there be some such favourable circumstances in extenuation of it, as may bring it some way within the equity of the cases in the Register, and those old statutes.

Sect. 15. It is recited by the statute of 13 Rich. 2. c. 1. "That the commons had grievously complained of the outrageous mischiefs which had happened to the realm, for that treasons, murders, and rapes had been commonly done, and the king because charters of pardon had been easily granted in such cases, and that hereupon the commons had requested the king that such charters might not be granted; to which the king had answered, "that he would save his liberty and regality, as his progenitors had done:" and thereupon it was enacted, "That no charter of pardon

(1) It is been said by Mr. J. Blackstone that the doctrine of "*non obstante*" fled Westminster Hall at the Revolution, and it is now settled law,

that the king cannot dispense with the enactment of any statute. Vide 1 Wm. & M. sess. 2. c. 2. post, s. 31.

"don shall from henceforth be allowed before any justice for murder, or for the death of a man slain by await, assault, or malice prepensed, treason, or rape of a woman, unless the same murder, death of a man slain by await, assault, or malice prepensed, treason, or rape of a woman, be specified in the same charter. And if the charter of the death of a man be alleged before any justices, in which charter it is not specified that he of whose death any such is arraigned, was murdered or slain by await, assault, or malice prepensed, the same justices shall enquire by a good inquest, of the *risne* where the dead was slain, if he were murdered or slain by await, assault, or malice prepensed; and if they find that he was murdered or slain by await, assault, or malice prepensed, the charter shall be disallowed, and further it shall be done as the law alloweth."

Sect. 16. Also the said statute required, that the name of him who sued for such a charter should be endorsed upon the bill under a great penalty, &c. But to this, and all other matters, except only what is contained in the precedent section, it is repealed by 16 Rich. 2. c. 6.

Sect. 17. It so fully appears from the express words of 13 Rich. 2. that the king's pardon of murder, rape, or treason, cannot be good, without a clause of *non obstante*, unless the crime be specified in the pardon, that I do not (u) know that it hath ever been disputed. But it hath been often formerly (v) adjudged, that a murder might be well pardoned under the general description of a felonious killing, if the charter had the clause of *non obstante* of this statute; which construction seems in a great measure to evade so excellent a law, by barely changing the form of the charter. But it seems difficult to give a good reason why this statute should so easily be evaded, which was made for the prevention of such great mischiefs, and no ways tends to abolish the king's prerogative, but only to put such a restraint upon the abuse of it, which every one must own to be reasonable. But if such opinions were founded on the king's power of dispensing with statutes, they seem to have been of (x) little force since the statute of 1 Will. & Mary, sess. 2. c. 2. by which it is declared and enacted, "That from and after that session, no dispensation by *non obstante* of or to any statute, or any part thereof, shall be allowed, &c."

done; for it appears that the attainder for it was expressly mentioned. (u) 2 Keble, 363. 574. Shower, 283, 284. Skinner, 157. 1 Siderfin, 366. 3 Modern, 37, 38. Kelynge, 24, 25. Moor, 752. 12 Coke, 18. 2 Jones, 56. Rastal, 455. The same point is admitted and complained of, S. P. C. 152. Summary, 250. Vide 3 Inst. 136. 2 H. 7. 6. 6. March, 214. Stykes, Rickabec's case. (s) Shower, 283, 284.

Sect. 18. But it seems plain, that pardons of manslaughter, or any other felony, except murder or rape, remain as they were at common law, for which I shall refer to sections 8, 9, 10, 11, 12, 13. from whence it follows, that the pardon of the (y) felonious killing of J. S. may be well pleaded to an indictment of manslaughter for killing him. But where such a pardon hath been pleaded to an indictment of manslaughter by the coroner's inquest, the court in prudence hath refused (z) to allow it till the

(u) Vide B. Chart. of Par. 10. Crompton, 115. Keilway, 91. C. Jac. 495. March, 213, 214, &c. 1 Hale, 466, 497. Yet in Rastal, 455. there are precedents of pardons of all murders in general, without any *non obstante*; and in Dyer, 124. pl. 39. there is mention of a pardon of all treasons, &c. but I suppose that the particular treason was also expressly par-

(y) 2 Keble, 363. 574. Kelynge, 24, 25. 2 Jones, 56.

(z) 2 Keble, 415.

fact

fact had been found manslaughter only, by a jury directed by a higher court.

(a) Dyer, 50.
235.
6 Coke, 13.
Crompton, 115.

Sect. 19. It hath been (a) adjudged, that where a general act of pardon expressly pardons "all petit treasons," but excepts murder, it cannot be avoided by indicting one for murder only, without the word *proditorie*, &c. who has been guilty of petit treason; for the less offence being included, and consequently drowned in the greater, cannot but be pardoned by a pardon of it; and therefore the exception of murder in such a pardon must be construed of such murder only as is specially so called, and doth not amount to petit treason.

(b) 1 Levinz, 8.
120.
1 Sider. 150.
1 Keb. 66. 548.

Sect. 20. Also it hath been (b) adjudged, that a general act of pardon of "all felonies, &c. except murder," shall extend to a *felo-de-se*; for notwithstanding his offence may in strictness be called murder, and consequently may seem naturally enough to come within the exception, yet since the general words of an act of parliament are to be expounded according to the common use of them, and the offence of *felo-de-se* and murder are generally understood as distinct offences, and such as are distinctly treated by all authors, who when they use the word "murder" as signifying a certain species of offences, always meant by it the murder of another; and farther, since there is greater reason to except the murder of another out of a pardon than that of a man's self, because both the law of God and nature seem generally to require blood for blood, which can be applied only to the murder of another, the word murder shall in such an exception be taken only to signify the murder of another.

(c) Cole's case,
Plowden, 401.
1 Hale, 426.
Crompton, 116.
This is made a
quære, Dyer, 99.
and see the case
of Will. Nichols,
Foster, 64 to 68.
where Cole's
case is said to be

Sect. 21. Also it hath been (c) adjudged, that if a general act of pardon extend to all felonies, offences, injuries, misdemeanors, and other things done before such a day, it pardons a homicide from a wound given before the day, whereof the party died not till after the day, because the stroke which is the cause of the death being pardoned, all the effects of it are consequently pardoned.

case is said to be good law, but not to warrant the rule here contended for.

As to the third particular, *viz.* How far the pardon of one man may discharge another.

(d) Sup. c. 29.
sect. 41.
34 H. 6. 9.
42 Assize, 16.
B. Chart. of
Pardon, 33.
Corone, 122.
or 123.
F. Charter, 15.
(e) Cro. Eliz.
30, 31.
22 F. 4. 7.
Infra, sect. 23.
Dyer, 34.
(f) F. N. B.
115.
7 H. 4. 16.

Sect. 22. It seems to be generally (d) agreed, that notwithstanding all felonies are (e) several, and consequently a pardon of one man cannot be a direct discharge of another, yet in some cases the felony of one man may be so far dependent upon that of another, that the pardon of the one will by a necessary consequence enure to the benefit of the other. As where the principal pleaded his (f) pardon, and was allowed it at the common law, (g) before his attainder, or where he pleads and is allowed it at this day before his (h) conviction, in which case it seems that the accessory may by a necessary consequence take benefit of it, because he cannot be arraigned till after the principal is convicted.

Sup. c. 29. sect. 41. (g) Sup. c. 29. sect. 41, 42. (h) Sup. c. 29. sect. 43.

Sect.

Sect. 23. It is (i) agreed, that if a man be bound to the king as surety for another, for the payment of a certain fine or other debt due to the crown, the pardon of the principal is a discharge of the surety also. But it seems to have been (k) holden as a general rule, that where a man is bound a surety for another for the performance of a future act, the discharge of the principal before the time of the performance will not discharge the surety, because nothing was due to the king at the time of such discharge. But this seems extremely nice: neither do the cases (l) brought for the proof of it seem any way to come up to it. For as to the first of them, viz. that of the king's release of a recognizance for the peace to the principal, before it is forfeited, which shall not discharge the sureties; it may be answered, that it will (m) not so much as discharge the principal. And as to the other case (n) cited for this purpose, viz. that of the king's pardoning J. N. the building of such a house, for his building whereof J. S. is bound to the king, which shall be no discharge to J. S.; it may be answered, that as this case is put, J. N. doth not seem to be bound at all, but only J. S. who therefore doth not seem to come under the notion of a surety but of a principal.

As to the fourth particular, viz. How far it is necessary that the pardon of several persons for felony be several.

Sect. 24. It seems (o) agreed, that the pardon of A. B. and C. of all felonies by them done, without adding, *or any of them*, is void; because it supposes them jointly guilty, and extends to no other but joint felonies, whereas all felony is several (p) in each offender, and cannot be joint. And the Year-book of (q) 22 Edw. 4. goes so far as to hold, that the addition of the words, *or any of them*, will not help a pardon beginning with such joint words. But this is (r) said to be misreported, and contrary to the roll, and seems to be agreed (s) not to be law at this day.

As to the fifth particular, viz. Whether the king's grant of a protection, or of a place of trust to a traitor or felon, carry with it an implied pardon of his crime.

Sect. 25. It is generally (t) agreed, that a protection granted to a felon shall be so far from enuring as a pardon, that it shall not so much as privilege him from answering immediately to an indictment, in the same manner as if he had no protection at all. But there is a short (u) note of a case in Fitzherbert's Abridgment, where one, being indicted and found guilty of felony, produced a charter whereby it appeared that the king had hired him to go into Gascoign to the army, whereupon the court allowed the charter. And Sir Edward Coke (x) supposes that the offence was specially recited in the charter, and that such recital varies this case from that of a protection, which must be a formed writ, and therefore can have no such recital. But however such a charter may enure as a (y) suspension of the proceedings against a felon for a time, I do not see how it can be collected from this case, that it shall enure as a pardon of the felony by implication, which seems contrary to the rule (z) of law in other cases, which will not suffer a pardon of felony to be carried beyond the express purport of it.

However,

(i) 1 H. 7. 10.
F. Pardon, 4.
B. Chart. of
Pardon, 36.
(k) See the
books next
above cited.

(l) See the
books next
above cited.

(m) See bk. 1.
c. 28. sect. 17.
(n) 1 H. 7. 10.

(o) 22 E. 4. 7.
B. Char. of
Par. 51.
Dyer, 34.
S. P. C. 102.
(p) Sup. s. 23.
(q) 22 E. 4. 7.
(r) B. Char. of
Pardon, 51.
Dyer, 34.
S. P. C. 102.
(s) Dyer, 34.
Summary, 252.

(t) S. P. C. 104.
Co. Lit. 130.
7 Ed. 4. 29.
Ab. F. Corone,
30.
3 Inst. 230, 240.
2 R. Abr. 323.
F. Corone, 61.
But F. Corone,
122. seems con-
trary.
(u) F. Cor. 239.
cited.
3 Inst. 239, 240.
S. P. C. 140.
2 Roll. 50.
(x) 3 Inst. 240.
(y) S. P. C. 104.
3 Inst. 239, 240.
2 Roll. 50.
(z) Sup. sec-
tion, 12, &c.

(a) G. Jac. 494.
2 Roll. 50.
1 State Trials,
187, 188. 877.

(b) Sup. sect. 15.

(c) Sup. sect. 8, 9.

(d) Sup. sect. 8, 9.

However, it was solemnly adjudged (a) in Sir Walter Raleigh's case, that the king's grant of a military command to a person attainted of high treason, wherein he called him his true and loyal subject, and gave him judicial power over the lives of others, did not pardon the high treason, because every pardon of high treason requires an express mention of it, if not by the common law, yet at least by the statute of 13 (b) Rich. 2. Besides, if the offence had been but felony, yet after an attainder it could not have been pardoned without an express mention both of the (c) felony and also of the (d) attainder.

As to the sixth particular, viz. What is required to make a good pardon of offences not capital.

(c) 36 H. 6. 24.
37 H. 6. 21, 22.
Ab. F. Chart. 22.
Bro. Charter of
Par. 25.

(f) 1 Lev. 106.

1 Siderfin, 211.

1 Keble, 852.

(g) 1 Mod. 102.

(h) Cro Jac. 306.

2 Bulst. 299.

(i) 1 Mod. 102.

Keilway, 159.

198.

F. Corone, 122.

(k) Watson's

Clergyman's Law, c. 5.

2 Modern, 52.

Sect. 26. It hath been adjudged, that a pardon of "all mis-prisions, trespasses, offences and contempts," will pardon a contempt in making a (e) false return, &c. and a (f) striking in Westminster Hall, and (g) barratry, and even a (h) *præmunire*: and it hath been laid down as a (i) general rule, that it will pardon any crime which is not capital. But it is said (k) to have been holden, that such a pardon will not extend to simony, because it is *malum in se*; but this seems to be no good reason; for barratry, and the injurious striking of another, and generally all offences at common law, are also *malum in se*; and yet it seems clear, that unless they be capital, they may be pardoned by such a pardon.

The same case is in Keble, 780; but this point is not taken notice of. And the contrary seems to be admitted, Cro. Eliz. 585. Moor, 916. and is agreed,

(l) 7 H. 1. 1.

Sect. 27. It hath been questioned, (l) whether a general pardon of all trespasses extends to champerty or confederacy.

As to the seventh particular, viz. Whether any offence can be pardoned before it is committed.

(m) Finch, 234,

235.

19 H. 6. 69.

37 H. 6. 4, 5.

11 H. 7. 11, 12.

B. Chart. de

Pardon, 76.

Davis, 75.

5 Coke, 25.

12 Coke, 29, 30.

(n) But chief

justice Vaughan, in Sorrell's case, f. 332, &c. seems to hold, with the distinction between *malum in se*

et *prohibitum*, as not fully answering all the cases concerning dispensations.

Sect. 28. It seems agreed, (m) that the king can by no previous license, pardon, or dispensation whatsoever, make an offence dispunishable which is (n) *malum in se*, id est, unlawful in itself, as being against the law of nature, or so far against the public good as to be indictable at common law. For a grant of this kind tending to encourage the doing of evil, which it is the chief end of government to prevent, is plainly against reason and the common good, and therefore void.

with the distinction between *malum in se* et *prohibitum*, as not fully answering all the cases concerning dispensations.

(o) 3 H. 7. 15.

Ab. F. Grant,

37.

B. Pat. 51.

Cited S. P. C.

102.

Yet it seems to have been adjudged, (o) that the king's grant to the bishop of Salisbury, and his successors, having the custody of a prison, that they shall be quit from all escapes, &c. having been allowed in eyre, shall be a good discharge from any fine for a negligent escape out of such prison. And yet it is admitted that such a grant is no discharge of a voluntary escape; but it is said, that it shall discharge a negligent one, because it is punishable only by pecuniary penalty; and it is a general rule, that the king may discharge a (p) possibility of an interest before it happens;

(p) Dyer, 58.

19 H. 6. 62,

63, 64.

Ab. B. Pat. 16.

pens; as where the tenants of his manor are to be amerced for a default in respect of their tenures, which the king may pardon beforehand. But if it be a good rule, that the king cannot pardon an offence which is *malum in se* before it happens, and the negligent keeping of a prison be such an offence, which I think cannot be denied; and farther, if it be also a good rule, that where the king's grant is plainly against the common good, as a grant of this kind seems to be, as tending to make a gaoler less diligent in his duty, by taking off the legal punishment of his negligence, I do not well see how this case can be maintained. For it seems by no means to follow, that because the king can discharge his right to an amercement before it happens, for a default of his tenants in a matter relating barely to the revenue of the crown, which it is admitted that in the like case any other lord may do as well, therefore he can discharge a pecuniary penalty for an offence of a public nature before it happens. Neither doth it seem, that a negligent escape is only punishable by a pecuniary penalty; for in some (q) books it is said to be finable, by which it is implied that the offender may be imprisoned. Besides it seems (r) agreed, that many negligent escapes will forfeit the office of keeping a gaol, and therefore it is plain that a pecuniary penalty cannot be said to be their only punishment. However, this is the only case I (s) meet with which looks like an exception out of the general rule, that the king cannot pardon an offence that is *malum in se* before it happens,

(q) Sup. c. 19. s. 31.
(r) Sup. c. 19. sect. 29, 30.
(s) But chief justice Vaughan, in Sorrel's case, 335, 336, seems to argue to the contrary.

Sect. 29. But where (t) a thing which is lawful in its own nature is made unlawful by the prohibition of an act of parliament only, as the carrying (u) bell-metal or (x) beer, &c. out of the realm, importing (y) certain merchandises in foreign ships, &c. selling (z) wines beyond a certain price, (a) exporting wool to another place than Calais, selling (b) wines without a license, multiplying (c) gold or silver, (d) coining money of a base alloy, and (e) other matters of the like nature, it seems to have been formerly taken (f) for granted, that generally the king might dispense with it as to a (g) particular time, or place, or person, or even a (h) corporation aggregate, &c. so far as the public was concerned in it. Yet where such dispensation could not but be attended with a great inconvenience, as the introducing a monopoly, or frustrating the end for which the law was made, as the licensing (i) a particular person to import foreign cards or wines prohibited by parliament, and (k) *à fortiori*, if it tended to suspend the whole statute in general, it was commonly agreed to be void.

(t) Davis, 75, 76. Finch, 234, 235.
(u) Dyer, 52.
(x) Dyer, 92.
(y) Dyer, 54.
(z) Dyer, 270.
(a) 2 Rich. 2. 11, 12.
(b) 11 H. 7. 11, 12.
(c) 37 H. 6. 4.
(d) 1 H. 7. 6.
(e) B. Chart. de Pardon, 24. 76.
(f) Parliament, 98.
(g) 13 H. 7. 8.
(h) F. Chart. 21.
(i) F. Grant, 33.
(j) Vaugh. 330.
(k) 1 Levinz, 217.
(l) Siderfin, 6, 7.
(m) Vaugh. 344.
(n) 11 H. 7. 11.
(o) Vaughan, 344.
(p) 2 Rich. 3. 12.
(q) 2 H. 7. 6.

12 H. 3. by Martyn. Dyer, 224, 225, 303. (r) See the books above cited to the other parts of this section, and 3 State Trials, 799 to 810, and 845. (s) 11 Coke, 38. 7 Coke, 36. 1 Levinz, 218. Co. Lit. 99. Vide 3 Levinz, 389. (h) Vaugh. 652. 1 Levinz, 217. (i) Vaugh. 344. 11 Coke, 88. See the books above cited. (k) 3 State Trials, 793, 796, 808, 809.

Also, wherever an act of parliament gives a particular interest, or right of action, to the party (l) grieved by the breach of it, as the statutes of (m) mortmain, which give an entry to the next immediate lord for an alienation to a corporation, the (n) statutes against

(l) Sup. c. 26. sect. 64.
(m) 37 H. 6. 4.
(n) 2 Rich. 3. 12.
(o) Vaugh. 342, 343.
(p) Infra, sect. 34.
(q) 11 Coke, 98.

99. Vide Keilway, 134. But now by 7 and 8 Will. 3. 37. such license may be granted by the king alone. (p) Vaughan, 342, 343.

^(o) Dyer, 162. 297. against maintenance, forcible entries, carrying distresses out of the hundred, (o) suffering one in execution to escape, &c. which give an action to the party grieved by the offence prohibited; it seems to have been always agreed, that no charter by the king can be of any force to bar the right of the party grounded upon such statute, because it is a settled rule, that the king cannot prejudice the interest of the party.

Also, where a statute is express, that the king's charter against the purport of it, whether with or without a clause of *non obstante*, shall be void; it is said by Sir (p) Edward Coke, "and (p) 12 Coke, 18, 19. "no clause of *non obstante* can dispense with it, unless it "tend to restrain some prerogative solely and inseparably incident to the person of the king;" as the right of pardoning, or of commanding the service of the subject for the public weal; (q) 7 Coke, Calvin's case, 14. which being (q), as he seems to argue, founded on the law of nature, are so far inseparable from the king, that by a clause of *non obstante* he may dispense with any statute whatsoever which tends to deprive him of them. And on this ground the resolution of the judges in the (r) Year Book of Henry the Seventh, is said to be maintainable, whereby it was adjudged, without any difficulty, that where the statute of 23 Hen. 6. c. 8. expressly enacts, that patents to sheriffs to continue longer than a year shall be void, and the party disabled to bear the office of sheriff notwithstanding any clause of *non obstante*, yet the king by the clause of *non obstante* might make a good patent of such office for life. Which is in effect to say, that let there be never so good reasons for the making a new law for the restraint of the prerogative in any particular relating to the service of the subject, yet it is not in the power of the legislature to make such a law; and yet no one will deny that wherever the law of nature leaves a matter indifferent, there the law of man ought to prevail. Neither is there any pretence to say, that the king has a right by the law of nature to appoint sheriffs, since it is plain that before the (s) statute of 9 Edw. 2. the freeholders chose them, unless they had a fee in their office. And what reason can there be, that the statute-law, which gives the crown the power of making sheriffs, may not also qualify that power as shall be thought convenient? But it is observable, that the resolution above-mentioned does not go upon any particular reason which may distinguish the case of a sheriff from any other case, but only on the king's power by *non obstante* to dispense with the statutes concerning the transporting wool, the pardoning of murder, and the expressing the quantities of the land granted by the king's patents, and such like; which because they may be dispensed with by clauses of *non obstante*, it is taken for granted, that the statute of 23 Hen. 6. might as well be dispensed with by them; as if it were a plain consequence, that because statutes which say nothing concerning the clause of *non obstante* may be dispensed with by it, therefore the statute which expressly provides against it may also as well be dispensed with by it.

(t) Co. Lit. 99. Sect. 50. It is (t) said, that the king may dispense with the statutes of mortmain, without any clause of *non obstante*; and (r) Co. Lit. 99. Plowden, 502. Dyer, 369. where the grant is made *ex certa scientia*. Con. by Dyer in Plowden, 502. Vide Rastal, 309. F. Grant, 36. Ent. Conge, 28. Plowden, 334. this

this seems very reasonable, because thereby he only gives up that right of entry which those statutes give him for the forfeiture, which every mesne lord might also do as well so far as he had a right by those statutes. Also it seems to be holden (u) by some books, that the clause of *non obstante* was only requisite in respect of such statutes which expressly said it should be void. But the far greater number of (x) authorities seem to be to the contrary.

(u) Finch, 234, 235.
 Plowden, 502.
 (x) 2 H. 7. 6.
 Ab. B. Pat. 109.
 F. Chart. 33.
 2 Rich. 3. 12.
 43 Assize, 19.
 Dyer, 52. 54. 29.
 270. 303. 332.

Sect. 31. But the dispensing power was carried so very high in a late reign, and found to be of such dangerous consequence, as to make the execution of the most necessary laws in effect precarious, and merely dependant on the pleasure of the prince. And it seeming highly incongruous that the king should have a kind of absolute and unlimited power in dispensing with laws wherein the church and state have the highest interest, when at the same time he has no power at all to dispense with any law which vests the least right or interest in a private subject, it was found by experience necessary to declare and enact by 1 Will. & Mary, sess. 2. c. 2. "That no dispensation by *non obstante* of or "to any statute, or any part thereof, be allowed, but that the same "shall be held void and of none effect, except a dispensation be "allowed in such statute. But it is provided, that no charter, "grant, or pardon, granted before the 23d of October, 1689, "shall be any way impeached or invalidated by that act, but "that the same shall be and remain of the same force and effect "in law, and no other, as if the said act had never been made."

See Hargrave,
 Co. Lit. 120,
notis.

Sect. 22. It hath been always agreed, (y) that the king never could dispense with a statute before it was made.

(y) Finch, 235.
 1 Siderfin, 6.
 Dyer, 52.

As to the eighth particular, *viz.* Whether there be any offence which cannot be pardoned after it is committed.

Sect. 33. I take it to be a settled rule, (z) that the king may pardon any offence whatever, whether against the common or statute law, so far as the public is concerned in it, after it is over, and consequently (a) may prevent any popular action on a penal statute by a pardon of the offence before any suit commenced by an informer. But while a public nuisance continues unreformed, it seems (b) agreed, that the king cannot wholly pardon it, because such pardon would take away the only means of compelling a redress of it. But it hath been (c) holden by some, that a pardon of such offence will save the party from any fine for the time precedent to the pardon.

(z) See the books cited to the other parts of this and the next section.
 (a) Sup. c. 26. s. 64.
 Infra, sect. 34.
 (b) 3 Inst. 237.
 Vaughan, 333.
 37 H. 6. 4.
 Plowden, 487.
 Vide F. Assize, 445.
 Keilway, 134.
 (c) 12 Coke, 30.

22 Coke, 29, 30. 1 State Trials, 578.

As to the ninth particular, *viz.* How far a pardon may be of force against the private interest of the subject.

Sect. 34. I take it to be a (d) settled rule, that the king cannot by any dispensation, release, pardon or grant whatsoever, bar any right, whether of entry, or action, or any legal interest, benefit, or advantage whatsoever before vested in the subject; and upon this ground it seems clear, that the king can no way bar any action

(d) Sup. s. 29.
 8 H. 6. 19.
 Ab. F. Grant. 4.
 37 H. 6. 4.
 Ab. B. Char.
 de Pardon, 24.
 2 Rich. 3. 12.
 Plowden, 487.

F. Assize, 445. C. Car. 199. 2 R. Ab. 178. 304. C. Jac. 259.

- (e) Sup. c. 26. s. 64. 2 Rich. 3. 12. Kellway, 134. F. Char. 21. (f) Sup. c. 26. s. 64. 37 H. 6. 4. Ab. F. Grant, 21. B. Chart. de Pardon, 24. 2 Rich. 3. 12. 5 Edw. 4. 3. (g) 37 H. 6. 4. F. Chart. 21. Pardon, 4, 5. Bro. Char. de Par. 24. Recognis. 22. 11 H. 7. 12. 12 Coke, 29, 30.

Sect. 35. And upon the same ground it seems to be clearly agreed, that as the release of a person robbed, or of the wife or heir of a person killed, will not (h) bar an indictment or a demand of execution at the suit of the king; so neither will a pardon (i) by the king be any bar to an appeal, except only where it is carried on at the suit of the king, after a nonsuit of the party, in which case it may be barred by a (k) pardon, in the same manner as an indictment. But if one who appears to be attainted of felony, whether by outlawry or otherwise, on an appeal carried on at the suit of the party, get a pardon from the king, he (l) must sue a (m) *scire facias* against the appellant before the pardon shall be allowed, unless the appellant appear (n) *gratis*, and confess that he will sue no farther, &c.

- (h) 8 H. 4. 22. Ab. F. c. 26. B. Char. de Pardon, 13. Appeal, 27. 35. 41. 128. 11 H. 4. 16. (i) See the authorities cited to the other parts of this section, and B. Appeal, 150. 3 Inst. 237. (k) Sup. c. 25. s. 13. B. Appeal, 33. (l) Dyer, 34. S. P. C. 104. Summary, 251. 11 H. 4. 11. 11 H. 4. 48. 9 H. 7. 5. 2 Rich. 3. 8. 9 H. 4. 1. 13 H. 4. 6. 38 H. 6. 13. and the authorities cited to the other parts of this section. (m) That the appellee may have such a *scire facias* of course on such a pardon, without producing a release or other deed from the appellant, 9 H. 7. 5. Ab. F. *Scire facias*, 56. B. *Scire facias*, 166. 2 Rich. 3. 8. S. P. C. 104. Con. 11 H. 4. 16. Ab. B. *Scire facias*, 73. that there was no need of any *scire facias* where an appeal was abated by the king's death, and the year and day were passed, 2 H. 7. 10. B. Chart. of Pardon, 69. (n) 11 H. 4. 16. F. Corone, 87. Same case, B. Confession, 12. and Jour. in Court, 21. But it is made a wonder that a *scire facias* was not awarded. (o) S. P. C. 104. Summary, 251. 11 H. 4. 1. (p) S. P. C. 104. Summary, 251. (q) Finch, 477. Vide Dyer, 168. 172. (r) 2 Rich. 3. 8. 9 H. 4. 1. Ab. F. Sc. Fa. 103. B. Ch. de Par. 14. (s) 11 H. 4. 11. 11 H. 4. 48. 19 H. 4. 6. Ab. F. Cor. 266. F. Corone, 85. Sup. c. 23. s. 38. and 41. (t) 9 H. 7. 5. Ab. Sc. Fa. 56. B. Sc. Fa. 166. F. Appeal, 88. 144. 38 H. 6. 13. B. Appeal, 141. C. de Par. 28. Sup. c. 23. s. 38. 41.

- (u) Dyer, 34. **Sect. 37.** There is said (u) to be no need of any *scire facias* on such a pardon against the lords mediate or immediate, because the pardon no way tends to reverse the attainder, and consequently can do no hurt to their title of escheat, &c. grounded on the attainder, but rather affirms it.

- Sect. 38.** If several persons be outlawed in an appeal, and one of them be pardoned, and get his pardon allowed on the non-appearance of the appellant on a *scire facias*, &c. and afterwards another of them get his pardon; it seems, that he shall take no (x) advantage of the appellant's default on the first *scire facias*, but must sue out his *scire facias*, &c. in the same manner as if there had been no such default.
- (a) 1 H. 4. 1. F. Sc. Fa. 63. But B. C. de Par. 14. in the Ab. of the same case holds the contrary.

Sect. 39. It is holden by great (y) authorities, that if a person be convicted of manslaughter upon an appeal of death, the king may pardon the burning in the hand; for which this reason is given by Sir Edward Coke, that it is no part of the judgment at the suit of the party, but a collateral and exemplary (z) punishment inflicted by the statute of 4 Hen. 7. c. 13. But this is made a *quære* by (a) others, and the principal case wherein it is said to have been resolved, is very differently (b) reported, and was never adjudged (c): and the ground laid down, that the king may pardon it because it is no part of the judgment at the suit of the party, by which it seems admitted, that if it were part of the judgment, the law would be otherwise, seems rather to make against it than for it; for there are (d) precedents of express judgments, *quod cauterisetur in manu sua lava*. Also it is (e) admitted, that where a defendant is to have a certain imprisonment, &c. at the suit of the party upon a statute, the king cannot dispense with it except in some special (f) cases, wherein it may be reasonably intended that such imprisonment was given by the statute by way of satisfaction to the public justice only; in which case it seems agreed, (g) that the king may dispense with it, as it is said that he may with finding of sureties by one convict on the statute against trespasses in parks.

Yet it is omitted 55. (e) 5 Coke, 50. Dyer, 261. 323. (f) 3 Inst. 171. 257. (g) Dyer, 238. 3 Inst. 171. 2 Inst. 200.

But it seems doubtful, whether the statute of 4 Hen. 7. c. 13. which appoints the burning of the hand, can well admit of such a construction; for the words are, "whereas upon trust of the privilege of the church, divers have been more bold to commit murder, &c. because they have been admitted to their clergy as oft as they have offended; for avoiding of such presumptuous boldness," it is enacted, "That every person not being in orders, who hath once been admitted to his clergy, be not again admitted thereto, and that every such person convict, &c. shall be marked, &c." from whence it seems plain, that the statute expressly intends such marking as a discouragement of the offence; and it seems difficult to give a reason why it should be construed to mean it only as a collateral and not as a direct punishment.

Neither doth it seem a plain reason, that because the statute intended it an exemplary punishment, the king may dispense with it: for surely the execution of an appellee attainted of murder, and the perpetual imprisonment of a clerk delivered to the ordinary upon a conviction on an appeal, who could not make his purgation, were also exemplary punishments; and yet it is generally (h) agreed, that the king never could dispense with them. And therefore upon the whole this seems to be a point that deserves to be farther considered.

Sect. 40. But granting that the king may pardon the burning in the hand in an appeal, it seems a very reasonable (i) consequence, that the party shall immediately be delivered by force of the statute of 18 Eliz. c. 7. which says, that after burning he shall

(y) Sum. 252.
3 Inst. 237.
Hobart, 294.
cited 4 State Trials, 382.
(z) But my Id. Hobart, f. 294. says, that it is no part of the judgment, nor so much as in the nature of the punishment, but only a mark to notify that the party may have his clergy but once.
(a) Raym. 369, 370.
Dyer, 202. 261.
C. Eliz. 464.
(b) Bigging's case, 5 Coke, 50.
C. Eliz. 632. 682.
Moor, 571.
(c) Raym. 371.
(d) Rastal, 1.56.
(e) 2 Inst. 200. 439.

(h) Sup. s. 35.
5 Coke, 50.
Dyer, 261..
Yet it is made a *quære*, Dyer, 200. whether the king could not pardon such imprisonment.

(i) 5 Coke, 50.
Vide c. 33.
s. 131.
C. Car. 596.
597.
Hobart, 294.

be delivered; which ought to have this construction, that he shall be delivered after burning, where he is to be burned.

(k) 5 Co. 51.
C. Eliz. 684.
C. Car. 113,
114.

Sect. 41. It seems to have been always agreed, (k) that the king's pardon will discharge any suit in the spiritual court *ex officio*.

(l) 5 Co. 51.
Winch, 125.
C. Jac. 335.
Hobart, 81.
Con. C. Eliz.
684.

Also it seems to be (l) settled at this day, that it will discharge any suit in such court *ad instantiam partis pro reformatione morum*, or *salute animæ*, as for defamation, or laying violent hands on a clerk, and such like; for such suits, like those in the star-chamber, are in truth the suits of the king, though prosecuted by the party.

(m) C. Jac. 335.
C. Car. 9.
Vide C. Car.
667, 668.
(n) 2 R. Abr.
304, 299.
5 Coke, 51.
Latch. 190.
Noy, 85, 91.
C. Car. 46, 47.
Vide C. Car. 9.

Also it seems to be (m) agreed, that if the time to which such pardon hath relation, be prior to the award of costs to the party, it shall discharge them: and it seems to be the general (n) tenor of the books, that though it be subsequent to the award of the costs, yet if it be prior to the taxation of them it shall discharge them; because nothing appears in certain to be due for costs before they are taxed.

wherein it is holden, that an award of costs, though they have not been taxed, shall not be avoided by a pardon; but the other books seem contrary.

(o) 1 Jones, 227.
2 Roll. 178.
Con. adjudged,
C. Jac. 159.
And it is made
a *quære*, C. Jac.
212. whether an
excommunication
can be dis-
charged by the
king's pardon.

Also, (o) if a person be imprisoned on a writ of *excommunicato capiendo* for his contumacy in not paying costs, and afterwards the king pardon all contempts, it seems, that he shall be discharged of such imprisonment without any *scire facias* against the party, because it is grounded on the contempt, which is wholly pardoned; and the party must begin anew to compel a payment of the costs.

8 Coke, 68, 69.

(p) 5 Coke, 51.

Sect. 42. But it seems agreed, (p) that a pardon shall not discharge a suit in the spiritual court, any more than in a temporal, for a matter of interest or property in the plaintiff, as for tithes, legacies, matrimonial contracts, and such like.

(q) Latch. 190.
5 Coke, 51.
C. Car. 46, 47.
and the autho-
rities cited to
the precedent
section.

Also it is (q) agreed, that after costs are taxed in a suit in such court at the prosecution of the party, whether for a matter of private interest, or *pro reformatione morum*, or *pro salute animæ*, as for defamation, &c. they shall not be discharged by a subsequent pardon.

(r) C. Car. 46,
47.
Winch, 125.

Sect. 43. If the offence be pardoned after costs are taxed, and then the defendant appeal to a superior court, which gives new costs, whether upon the affirmance or reversal of the first sentence, they shall (r) not be avoided by reason of the pardon, because they are not given in respect of the offence, but of the award of the former costs, which being taxed before the pardon, are not avoided by it, and therefore the appeal ~~was~~ proper for determining whether they were well given or not. But if the offence for which the suit was in the spiritual court be pardoned, hanging an appeal, and such pardon relate to a time precedent to the award of the costs, and after such pardon the appellant desert his appeal, and the spiritual court award costs against him in respect of such desertion,

desertion, it seems, (s) that he may have a prohibition, because the pardon having discharged the costs of the first suit as well as the offence, made the appeal to be to no purpose. It is (t) said, that costs taxed to the party grieved for a contempt in a court of equity are not discharged by a general pardon of all contempts, because it is the common course of a court of equity to award such costs at the pleasure of the judge. But it hath been questioned, whether costs taxed by the prothonotary upon an attachment to the party grieved be not discharged by a general pardon of all contempts.

Sect. 44. It was insisted (u) by the house of commons in the Earl of Danby's case, and it is enacted by 12 and 13 Will. 3. c. 2. "That no pardon under the great seal be pleaded to an impeachment by the commons in parliament."—† But after the impeachment is solemnly heard and determined, it is not understood that the king's royal grace is farther restrained or abridged (v); for after the impeachment and attainder of the six rebel lords in 1715, three of them were from time to time reprieved by the crown, and at length received the benefit of the king's pardon.

As to the tenth particular, *viz.* Whether a pardon may be conditional.

Sect. 45. It seems agreed, (y) that the king may extend his mercy on what terms he pleases, and consequently may annex to his pardon any condition that he thinks fit, whether precedent or subsequent, on the performance whereof the validity of the pardon will depend.

As to the eleventh particular, *viz.* Where a pardon is void in respect of a wrong recital.

Sect. 46. It being a general rule, (z) that wherever the king appears to have been deceived, his grant is void, I take it to be agreed, that if it appear from the recital of a pardon, that the king was misinformed either as to the (a) nature of the case, or the proceedings thereupon, the pardon is void; as where the (b) king pardons a man for felony whereof he stands indicted, or indicted and attainted, and in truth he never was indicted, &c.

Sect. 47. How a pardon of felony shall be avoided by statute in respect of a wrong suggestion, hath been already shewn, section the tenth.

As to the SECOND GENERAL POINT, *viz.* What is the effect of a pardon.

Sect. 48. I take it to be settled at this day, that the pardon of a treason or felony, even after a conviction or attainder, does so far clear the party from the infamy and all other (c) consequences of his crime, that he may not only have an action (d) for a scandal in calling him traitor or felon after the time of the pardon, but may also be a good witness notwithstanding the (e) attainder or conviction; (f) Hobart, 67.

81, 82. Moor, 863. 872. 1 R. Abr. 87. Owen, 150. 1 Brownlow, 10. Raymond, 23. Con. Cro. Jac. 622. (g) 2 State Trials, 269. 3 State Trials, 552, 553. 585. 596. 610. 4 State Trials, 119. 5 Modern, 15, 16. Raynold, 369, 370. 2 Hale, 278. But the contrary is held, Balstrode, 154. and 2 State Trials, 520 to 524. Raymond, 379, 380.

(f) Skinner, 578, 579. conviction; because the pardon makes (f) him as it were a new man, and gives him a new capacity and credit.
4 State Tr. 119. Reilly's case, Cases C. L. 360.

(g) 4 St. Tr. 379 to 386. Sect. 49. And it hath been (g) admitted, that the king's pardon of the burning of the hand on a conviction of manslaughter had the same effect as to this purpose, as the burning would have had, which is (h) agreed to restore the party to his credit.

(h) Sup. c. 33. sect. 129. (i) By the lords in the earl of Warwick's trial, 5 State Trials, 167 to 173. Sect. 50. But it hath been adjudged, (i) that a pardon is of no manner of force, as to this purpose, till it have passed the great seal.

(j) Hobart, 67. 82. Sect. 51. Also it is said, (j) that the pardon of a felony will not make an arrest for it, by one who did not know of the pardon, unlawful, because such arrests being for the public good are to be favoured; and therefore shall not be actionable by reason of such a pardon, as scandalous words shall be, because they deserve no favour.

† And it is enacted by 4 Geo. 1. c. 11. s. 2. "That where
" any offender shall be transported, and shall have served his
" term according to the order of the court, such service shall have
" the effect of a pardon to all intents and purposes, as for the
" crime for which he was so transported, and shall have so served."

(k) 3 St. Tr. 520 to 524. 1 Keble, 780. 5 Mod. 15, 16. Raymond, 369, 370, 379, 380. Kelynge, 37, 38. 1 Siderfin, 52. 221, 222. 3 Levinz, 426. A pardon of perjury at common law restores the party to his credit and competency, Gilb. L. E. 142. Reilly's case, Cases in C. L. 360; but by 5 Eliz. c. 9. the king is by express words restrained from pardoning a perjury on the statute. Gilb. L. E. 142.

(l) C. Eliz. 41. Latch, 22. Sect. 53. If a man be convicted, or deprived, or otherwise punished for an offence during a session of parliament, and at the same session an act passeth which pardons the offence, it seems agreed, (l) that the conviction or deprivation, &c. are *ipso facto* avoided; because the act taking effect from the first day of the session, (1) it now appears that the offence was pardoned at the time of the conviction, &c.

(m) 6 Coke, 14. C. Car. 67, 68. 114, 115. Vide Latch. 22. 141. 8 H. 5. 2. 36 H. 6. 1, 2. F. Fines, 21. Pardon, 6. (n) 6 Coke, 13. 14. Also it hath been adjudged, that where an act of parliament expressly pardons such and such crimes from a certain day before the session, it thereby avoids all (m) convictions, and (n) deprivations, and (o) awards of costs and amerciaments (p), &c. for such crimes, whether such convictions, &c. were before or after the session, because it appears to be the intent of the parliament that such crimes shall no way be punished, which cannot take effect if such convictions, &c. continue in force.

But this case has often been denied to be law, 1 Keble, 780. 1 Siderfin, 161, 222. (o) Latch. 190. Noy, 91. Cro. Car. 47. (p) 36 H. 6. 24, 25. 37 H. 6. 21. F. Chart. 22. 5 Coke, 49. Co. Litt. 126. C. Jac. 64. Moor, 394. Cro. Eliz. 768, 778. Whether an excommunication be pardoned by a general pardon of all contempts, &c. sup. sect. 41.

(1) But all acts of parliament are now dated on the day on which they receive the royal assent and are generally made to take effect from and after the passing, viz. from that day.

Sect. 54. But it seems to be a settled (*q*) rule, that no pardon by the king, without express words of restitution, shall divest, either from the king or (*r*) subject, an interest either in lands or goods vested in them by an attainder or conviction preceding. Yet it seems (*s*) agreed, that a pardon prior to a conviction shall prevent any forfeiture either of lands or goods.

1 Saunders, 362, 363. 1 Siderfin, 167, 168. 264. Thelol. l. 1. c. 85. sect. 3. (*r*) Dyer, 34. Finch, 467. Thelol. l. 1. c. 15. sect. 3. (*s*) 5 Coke, 110. Owen, 87. 4 State Trials, 119. 2 Mod. 53.

Sect. 55. It hath been adjudged, (*t*) that a clause of release of "all judgments and executions" in a general pardon extends as well to debts due to the king by assignment or forfeiture, as to those originally due to him, and that it doth not restore them to the person who assigned or forfeited them, but extinguishes them in the hands of the debtor.

Sect. 56. It seems agreed, that notwithstanding the king's pardon to a simonist coming into his church contrary to the purport of 31 Eliz. c. 6. or to an officer coming into his office by a corrupt bargain, contrary to the purport of 5 and 6 Edw. 6. c. 16. may save (*v*) such clerk or officer from any criminal prosecution in respect of the corrupt bargain; yet it shall not (*u*) enable the clerk to hold the church, nor the (*w*) officer to retain the office, because they are absolutely disabled by statute.

Sect. 57. Also it seems (*x*) agreed, that the king's pardon cannot salve the corruption of blood (*l*) by attainder of treason or felony.

1 Hale, 358. 2 Comm. 254. 4 Comm. 395.

As to the THIRD GENERAL POINT, *viz.* Whether a pardon may be waived.

Sect. 58. I take it to be (*y*) agreed, that a general pardon by parliament cannot be waived, because no one by his admittance can give a court a power to proceed against him, when it appears there is no law to punish him.

11 H. 4. 41. B. Cor. 30. 200. Indict. 2. F. Cor. 89. Crompton, 116. Foster, 43. 4 Comm. 394.

Sect. 59. But it is (*z*) certain, that a man may waive the benefit of a pardon under the great seal; as where one who has such a pardon doth not plead it, but takes the general issue, after which he shall not resort to the pardon.

Foster, 40. Wilson, 150, and vide the case of *Rex v. Haines*, Wilson, 214. where the benefit of an act of grace was allowed after the general issue pleaded.

And now I am to shew in what manner a pardon is to be taken advantage of; which I shall consider,

1. In relation to a general pardon by parliament.
2. In relation to a particular pardon under the great seal.

And

(1) But corruption of blood, except in cases of treason and murder, is abolished by st. 54 Geo. 3. c. 145. see *postea*, tit. "forfeiture."

And FIRST, As to the pleading of a general pardon by parliament.

(a) Sum 232.
8 E. 4. 7.
C. Car. 32.
Cromp. 115.
C. Eliz. 768.
778.

Sect. 60. It seems (a) agreed, that if any persons are excepted out of it, the court is not bound, and some (b) have holden that it hath no power in discretion, to give any person the benefit of it unless it be pleaded.

6 Coke, 79. Moor, 770. Raym. 23. 2 Inst. 254. 2 Roll. 307. C. Eliz. 4. Moor, 619. (b) Leon. 300. C. Eliz. 125. Con. Lanc, 71. Moor, 394. Vide 5 Coke, 49. C. Car. 32. Yelverton, 126.

(c) 8 E. 4. 7.
S. P. C. 103.
F. Pardon, 3.
B. Plead, 124.
Con. 2 Leon. 26.
(d) 8 E. 4. 7.
S. P. C. 103.
F. Pardon, 3.
Plowden, 103.
418.
B. Charter, 66.
4 H. 7. 8.
Dyer, 27.
2 State Tr. 5.
(e) 8 E. 4. 7.
S. P. C. 103.
F. Pardon, 3.

Also it seems generally agreed, that if the body of such a pardon either excepts divers particular persons by name, or excepts all those who come under a general description, as "all those who adhered to J. S. &c." no one can demand the benefit of it, without expressly shewing, in the (c) first case, that he is not one of the persons excepted, and in the latter (d) case, that he is not included in such description. And if he happen to be of the same name with one of the persons excepted by name, it is said, that it will not (e) be sufficient for him to aver that he was none of the persons excepted, without adding that he is a different person from such other of the same name. Which how it can be tried, unless it appear by some additions to the name in the statute, may deserve to be considered.

(f) Vide 1 Lev. 26.
4 H. 7. 8.
Raym. 23.
(g) 1 Lev. 26.
88.
Raym. 65.
C. Car. 515.
Vide the earl of Salisbury's case, Shower, 100.
more fully reported, Carth. 131, &c. But see Ratcliffe's case, Foster, 43. 45.

But if the body of a statute be general as to all persons whatsoever, and afterwards some are excepted in the provisoes, (f) perhaps it may be sufficient to plead such a pardon, without any averment that he who pleads it is none of the persons so excepted; it being a (g) general rule, that where a man is within the general words of the body of a record or deed which is qualified by subsequent provisoes, it is sufficient for him to bring his case within such general words, and that the exceptions in such provisoes ought to be shewn of the other side.

(h) Sum. 252.
Plowden, 83.
26 H. 8. 7.
B. Notice, 1.
Dyer, 28.
5 Coke, 49.
3 Inst. 244.
11 H. 4. 41.
B. Corone, 30.
Indictment, 2.

Sect. 61. But it seems agreed, (h) that the court is so far bound to take notice *ex officio* of a general pardon by parliament, which extends to all persons in general without exception, that it cannot proceed against any person whatsoever as to any of the offences pardoned, though he be so far from pleading it, or praying the benefit of it, that he does all he can to (i) waive it.

(j) Noy, 100.
C. Car. 449.
Moor, 620.
2 Leonard, 26.
Carthew, 132.
Crompton, 116.
8 Coke, 68.
3 Inst. 234.

2 Roll. 307. (i) Sup. sect. 58.

Sect. 62. Also, where a general act of pardon excepts certain kinds of crimes, there is (j) no need to aver that the crime whereof a person is indicted is not one of such excepted crimes; but the court ought judicially to take notice whether it be excepted or not.

(k) C. Eliz. 125.
2 Leonar. 26.
But see Foster, 44, 45.

Sect. 63. Also, where such a statute excepts only one particular person, it hath been (k) said, that there is no need of an averment that a person indicted is not such person; but that the court is to take notice whether he be or not.

SECONDLY, As to the taking advantage of a particular pardon under

under the (1) great seal, I shall observe only the following particulars.

Sect. 64. FIRST, That it will be (l) error to allow a man the (l) C. Eliz. 153. benefit of such a pardon unless it be pleaded.

Sect. 65. SECONDLY, That he who pleads such a pardon ought (m) to produce it *sub pede sigilli*, though it be a plea in bar, because it is presumed to be in his custody, and the (n) property of it belongs to him. (m) Sum. 252. S. P. C. 103. 11 H. 4. 41. (n) See the books above cited, and Cro.

Jac. 70. 317. Cro. Car. 441, 442. 1 Jones, 377. 1 Siderfin, 311. C. Eliz. 217. 517. 716.

Yet if a man plead such pardon without producing it, it seems (o) that the court may in discretion indulge him a farther day to put in a better plea; and at such day he may perfect his plea by producing the charter. (o) 11 H. 4. 41. S. P. C. 103.

Also it seems (p) agreed, that there is no need in a plea of *autrefois acquit*, &c. to produce the record immediately; because it is pleaded in bar, and he who pleads it hath neither the custody nor property of it. (p) Vide sup. c. 35. sect. 2.

Sect. 66. THIRDLY, That if there be a variance (q) between the record on which a man is convicted or attainted, and his charter of pardon, yet if there be no repugnancy to intend that the same person or thing are meant in both, it may be supplied by proper averments: and therefore if one be indicted by the name of "J. S. (r) yeoman," and pardoned by the name of "J. S. gentleman," or indicted by the name of "B. the tasker," and pardoned by the name of "B. the son of W." he may make good the variance by averring that he is the same person intended in such indictment and pardon: or if in an indictment (s) of the death of J. S. the stroke being supposed to have been given "on the first of August," and in the pardon "on the third," the party may aver that the death of one and the same J. S. are intended in both. And if such a variant pardon be pleaded without any such averment, it seems that the court may in discretion give the party a farther day either to (t) perfect his plea, or to (u) purchase a better pardon: and there are some (v) instances in old books, where upon such variance the court took an inquest of office, whether the same person were meant in both records. (q) Sum. 253. Sup. c. 35. s. 3, 4, 5. 3 Inst. 240. S. P. C. 101. Crompton, 116. (r) Keilway, 58. Dyer, 34. 1 Roll. 368. F. Corone, 291. But 18 E. 3. 33. Ab. F. Brief, seems contrary, 364. (s) 11 H. 4. 41. Ab. F. Mon. de Faits, 128. B. Variance, 38. B. Corone, 29. B. Charter de Pardon, 15. But note, that none of these books make mention of any averment, but

seem to imply that the pardon was allowed without it, notwithstanding the variance. (t) 11 H. 4. 41. F. Mon. de Faits, 128. (u) 3 Inst. 240. 1 Siderfin, 41. 26 Assize, 46. Raymond, 13. F. Office de Court, 34. B. Charter de Pardon, 32. B. Office de Court, 25. (v) F. Cor. 291. 3 Assize, 15. Ab. F. Corone, 166. B. Cor. 190. B. Variance, 63. But Brook, in abridging this case under the title of Charter of Pardon, 29. makes this remark, *quod mirum mihi*.

Sect. 67. FOURTHLY, That no such pardon can be pleaded together with, or after the general issue, unless it be of a date subsequent to the time of the pleading such issue, because otherwise it is waived by it. Vide sect. 59. where this point is treated of; and Ratcliffe's case, Foster, C. L. 40.

Sect. 68. FIFTHLY, (y) That the party shall not be obliged to lay (y) 37 H. 6. 4. F. Charter, 21.

(1) That no such pardon is good unless under the great seal, and consequently that articles of surrender cannot be pleaded as amounting to a pardon, 1 State Trials, 376, &c. Neither can the sign manual importing a pardon be pleaded, Rex v. Beaton, 1 Black, 479. Vide *infra*, sect. 71; the case of the King v. Murphy, in July session 1773; and Foster, 62.

lay the stress of his case on any particular words or clause in such pardon, but may take advantage of the whole.

(z) 36 H. 6. 24,
25.
F. Charter, 22.
B. Charter, 25.

Sect. 69. SIXTHLY, That after an (z) amerciament in the king's bench hath been estreated into the exchequer, and the party, being taken upon process from thence, hath insisted upon a pardon, and been denied any benefit from it, yet he may be brought by a *habeas corpus cum causa* to the king's bench, because the record remains there, and the transcript is only sent into the exchequer, and may plead the same pardon in the king's bench, and if it be adjudged sufficient, may have a *supersedeas* to the barons, &c.

(a) S. P. C. 103.
Crompton, 115.
3 H. 7. 5.
Plowden, 502.
1 Keble, 9.
1 Siderfin, 41.
Raymond, 13.
3 Inst 234, 235.
Cartlew, 121.
But there never
was any neces-
sity for such writ upon a pardon of treason. C. Eliz. 814. Noy, 31. (b) That a breach of the recognizance avoided the pardon, 3 H. 7. pl. 7. S. P. C. 103. Crompton, 115. See *Rex v. Chetwynd*, Strangle, 1203. 9 State Trials, 542.

Sect. 70. SEVENTHLY, That while the statute of 10 Edw. 3. c. 2. stood in force (which required all persons pardoned for felony to find sureties for their good behaviour before the sheriff and coroners within three months, &c.) no pardon of (a) felony could be allowed, without a writ out of chancery, commonly called a writ of allowance, testifying that the party had found (b) sureties, &c. according to that statute, unless it were dispensed with by a special clause of *non obstante*, &c.

But the necessity hereof is taken away by 5 and 6 Will. & Mary, c. 13. which hath repealed the said statute of 10 Edw. 3. but hath provided, "That the justices before whom any pardon for felony should be pleaded, may at their discretion remand, or commit the person who pleads it to prison, till he or they shall enter into a recognizance with two sufficient sureties for their good behaviour for any time, not exceeding seven years. Provided that if such person be an infant or *feme covert*, he or she may find two sufficient sureties, who shall enter into a recognizance for his or her being of the good behaviour, as is aforesaid."

(c) Fitzherbert's
Abridgment, tit.
Corone, 294.
4 E. 4. 10.
2 Jones, 56. 1 Siderfin, 452. Kelynge, 25. Pulton de Pace et Regis, 88.

Sect. 71. EIGHTHLY, That the judges may insist on the usual fee of gloves (c) to themselves and officers, before they allow a pardon.

1 Black. Rep.
479.
2 Black. Rep.
797.

Sect. 72. NINTHLY, That the mode of taking advantage of a pardon upon the circuits and at the Old Bailey is to procure the king's sign manual or privy seal signifying his majesty's intention to afford a pardon to the prisoner, either absolutely or conditionally as the case may be, and directing the justices of the gaol-delivery to bail him, on his entering into a recognizance to appear and plead the next general pardon that shall come out. This mandate the justices obey; taking security, if the pardon is conditional, for the performance of the stipulation upon which it is granted; and afterwards issuing their warrant to the gaoler for his discharge.

CHAP. XXXVIII.

OF THE GENERAL ISSUE.

HAVING shewn already, that the General Issue is pleadable in capital cases, together with any other plea in bar or abatement which is not repugnant to it; and that it may also be pleaded even after such plea found against a defendant (a): and having also shewn, that the plea of the general issue amounts to a waiver of a pardon (b): and what is a good general issue to an information on a penal statute (c); and in the same chapter in what manner the issue is to be joined on such an information, and where it is to be tried (d):

(a) Chap. 23.
s. 128. & 131.
(b) Chap. 37.
s. 59.
(c) Chap. 26.
s. 66.
(d) Sect. 73, 74.

I shall in this place take notice only of the following particulars.

Sect. 2. FIRST, That in a criminal information or indictment in the (e) king's bench for a misdemeanor, and also in an indictment before (f) justices of the peace, the issue is well joined for the king by the words "A. B. *qui pro rege sequitur similiter*, &c." without any addition, shewing that A. B. is the proper officer for this purpose; for it shall be intended that he was sufficiently known to be such by the court. But (g) in all precedents I meet with of informations of intrusion, the issue for the king is joined by the attorney-general, (h) naming himself such.

(e) 1 Sid. 230.
Co. Ent. 363.
(f) C. Car. 31.
(g) 1 Coke, 17.
27.
Co. Ent. 372.
379, 381, 385.
387, 390.
Rastal, 412.
(h) Coke, 352
to 361.
Rastal, 385.

Sect. 3. SECONDLY, That in indictments of capital crimes, after the defendant hath pleaded "*quod ipse in nullo est inde culpabilis, et inde de bono et malo ponit se super patriam*" (which is the general form of pleading the general issue in capital cases, both in (i) indictments and (k) appeals), the usage seems to have been immediately to award process against the jury, without any express joining of issue on the part of the king (l). But in the precedents of appeals of felony, whether by an (m) appellant or (n) approver, generally the issue is expressly joined by the appellant and approver as well as the appellee.

(i) See the precedents above cited.
(k) Coke, Ent. 57.
Rast. 47 to 55.
(l) 4 Burr. 2084, 2085.
Tremainc, 286.

8 St. Tr. 287. agree that it is not necessary to join issue on record. And see *Rex v. Dowlin*, 5 Term Rep. 311. See vide 9 Rep. 63. (m) See the precedents cited to the precedent letter. But in Rastal, 43, after the general issue with an, &c. the process is immediately awarded against the jury. (n) Rastal, 42.

Sect. 4. THIRDLY, It seems (o) the better opinion, that if an issue be joined in process on a recognizance for the peace, whether the defendant killed J. S. and such issue be found for the king, yet shall it not estop the defendant to plead not guilty to an indictment or appeal for the death of the same J. S.

(o) H. 4. 35.
B. App. 19.

† **Sect. 5. FOURTHLY,** It seems, that on the general issue "not guilty," being pleaded, the defendant cannot take an objection in law, which is in the nature of a plea, to the jurisdiction of the

Kinloch's case,
Fost. 16.

the court, nor can any evidence be received to support such an objection on that issue, but such matter must be specially pleaded.

CHAP. XXXIX.

OF ASSIGNING COUNSEL.

A PERSON having pleaded “not guilty” is to be tried either,

1. By his country.
2. By his peers.
3. By battle. (1)

But before I consider what is proper to each of these in their order, I shall endeavour to shew,

1. In what cases a prisoner may have counsel to assist him in his defence.

2. Where he may have a copy of the indictment.

As to the first of these particulars, *viz.* In what cases a prisoner may have counsel to assist him in his defence.

(a) 3 Inst. 29. *Sect.* 1. I take it to be a settled (a) rule at common law, that no counsel shall be allowed a prisoner, whether he be a (b) peer or commoner, upon the general issue, on an indictment of treason or felony, unless some point of law arise proper to be debated. 137. 7 H. 4. 35. Finch, 386. 2 Bulst. 147. B. Cor. 54. F. Cor. 31. C. Car. 147. S. P. C. 151. 9 E. 4. 2. 1 Levinz, 86. Dr. and St. b. 2. c. 48. 1 St. Tr. 70. 2 St. Tr. 1002. See the books cited to the other parts of this chapter. (b) 1 St. Trials, 70. 265. 634. 4 St. Trials, 355. 3 Inst. 29. 1 Rush. Col. 91. Foster, 231.

(c) 2 Bulst. 147. *Sect.* 2. This indeed many have complained of as very unreasonable; yet if it be considered, that generally every one of common understanding may as properly speak to a matter of fact, as if he were the best lawyer; and that it requires no manner of skill to make a plain and honest defence, which in cases of this kind is always the best; the simplicity, the innocence, the artless and the ingenuous behaviour of one whose conscience acquits him, having something in it more moving and convincing than the highest eloquence of persons speaking in a cause not their own. And if it be further considered that it is the (c) duty of the court to be indifferent between the king and prisoner, and to see that the indictment be good in law, and the proceedings regular, and the evidence legal, and such as fully proves the point in issue, there seems no great reason to fear but that generally speaking, the innocent, for whose safety alone the law is concerned, have rather

(1) As the appeal is abolished by 59 Geo. 3. c. 46. trial by battle cannot now be had.

rather an advantage than a prejudice in having the court their only counsel. Whereas, on the other side, the very speech, gesture, countenance, and manner of defence of those who are guilty, when they speak for themselves, may often help to disclose the truth, which probably would not so well be discovered from the artificial defence of others speaking for them.

Sect. 3. But the law allows a defendant the same benefit of counsel in an (*d*) appeal, whether capital or not capital, as in any other action. Perhaps for this reason among (*e*) others, because appeals are presumed to be generally carried on with greater heat and spleen than indictments, and yet are not so much to be favoured, as being for the most part rather grounded on a desire of private revenge than of public justice; and therefore the defendant shall have at least the same advantage in them as in common actions.

Sect. 4. Also upon indictments, the court will never refuse to assign the prisoner counsel to argue a doubtful point of law, happening to arise at or after his trial; as where it shall appear questionable whether the facts proved, if true, fully (*f*) amount to the crime charged against him; or whether the persons offered to be evidence against him be (*g*) legal witnesses, in respect to such or such exceptions against them; or whether certain persons returned (*h*) of his jury can be lawful jurors, in respect of certain objections against them; or whether the (*i*) indictment or (*k*) process, &c. be strictly legal; in all which cases the prisoner must (*l*) propose the point, and (*m*) if the court think it will bear a debate, they will assign him counsel to argue it.

(*k*) 5 Inst. 29. 137. 6 Coke, 14. (*l*) 3 Inst. 137. 2 St. Tr. 762. (*m*) 2 St. Tr. 694. 701. 709. 763, 764. 3 St. Tr. 876.

Sect. 5. Also, wherever a prisoner hath a (*n*) pardon or other (*o*) special matter to plead to an indictment, or an (*p*) error to assign in order to reverse an outlawry, the court will of course assign him counsel. And it is (*q*) said, that for such collateral matters any one may be of counsel to the prisoner without any assignment.

180. C. Car. 365. Yet in the Year Book of 1 H. 7. 13. the court refused it, because the party was of very bad fame. (*q*) 2 Jones, 180. Str. 824. 9 State Trials, 85. Foster, 232. See also Ratcliffe's case, Foster, 42. where upon the trial of a collateral issue the prisoner had the assistance of counsel.

Sect. 6. But if a question arise on the trial of a peer concerning the course of parliamentary proceedings, the lords will not (*r*) suffer it to be argued by counsel, but will debate it among themselves.

Duchess of Kingston for bigamy, before the peers, 11 State Trials.

Sect. 7. There is a case in the Year Book of (*s*) Henry the Fourth, where a serjeant at law, as *amicus curiæ*, offered his opinion to the court concerning the trial of an indictment of death, that it was not proper to proceed in it till the year and day were passed, nor doth he appear to have been any way reprehended for it. (*t*) But it is not safe for any one to be either counsel or solicitor to one in prison for a capital crime, in order to prepare him for his trial, without an assignment from the court. But by leave

(*d*) S. P. C. 151. Dr. and St. bk. 2. c. 48. Dyer, 296. Keilway, 176. Finch, 386. 1 Bulst. 85. 9 E. 4. 2. B. Corone, 54. F. Corone, 31. (*e*) Dr. and St. bk. 2. c. 48.

(*f*) 3 Inst. 137. 1 St. Tr. 569. Rush. Stafford, 671. (*g*) 2 St. Tr. 520. (*h*) 3 St. Tr. 135. (*i*) 3 Inst. 29. 1 Levinz, 68. C. Car. 147. 2 Hale, 236.

(*n*) 3 Inst. 29. 137. 26 Assize, 46. F. Off. de Court, 34. (*o*) 1 H. 7. 23. B. Cor. 128, 129. Finch, 386. (*p*) 2 Jones,

the party was of very bad fame.

(*r*) 2 St. Tr. 694. 696. Vide the trial of the

(*s*) 7 H. 4. 36. S. P. C. 151. 3 Inst. 29. 137.

(*t*) 2 St. Tr. 272, 273. 712. 743. 763. 768.

leave of the court, prisoners have sometimes been indulged the assistance of counsel, not ~~to~~ to (u) advise them in prison, but (x) also to stand by them at the bar: but it is said, (y) that, in strictness, they ought not to be prompted by them as to matters of fact, (z) nor to have the assistance of any papers drawn up by counsel to prepare them for their trial.

(u) 3 St. Tr. 133.
 (x) 2 St. Tr. 614.
 (y) 2 St. Tr. 614.
 (z) 1 St. Tr. 732. 2 St. Tr. 743. 762, 763. 770.

Sect. 8. After a prisoner hath had counsel assigned him, the court will not (a) discharge them without his consent, though they desire it, but will sometimes add others to them.

(a) 3 St. Tr. 233.

Sect. 9. It is (b) said, that the court cannot assign an appellee any of the king's counsel; but that if they will, they may be either for or against them.

(b) 1 Bulst. 85.

Sect. 10. It having been found by experience that prisoners have been often under great disadvantages from the want of counsel, in prosecutions of high treason against the king's person, which are generally managed for the crown with greater skill and zeal than ordinary prosecutions, it is enacted by 7 Will. 3. c. 3. "That all and every person and persons whatsoever that shall be accused and indicted for high treason, whereby any corruption of blood may or shall be made to any such offender or offenders, or to any the heir or heirs of any such offender or offenders, or for misprision of such treason, shall be received and admitted to make his and their full defence by counsel learned in the law: and in case any person or persons so accused or indicted shall desire counsel, the court, before whom such person or persons shall be tried, or some judge of that court, is authorised and required, immediately upon his or their request, (c) to assign to such person or persons, such and so many counsel, not exceeding two, as the person or persons shall desire, to whom such counsel shall have free access at all seasonable hours; any law or usage to the contrary notwithstanding."

See Henry's case, 1 Burr. 638.

Sir Bartholomew Shower was the first counsel assigned by virtue of this act.

(c) In the case of Lord George Gordon, Mr. Erskine moved that counsel might be assigned; but Buller, Justice, doubted whether this application ought not to be made by the prisoner himself at the bar, the words of the statute being "upon his or their request;" but the attorney-general consenting, the motion was allowed. Douglas, 591.

Sect. 11. But by 7 Will. 3. c. 3. s. 3. it is provided, "That any person being indicted of such treason may be outlawed, &c. and where by the law, after such outlawry, he may come in and be tried, he shall upon such trial have the benefit of the said act."

Sect. 12. And by 7 Will. 3. c. 3. s. 12 and 13. it is further provided, "That nothing in the said act shall extend, or be construed to extend to any impeachment or other proceedings in parliament whatsoever. And also, that it shall not any ways extend to any indictment of high treason, nor to any proceedings thereupon for counterfeiting his majesty's coin, his great or privy seal, his sign manual, or privy signet."

See *Ld. Wintons's case*, 6 State Trials, p. 17.

† *Sect. 13.* But now by 20 Geo. 2. c. 30. it is also enacted, "That all and every person and persons whatsoever who shall be impeached by the Commons of Great Britain of any high treason, whereby any corruption of blood may or shall be made to
 " any

“ any such offender or offenders, or to any the heir or heirs of any
 “ such offender or offenders, or in misprision of such treason,
 “ shall be received and admitted to make his or their full defence
 “ by counsel learned in the law, not exceeding two counsel, who
 “ shall be assigned for that purpose, on the application of the
 “ party or parties impeached at any time after the articles of im-
 “ peachment shall be exhibited by the Commons.”

As to the second particular, *viz.* Where a prisoner may have a copy of the indictment against him.

Sect. 14. It is said, (*d*) that by the common law it is always denied in cases of treason or felony (1). Yet if a prisoner take a legal exception to an indictment, it is said, (*e*) that the court will grant him a copy of so much as concerns his exception. Also, if he have such matter to plead which cannot well be put into form without knowledge of the charge against him as laid in the indictment, as *autrefois acquit*, &c. it is (*f*) said, that the court will give him the heads of the indictment, to enable him to have his plea so drawn as to suit the charge against him.

(*d*) 1 Lev. 68.
 Moor, 666.
 1 St. Tr. 644.
 2 St. Tr. 711, 763.
 3 St. Tr. 861,
 862, 863, 864.
 Show, 131.
 1 Siderfin, 85.
 2 Hale, 236.
 (*e*) 1 Lev. 68.
 1 Siderfin, 85.
 (*f*) 2 St. Tr.
 711.
 Foster, 40.

Sect. 15. But by 7 Will. 3. it is enacted, “ That every person
 “ and persons indicted for high treason, except for counterfeiting
 “ the coin, or the great or privy seal, or sign manual or privy
 “ signet, shall have a true copy of the whole indictment, but not
 “ the names of the witnesses, five days at the least before trial,
 “ to advise with counsel thereupon, to plead and make their de-
 “ fence, his or their attorney or agent requiring the same, and
 “ paying the officer his reasonable fees for writing thereof, not
 “ exceeding five shillings for the copy of every such indictment.”

Sect. 16. It is said this must be intended five days before arraignment, because the prisoner pleads *instantly* upon the arraignment.

See 1 Burr. 643.
 Douglas, 591.

What exceptions may be taken to such indictment, and when, hath been shewn, chapter the twenty-fifth (*g*).

(*g*) *Sect. 145* to
 150.

† *Sect. 17.* It is also enacted by 7 Anne, c. 21. s. 11. “ That
 “ from and after the decease of the Pretender, when any person
 “ is indicted for high treason, or misprision of treason, a list of
 “ the witnesses that shall be produced on the trial for proving
 “ the said indictment, and of the jury, mentioning the names, (*p*)
 “ profession, and places of abode of the said witnesses and jurors,
 “ shall

(*p*) 9 St. Tr. 679.
 the case of John
 Mathews.

(1) By an order of the judges in the 26 Car. 2. (prefixed to Kelynge's Reports) made for the regulation of the Old Bailey sessions, it is ordered, “ That no copies of any indictment for felony be given without special order, upon motion made in open court at the general gaol-delivery; for the late frequency of actions against prosecutors (which cannot be without copies of the indictment) deterreth people from prosecuting for the king upon just occasions.” And agreeable to this practice, it is usual upon the circuits to apply to the court for a copy of the indictment, upon the acquittal of the

prisoner, where the prisoner intends to bring an action for a malicious prosecution; which the court grants or refuses in its discretion, according to the circumstances of the case. But in Brangan's case, 1 L. C. L. 82. Willes, C. J. is reported to have said, that by the laws of this realm, every prisoner upon his acquittal has an undoubted right and title to a copy of the record, for any use he may think fit to make of it, and that after a demand, the proper officer might be punished for refusing to make out a copy.

(1) The case of Lord George Gordon, Hilary Term, 21 Geo. 3. was the first which has happened since this act took effect.

"(2) shall be also given at the same time that the copy of the indictment is delivered to the party indicted; and that copies of all indictments for the offences aforesaid, with such lists, shall be delivered to the party indicted, ten days before the trial, and in presence of two or more credible witnesses."

The attorney-general, as the only method of complying with the directions of the act, moved the king's bench for a rule upon the sheriff, to deliver to the prosecutor a list of the jurymen he intended to return upon the panel, in order that the prosecutor might be enabled to deliver such list to the prisoner; and the rule was drawn accordingly; for the terms of which, vide Douglas, 591.

† Sect. 18. But it is enacted by 6 Geo. 3. c. 53. "That nothing contained in the above last recited act shall any ways extend to any indictment of high treason for counterfeiting his majesty's coin, the great seal or privy seal, his sign manual or privy signet, or to any indictment of high treason, or to any proceedings thereupon against any offender or offenders who by any act or acts now in force is and are to be indicted, arraigned, tried, and convicted by such like evidence, and in such manner, as is used and allowed against offenders for counterfeiting his majesty's coin."

CHAP. XL.

OF THE JURY.

(a) Chap. 5. s. 10.

FOR the better understanding what more particularly relates to a trial by the country in capital cases, having shewn, (a) that by virtue of a special commission, justices of oyer and terminer may sit in one county for the trial of a fact in another by the proper jurors: And having also shewn (b) what is a proper place from whence a *visne* may come:

(b) Chap. 23. s. 92, 93.

I shall in this place only consider,

1. From what county the jury is to be returned.
2. By virtue of what process.
3. Before what court.
4. How they may be challenged.

As to the first of these particulars, *viz.* From what county the jury is to be returned.

I shall endeavour to shew,

1. From what county they are to be returned for the trial of the general issue.
2. From what county for the trial of a foreign plea.

As to the FIRST POINT, *viz.* From what county a jury is to be returned for the trial of the general issue.

Sect.

Sect. 1. I take it to be (c) agreed, that (d) regularly by the common law they must be returned in all cases, for the trial of the general issue, from the same county wherein the fact was committed. And it is said, that in an appeal of death, where the wound was given in one county, and the party died in another, the jury, (e) ought to be returned from each county before the statute of 2 and 3 Edw. 6. c. 24. since which the whole may be tried either upon an (f) indictment or appeal in the county wherein the death happens.

(c) S. P. C. 154.
Dyer, 132. 286.
F. Corone, 194.
3 Inst. 27.
26 Assize, 32.
Sup. c. 5. s. 19.
(d) Inf. s. 5.
(e) B. 1. c. 13.
s. 13.
Sup. c. 23. s. 35.
F. Cor. 59, 60.
(f) Sup. c. 25.
s. 35.
2 Hale, 262.
Traitors and
murderers ex-
amined by three
privy counsel-
lors may be tried
in any county
by special com-
mission.

Sect. 2. But it is enacted by 33 Hen. 8. c. 23. "That if any person being examined by the king's council, or three of them, upon any manner of treasons, misprisions of treasons, or murders, do confess any such offences, or that the said council, or three of them, upon such examination, shall think any person so examined, to be vehemently suspected of any treason, misprisions of treasons, or murder, that then in every such case, by the king's commandment, his majesty's commission of oyer and terminer under the great seal, shall be made by the chancellor of England to such persons, and into such vills and places as shall be named and appointed by the king, for the speedy trial, conviction, or delivery of such offenders; which commissioners shall have power to enquire, hear, and determine all such treasons, misprisions of treasons, and murders, within the places limited by their commission, by such good and lawful persons as shall be returned before them by the sheriff, or his minister, or any other having power to return writs and process for that purpose, in whatsoever other shire or place within the king's dominions, or without, such offences were done or committed, and that in such cases, no challenge for the shire or hundred shall be allowed." (1)

Sect. 3. It hath been (g) adjudged, that this statute, as far as it relates to treasons done within the realm, is repealed by 1 and 2 Philip & Mary, c. 10. which enacts, "That all trials for treason shall be according to the common law." But as to (h) murder, and (i) misprision of treason, it still seems to continue in force. And as to high (k) treason done without the realm, it doth not seem material whether it be in force or not, because that is fully provided for by 35 Hen. 8. c. 2. as hath been more fully shewn, Chapter 25. sect. 49, 50, 51, 52, 53.

(g) 1 And. 104.
(h) 1 And. 194.
(i) Sup. c. 25.
143.
B. Cor. 220.
3 Inst. 24.
(k) Dyer, 286.

Sect. 4. It hath been (l) adjudged, that the word "murder" in this statute shall have the same strict construction as in the (m) statutes which take away the benefit of clergy from murder, and consequently shall not extend to one examined before the council as accessory only, and not as principal; for murder is one offence, and the being accessory to it is another.

(l) 1 And. 194.
(m) Sup. c. 33.
s. 26. Bk. 1. c.
13. s. 11.

Sect. 5. Having shewn already, that he who steals (n) goods in one county, and carries them into another, or does a fact in one county which proves a (o) nuisance to another, may be indicted

(n) Bk. 1. c. 19.
s. 52.
Sup. c. 23. s. 47.
c. 26. s. 38.
(o) Sup. c. 25.
or sect. 37.

(1) In the case of *The King v. Sawyer*, who was tried, under a special commission, at the Old Bailey, in Nov. 1814, for a murder committed at Lisbon, in Portugal, it was held, after solemn argument, before the twelve judges, that this sta-

tute extended to a murder committed by a British subject, within a foreign independent state. But *quære*, how can a fact there committed be against the peace of the king, where his laws do not pre-
vail?

(p) Bk. 1. tit. 1.
Bigamy, p. 685.
Sup. c. 25. s. 39.
(q) Vol. 1.
p. 125. s. 10.
Sup. c. 25. s. 40.
(r) Bk. 1. c. 13.
s. 14.
Sup. c. 25.
s. 41, 42.
(s) Sup. c. 25.
s. 43, 44, 45.
(t) Sup. c. 25.
s. 48 to 54.
(u) Bk. 1. c. 20.
Sup. c. 25.
s. 43 to 48.
(x) Sup. c. 29.
s. 49.
(y) Sup. c. 25.
s. 54. and c. 29.
s. 50, 51, &c.

or appealed in either; from whence it follows that he may be also tried in either: having *(p)* shewn, that he who marries two wives, the first in a foreign country, and the second in England, may be indicted and tried in England; and that he who takes a woman by force out of one county, and carries her into another and there marries her, *(q)* may be indicted and tried in the second county: and that felonies in *(r)* Wales may by force of 26 Hen. 8. c. 6. be indicted and tried in the next adjoining English county: and that treasons upon the seas, *(s)* or in any foreign *(t)* country, and felonies *(u)* and piracies upon the sea, may be indicted and tried in any county in England; and that an *(x)* accessory in one county to a murder in another, may be appealed and tried in the county wherein the stroke was given; and that an accessory to murder, or any other felony in one county, may be indicted *(y)* and tried in the county wherein he was accessory; I shall refer to the places cited in the margin for the farther consideration of these matters.

As to the SECOND POINT, *viz.* From what county the jury is to be returned for the trial of a foreign plea, that is, the plea of issuable matter alleged in a different county from that wherein the party is indicted or appealed; as where a man indicted in the county of A. *(z)* pleads, that he was taken out of a sanctuary in the county of B. Or, where one appealed by a woman for the death of her husband in one county, *(a)* pleads, that since the death of her husband she hath married J. S. in another county.

(z) Keilw. 175.

(a) Dyer, 296.

(b) 3 Inst. 27.
S. P. C. 154.
Keilway, 175.
Dyer, 296.
Sum. 255.
Vide 23 H. 8.
c. 14. s. 5.
(c) Keilw. 175.
Dyer, 286. 296.

Sect. 6. It is *(b)* agreed, that by the common law such pleas can only be tried by juries returned from the counties wherein they are alleged: and therefore if issue be joined on such matters before a court which has no jurisdiction out of the county wherein it sits, there seems to be *(c)* no remedy by the common law, but to remove the proceedings by *certiorari* into the king's bench, which having a jurisdiction throughout the whole kingdom, will award proper process for the trial.

Sect. 7. But for the more speedy trials of murders and felonies, it is enacted by 23 Hen. 8. c. 14. s. 5. "That all manner of " foreign pleas triable by the country, upon an indictment for any " petit treason, murder, or felony, shall be forthwith tried before " the same justices afore whom the party shall be arraigned, and " by the jurors of the same county that shall try the petit treason, " murder, or felony whereof he shall be so arraigned, without any " further respite or delay, in whatsoever county or counties, place " or places of this realm, the matter of the pleas be supposed or " alleged."

Sect. 8. But this statute extending neither to indictments of high treason, nor to appeals, it *(d)* is said, that a foreign issue therein must still be tried by the jury of the county wherein it is alleged. (1)

(d) 3 Inst. 27.
S. P. C. 154.
Sum. 255.
Vide Dyer, 296.

(1) See further in the Chapter of Indictment, ante c. 25, as to Venue.

CHAP. XLI.

OF PROCESS AGAINST JURORS.

FOR the better understanding the nature of process against jurors in criminal cases, I shall endeavour to shew,

1. Where a panel may be returned without any precept by a bare award.

2. In what manner the process is to be returnable.

3. Where a *venire* may be joint or several.

4. Where process may be awarded by proviso.

5. In what cases, and in what manner, a *tales* is grantable.

6. Where it is necessary to return a panel into court, before an inquest can be taken upon it, and where the prisoner may have a copy of it.

As to the FIRST POINT, *viz.* Where a panel may be returned without any precept by a bare award.

Sect 1. It is (a) agreed, that justices of (b) gaol delivery may have a panel so returned by the sheriff without any precept or writ; and the (c) reason given for it is, that before their coming, they always make a general (d) precept to the sheriff on parchment under their seals, "to bring before them, at the day of their sessions, twenty-four out of every hundred, &c." "to do those things which shall be enjoined them on the part of the king, &c." And therefore it is said that they need not make any other precept for the return of a jury, for the trial of any issue joined before them. But that their bare (e) award "that the jury shall come" is sufficient, because there are enough for that purpose supposed to be present in court, whom the sheriff may return immediately whenever the court shall require their service.

(a) F. Inq. 55. 4 Inst. 168. 2 Inst. 568. 2 Hale, 54. 261. (d) Vide Rast. Car. 448. (e) 4 St. Tr. 182. confirmed Foster, 63; and for the form of such an award, see Rast. 385.

Also it is said, (f) that a jury may be so returned before justices of peace at their sessions, because the (g) precept for the summons of the sessions hath a clause to the same effect for the summons of twenty-four out of every hundred, &c. Yet I much question whether this matter doth not rather depend on (h) practice, and the constant course of precedents, than on any argument from the reason of the thing. For the (i) precept to the sheriff from justices of *oyer* and *terminer*, in order for the holding of their sessions, hath in effect the very same clause for the bringing of twenty-four before them, out of each hundred, at the day of their sessions, &c. And yet it seems (k) agreed, that they cannot have a jury returned for the trial of any issue joined before them, by force of a bare award, but ought to make a particular precept to the sheriff for that purpose under their seals.

(a) F. Inq. 55. 4 Inst. 168. 2 Inst. 568. Sum. 158. 256. 2 Hale, 261. 264. Crom. 128. S. P. C. 155. 4 Comm. 344. (b) Yet it is said that the law is otherwise if they have a special commission. F. Inq. 55. 4 Inst. 168. Crompton, Jur. 128. (c) F. Inq. 55. 384, 385. Cro (d) 2 Inst. 568. Adj. 1 Sid. 364. (g) See Lamb. Just. b. 4. c. 2. and Crompton, 232. (h) 4 Inst. 164. 2 Hale, 261. 1 Sid. 364. (i) Rast. 443. (k) 1 Sum. 162. 156. 4 Inst. 164. 2 Inst. 568. Foster, 64.

(l) S. P. C. 154. *Sect. 2.* It seems (l) agreed, that by the course of the king's
 Vide 27 H. 6. bench no jury can be returned into it from a foreign county,
 10. without proper process, under the (m) seal of the chief justice,
 Sup. c. 27. s. 16. &c. But (n) *quare* if it may not be returned for the trial of an
 (m) Sup. c. 27. indictment, &c. in the same county wherein it sits by a bare *præ-*
 s. 8. *ceptum est*, &c.
 (n) Dy. 118.

As to the SECOND POINT, *viz.* In what manner the process against jurors is to be returnable.

(o) C. 25. s. 49. *Sect. 3.* It seems agreed, that it may be returnable immediately
 to 70. into the court of king's bench for the trial of an indictment in the
 (p) 2 R. Abr. same county wherein it sits, whether for a crime committed in
 626. such county, or for a (o) treason, &c. beyond the sea. But that
 2 Hale, 260. for the trial of indictments, removed thither by *certiorari* from
 Sup. c. 3. s. 12. other counties, there (p) ought to be fifteen days between the *teste*
 and c. 27. s. 16. and return of every process.
 2 Inst. 568.
 4 St. Tr. 214.
 4 Com. 344.

(q) Keilway, *Sect. 4.* Also it is (q) agreed, that justices in *eyre*, or of gaol-
 159. 256. delivery, may order a jury to be returned immediately for the trial
 Crompton, 152. of a prisoner arraigned before them.
 C. Car. 315. F. Inquest, 55. Kelynge, 7.
 1 Siderfin, 335.

(r) 2 Inst. 568. Also it is clearly (r) holden by Sir Edward Coke, and hath
 4 Inst. 164. been often (s) adjudged, that justices of *oyer* and *terminer*, for
 (s) C. Car. 340. the trial of any issue joined before them, might award a *venire*
 583. returnable the same day on which the party is arraigned.
 2 R. Abr. 96.
 Sum. 161.
 2 Hale, 261. Admitted 2 Keble, 212. 292. 718. 2 Keble, 433. 1 Siderfin, 334. 1 R. Abr. 96.
 C. Car. 340. 583. Con. Keilway, 159. Tr. per Pais, 26. 2 R. Abr. 625. Sum. 266.

(t) 2 Inst. 568. Also it is holden by Sir (t) Edward Coke, and hath been (u)
 4 Inst. 164. adjudged, that justices of the peace may do the like; but there
 (u) C. Jac. 404. are very (x) strong authorities to the contrary, unless the crime
 And in this amount (y) to felony, or the party (z) consent to be tried imme-
 book it is said diately.
 that common
 experience is so.
 (x) F. Corone, 44. Keilway, 159. 1 Jones, 379. S. P. C. 156. 1 Keble, 433. Tr. per Pais, 25, 26.
 2 Keble, 212. Crom. 152. 1 Siderfin, 99, 335. C. Car. 438. 448. 2 R. Abr. 625. Sum. 256.
 (y) 1 Sid. 335. In Crompton, 150, it is said that the sessions for the peace may award process for the
 trial of an indictment of felony the next day after it is traversed. *Quære* if the party's being in gaol
 make no difference? C. Car. 340. 2 R. Abr. 96. 1 Sid. 335. (z) 1 Keble, 433. 1 Sid. 99. 334.

Sect. 5. *Quære* how far the law is altered as to these points by
 4 and 5 Will. & Mary, c. 24. and 7 and 8 Will. 3. c. 32. which,
 * by requiring that jurors shall be summoned six days before they
 (a) Sup. s. 1. are to appear, seem to make it necessary whenever a (a) *venire* or
 (b) 4 St. Tr. 99, particular precept is required for the return of a jury, (b) that there
 100. be six days between its *teste* and return.

(c) 1 Sid. 348. *Sect. 6.* It hath been (c) adjudged, that a *venire* before justices
 2 Keble, 248. of *oyer* and *terminer* returnable at a day certain is erroneous, un-
 292. 718. 854. less the sessions appear to have been (d) adjourned to the same
 And in these day; because otherwise it shall not be intended that their com-
 books such error mission continued till such day; and if it did not, their authority
 is said not to be to try the issue was determined. But it is admitted (e) that such
 helped by the *venire* may be made returnable at the next assizes, and then tried
 next assizes by virtue of (f) 1 Edw. 6. c. 7.
 happening to
 fall on the same
 day.

(d) Sup. c. 5. *Sect.*
 sect. 7. 14. (e) 1 Sid. 348. 2 Keble, 284. 718. 954. C. Car. 340. (f) Vide c. 5. s. 12. Salk. 51.
 pl. 114. Lord Raym. 1061.

Sect. 7. It hath been (g) adjudged, that the award of a *venire* returnable at a certain day before justices of oyer, &c. need not expressly mention before what justices it shall be returnable; for it cannot but be intended that it ought to be before the same court which awards it.

venire itself needs not shew before what justice it is returnable; but this seems not to the book at large. Vide 2 Keble, 855.

As to the **THIRD POINT**, viz. Where a *venire* may be joint or several.

Sect. 8. It seems agreed, that where several persons are arraigned upon the same (h) indictment or (i) appeal, and severally plead not guilty, it is in the (k) election of the prosecutor, &c. either to take out (l) joint *venires* against them all, or (m) several against each of them. But in an appeal, if one plead not guilty, and the other plead a release made at A. it seems (n) that there must be several *venires*.

try the defendants in appeal by several *venires*, S. P. C. 155. It is said, that where there are three defendants, the plaintiff may join two of them in one *venire*, and take out another against the third. (k) See the books above cited, and 1 Jon. 425. and F. *quare impedit*, 199. 21 Hen. 6. 22. (l) See the book above cited. Also the same is adjudged 1 Jon. 425. where one appellee was charged with doing he fact *proditorie*, the others *felonice*. See F. *quare impedit*, 199. Visne, 11. Keilway, 106. (m) Dyer, 120. 131. C. Eliz. 541. (n) 50 E. 3. 1. B. Visne, 27. Vide 11 H. 7. 5. B. Disc. de Pro. 62. F. Execut. 114. Nisi Prius, 7, 8.

Sect. 9. It seems generally (o) agreed, that where the same jury is returned on such a joint process against several defendants, if a juror be challenged by any one defendant, and the challenge allowed, and the juror thereupon (p) drawn, he is by necessary consequence drawn as to all the other defendants also, because there being but one panel, the same person cannot at the same time be taken from it, and yet continue in it. But where one jury is jointly returned for the trial of several defendants before justices of gaol delivery, it is (q) certain that they may afterwards sever the panel, if they find it expedient, for the prevention of this inconvenience. But I do not find (r) that this can be done in any other case. And it seems agreed, that after an appellant hath taken out a joint *venire* against all the appellees, he cannot (s) afterwards take out several ones, though the first be never returned; and the reason seems to be, because it would amount to a (t) discontinuance.

(p) But if no judgment be given that the juror who is challenged by one shall be drawn, but only that he shall stand aside for a time, it is said, that he may try those who do not actually challenge him. Dyer, 120. Con. Bendloe, 58. (q) Kelynge, 7. Summary, 256. 2 Hale, 264. Plowden, 100. 9 E. 4. 27. Crompton, 113. (r) Plowd. 100. 2 Hale, 263, 264. (s) 8 Co. 66. S. P. C. 155. 27 H. 6. 4. F. Pro. 94. S. P. C. 155. B. Veni. faci. 32. 9 Ed. 4. 27. F. Chall. 56. Vide F. Inquest, 59. Executors, 114. (t) Sup. ch. 27. sect. 96.

As to the **FOURTH POINT**, viz. Where process may be taken out by the defendant in criminal cases by *proviso* (i. e. with a (u) clause that if two writs come to the sheriff he shall execute one of them only).

Sect. 10. I take it to be agreed (x), that it may be so awarded in any appeal, whether capital or not capital, in the same manner as in other actions after the appellant hath made default in relation

(g) 29 E. 3. 30. 31. In Dyer, 315. the same case is taken notice of, and it is there said, that the be warranted by

(h) Sum. 256. 2 Hale, 263. (i) 4 State Tr. 100. Summary, 256. S. P. C. 155. 1 Jones, 425. But C. Eliz. 541. it is said to be the course to

(o) S. P. C. 155. 2 Hale, 263. 9 Ed. 4. 27. Moor, 13. Co. Litt. 156. Dyer, 246. Plowden, 100. B. Chall. 84. Parallel case, Co. Litt. 130. 4 H. 4. 4. Dyer, 246. 50 E. 3. 1. F. Protection, 21, 126. 3 H. 4. 5. Crompton, 113. But this is made a *quare*, Dyer, 152. and denied in the same case in Dalison, 25.

(u) 8 H. 6. 6. F. Process, 79. Vide 2 R. Ab. 266. Rastal, 625.

(x) Sum. 257. S. P. C. 155. F. Process, 211. 15 H. 7. 9. Keilway, 1767

(y) See the books cited to the other part of this section. 33 H. 6. 13. (z) Dyer, 215. C. Car. 484. Vide Dyer, 284. 319. 2 R. Abr. 666. 2 Jones, 31. Keilway, 176. (a) 8 H. 6. 6. F. Pro. 79. B. Nisi Prius, 13.

relation to the very same kind of process (y). And therefore if the appellant, after issue joined, either neglect to take out any (z) *venire* the same term, &c. or take one out but doth not (a) get it returned, it seems that the defendant may take one out by *proviso*, &c.

And in like manner if the appellant make the like default in suing out an *habeas corpora*, or other subsequent process, the defendant may sue out the like process by *proviso*.

(b) 15 H. 7. 9. 14 H. 7. 7. F. Protest, 211. Dyer, 318. Summary, 257. C. Car. 484. 2 R. Abr. 666. B. Octo Tales, 8. S. P. C. 71. 155. Dyer, 284. 193. Con. F. Process, 68. Dyer, 215. 217. 2 Jones, 31. (c) Dyer, 215. Bro. Nisi Prius, 40. 6 Modern, 246. (d) Dyer, 193. 21 H. 6. 22. 16 H. 7. 14. F. Nisi Prius, 9. Bro. Nisi Prius, 40. (e) 2 Levinz, 5, 6. 2 Staund. 336. (f) 6 Mod. 246. F. Nisi Prius, 6. (g) Par. Case, 2 R. Ab. 666. F. Nisi Prius, 3. (h) 2 Levinz, 5, 6. 16 H. 7. 14. Bro. Nisi Prius, 40. 21 H. 6. 22. B. Octo Tales, 17. 2 Saunders, 336.

But where the defendant hath sued out any process by *proviso*, there are (b) authorities that the plaintiff is to sue out the proper subsequent process upon it in the same manner as if he had sued out the first; and that it is irregular for a defendant to take out any such subsequent process till the plaintiff has made a (c) default in respect of the same kind of process, except only in such actions wherein the defendant is an actor as well as the plaintiff; as in (d) replevin, or (e) error, or (f) *quare impedit* against the patron only, or (g) prohibition, &c. in which actions the defendant may either take out process by *proviso*, without any default in the plaintiff, or (h) may, if he think fit, take it out in the same manner as the plaintiff, without any clause of *proviso*.

(i) 2 Leon. 110. (k) 6 Mod. 216. 217. 1 Keble, 195. Con. 1 Sid. 316.

But it seems agreed, that neither in actions wherein the king is sole (i) party, nor in (k) indictments, there can be any process taken out by *proviso*, because no laches is imputable to the king.

(l) 2 Leo. 110. Vide 7 and 8 Will. 3. c. 32.

Also it hath been (l) questioned, whether there can be any such process in informations *qui tam*, because the king is in some sort party.

As to the FIFTH POINT, *viz.* In what cases, and in what manner, a *tales* is grantable.

I shall observe the following particulars.

(m) S. P. C. 155. 10 Coke, 104. Sum. 257. 20 Ed. 3. 11. (n) 1 St. Tr. 502. and the books next above cited. (o) S. P. C. 155. 12 H. 4. 40. 10 Coke, 104. Quere 2 Roll. Ab. 671. (p) Summary, 257. S. P. C. 155. 14 H. 7. 7. (q) C. Car. 484. 14 H. 7. 7. 10 Coke, 104. See the books cited to the precedent section, under the letter (s). Yet it is said in Dyer, 359. that if a full jury doth not appear, and the plaintiff pray a *distingas* without praying any *tales*, the court ought to grant it at the prayer of the defendant. Vide 2 R. Abr. 671.

Sect. 11. FIRST, That if a full jury appear not in an appeal whether by reason of the (m) death of some of the persons returned, or for any other cause, or if so many be (n) challenged and drawn that there do not remain enough to make a jury; or if after the jury is charged, one (o) or more of them die, the appellant (p) may pray a *tales*, in the same manner as a plaintiff in other actions. And so also may the appellee, if the appellant neglect to pray one the same (q) term, &c. But it seems that a defendant cannot regularly pray it till there has been a default in the plaintiff.

Sect. 12. SECONDLY, That if a full jury appear not in an appeal whether by reason of the (m) death of some of the persons returned, or for any other cause, or if so many be (n) challenged and drawn that there do not remain enough to make a jury; or if after the jury is charged, one (o) or more of them die, the appellant (p) may pray a *tales*, in the same manner as a plaintiff in other actions. And so also may the appellee, if the appellant neglect to pray one the same (q) term, &c. But it seems that a defendant cannot regularly pray it till there has been a default in the plaintiff.

Sect. 12. SECONDLY, That in capital cases, a *tales* may be granted for a larger number than the first process, as for (r) sixty or forty, or any other even (s) number that the court thinks proper, in order to prevent the delay which may be occasioned by the defendant's peremptory challenges. And in this respect the law in respect of a *tales* in capital cases is different from what it is in any other case; it being an allowed rule; that in all (t) other cases the *tales* must be for a less number than the first process.

16 Ed. 4. 5. 10 Coke, 104, 105. (s) 10 Coke, 105. Finch of Law, 414. But a *tales de circumstantibus* may be of any uncertain number, 10 Coke, 105. (t) 14 H. 7. 7. Finch, 414. 10 Coke, 104, 105. 2 R. Ab. 672. 37 H. 6. 12. B. Octo Tales, 11. 16. F. Inquest, 20. 40. 18 Ed. 4. 6.

(r) 14 H. 7. 7.
2 Hale, 266.
S. P. C. 155.
Finch, 415.
B. Octo Tales,
6. 8. 19.
Keilway, 176.
Dyer, 213.
1 Bulst. 121.
15 Ed. 4. 33.

Sect. 13. THIRDLY, That every subsequent *tales*, in capital as well as in all (u) other cases, must be for a (x) less number than the former, except the former were quashed, in which (y) case the next may be for the same number.

10 Coke, 105. 47 Assize, 10. 14 H. 7. 2. (z) S. P. C. 155. Summary, 257. Keilway, 176. 10 Coke, 105. F. Inquest, 40. It is said that there may be 12 *tales*; but this is contrary to all the other books. (y) S. P. C. 155. Sum. 257. F. Challenge, 36. 20 H. 6. 38.

(u) Finch, 414.
2 R. Ab. 672.
B. Octo Tales,
15, 16.
B. Attaint, 7.

Sect. 14. FOURTHLY, That the quashing the array of the principal panel doth (z) not quash that of the *tales*, but the inquest shall be taken of those returned on the *tales* if there be enough, and if not, others shall be added to them by a new *tales*.

(z) F. Inquest, 30.
S. P. C. 155.
Dyer, 245.
10 Coke, 104, 105.

Yet it seems (a) agreed, that if all the persons returned on a *habeas corpora* be challenged and drawn, there shall not be a *tales* awarded, but a new *venire facias*; for the word *tales* plainly refers to some others, to whom the persons returned are to be like.

(a) S. P. C. 155.
Finch, 414.

Also it seems agreed, (b) that if the first *habeas corpora* be quashed, the *habeas corpora* with a *tales* cannot but be quashed with it, and the party must go on in the same manner as if the *venire* had been only returned, and nothing done upon it; for where a process is quashed, all that follows it and depends upon it, seems of course to fall with it.

(b) 34 H. 6. 20.
F. Inquest, 20.

Sect. 15. FIFTHLY, That it seems the stronger opinion, that a *tales* is not grantable upon the return of a *venire*, but only (c) upon the return of a *habeas corpora* or *distringas*, because it appears not before such return but that a full jury may appear.

(c) Cro. Eliz. 502.
27 H. 6. 10.
B. Nisi Prius, 1.
B. Oct. Tales, 1.
34 H. 6. 21. 2 R. Abr. 671. Cont. B. Octo Tales, 10. 15 H. 7. 9.

Sect. 16. SIXTHLY, That the (d) *distringas* or (e) *habeas corpora*, with a command to add so many more to those summoned on the *venire*, is the first process against the *tales*; but it is (f) said not to be grantable with a *nisi prius*, without having been first returned into the court.

(d) 1 R. Abr. 798.
(e) 27 H. 6. 10.
B. Nisi Prius, 1.
Octo. Tales, 1.
(f) 27 H. 6. 10.
B. Nisi Prius, 1.
Octo. Tales, 1.
1 H. 5. 11. S. P. C. 157.

Sect. 17. SEVENTHLY, That (g) if a juror be withdrawn after a trial is commenced whereon a *tales de circumstantibus* was awarded, and afterwards a new *habeas corpora* be taken out with a *tales*, it shall appoint such *tales* to be added to the jurors returned.

(g) Cro. Jac. 677.

turned on the first *venire*, and also to those returned on the *tales de circumstantibus*; because, the court above will take judicial notice of what is done *nisi prius*, being entered on record.

(h) 35 H. 8. 6. *Sect. 18. EIGHTHLY*, That the (h) statutes which authorise justices of *nisi prius* to award a *tales de circumstantibus*, extend (i) as well as to all capital cases, whether of treason or felony, as to others.
 a. 7. made perpetual by 2 and 3 Ed. 6. 32.
 4 and 5 Ph. & M. 7.
 5 Eliz. c. 25. 14 Eliz. c. 9. 7 and 8 Will. 3. c. 32. 3 Geo. 2. c. 24. Vide also 2 Sess. Cas. 333. 21 Vin. 313. 3 Bac. Ab. 248. (i) Raym. 367. 1 Levinz, 223. 1 Keble, 490.

But it seems, that such a *tales* cannot be prayed for the king upon an indictment, or criminal information, without a (k) warrant from the attorney-general, or an express (l) assignment from the court before which the inquest is taken. But for the fuller understanding of these matters, not being so proper for this treatise, I shall refer to the statutes in the margin.

(k) 1 Lev. 223.
 (l) See the statute of 14 Eliz. c. 9.
 (m) 4 Stat. Tr. 179 to 182.
 (n) 4 Stat. Tr. 179 to 182.
 Yet there is an instance in Keilw. 176. of the *tales* awarded in an appeal before such justices. And the like was done, Plowden, 100. upon an indictment of murder.
Sect. 19. NINTHLY, That it hath been (n) questioned whether any *tales* be grantable by justices of oyer and terminer; and it hath been (n) holden, that it is not grantable by justices of gaol-delivery; and therefore if a trial before such justices be put off for want of a sufficient number of jurors, it seems the usual practice for the court not to order a *tales*, but a (o) larger panel, whereon the former jurors shall be returned in the same order as before, and called to be sworn as they stand, without any more regard to those who were sworn before than to the others (†). Which is the method likewise to be observed in the like case, (p) as to the swearing of a jury returned with a *tales*.
 Vide 2 Hale, 266. S. P. C. 155. Keilw. 176. Plowden, 100. Jenk. 340. Foster, 64. (o) 4 St. Tr. 179 to 182. (†) See Foster, 63, 64. (p) Yelverton, 23. It was agreed to be common practice on the circuits, that if but one juror appears and he is challenged, there may be twelve talesmen sworn, who may try the cause. Sel. Cas. Evid. 110. 3 Bac. Ab. 249.

As to the SIXTH POINT, *viz.* Where it is necessary to return a panel into court, before an inquest can be taken upon it, and where the prisoner may demand a copy of it.

Sect. 20. It is recited by 42 Edw. 3. c. 11. "That divers mischiefs had happened, because that the panels of inquests which had been taken before justices by writ of *scire facias*, and other writs, had not been returned before the sessions of the justices at the *nisi prius*, and otherwise, so that the parties could not have knowledge of the names of the persons which should pass in the inquest, whereby divers of the people had been disherited and oppressed;" and thereupon it is ordained, "That no inquest (q) "but assizes and deliverances of gaols be taken by writ of *nisi prius*, nor in any other manner, at the suit of great or small, "before the names of all them that shall pass in the inquest be "returned in the court."

(q) Note, that 6 H. 6. ch. 2. provides also for assizes.
 3 Inst. 175.

(r) S. P. C. 156, 157. Sum. 258. *Quere*, If the statute extends to justices of oyer and terminer, for it is said to be the practice for trials before them for treason to be on the *venire*, and not to award any *habere corpora*. 4 Stat. Trials, 102.

Sect. 21. It seems (r) agreed, that this statute extends as well to writs of *nisi prius* in criminal cases as in civil, and to jurors returned upon a *tales* as well as to those returned upon a principal panel.

Sect.

Sect. 22. But it seems, (s) that in trials before the justices of gaol-delivery the prisoner has no right to a copy of the panel before the time of his trial, except only in cases within the purview of 7 and 8 Will. 3. c. 3. which enacts, "That every person indicted and tried for high treason, or misprision thereof (except it be for counterfeiting the coin, &c.), shall have a copy of the panel of the jurors who are to try him, duly returned by the sheriff, and delivered unto him two days (t) at least before he shall be tried."

(s) 2 Stat. Tr. 762.
3 Stat. Tr. 866, 867.
4 Stat. Tr. 6.

(t) Vide ante, c. 39. s. 16. for an alteration in this respect.

Sect. 23. It hath been (u) adjudged to be sufficient, within the intent of this act, to deliver to a prisoner a copy of a panel arrayed by the sheriff before it is returned into court, if the very same panel be afterwards returned.

(u) Rookwood's Case, 4 State Tr. 666.

† **Sect. 24.** It hath also been ruled, that if the panel returned by the sheriff be rendered insufficient, by challenges, as to the number of jurors, a new panel may be awarded.

Cooke's Case, 4 St. Tr. 743.

CHAP. XLII.

BEFORE WHAT COURT THE JURY IS TO BE RETURNED.

AND now I am to consider before what court the process against jurors in criminal cases is returnable.

Sect. 1. There can be no (a) doubt but that, by the common law, it is returnable only into the court wherein the prosecution is depending.

(a) 4 Inst. 159.

Sect. 2. But the statute of (b) Westminster the second, c. 30. having ordained, "that all pleas in either bench, which require only an easy examination, shall be determined in the country before the justices of assize, by virtue of the writ prescribed by that statute, commonly called the writ of *nisi prius*," it seems to have been universally agreed, (c) that an issue joined in the king's bench upon an (d) indictment or (e) appeal, whether for treason or (f) felony, or a crime of an inferior (g) nature, committed in a different county from that wherein the court sits, may be tried in the proper county by writ of *nisi prius* by virtue of the said statute.

(b) 2 Inst. 421. 423, 424.
C. Car. 349.
(c) 2 Inst. 424.
4 Inst. 160.
See the books cited to the other parts of this section.
(d) B. Cor. 231.
(e) 4 Coke, 43.
4 Inst. 160.
Dyer, 46. 261.
21 H. 7. 34.
Rastal, 47. 55.
(g) C. Car.

Sup. c. 7. s. 18. c. 23. s. 146. (f) B. Corone, 231. 4 Inst. 160. Raymond, 367. 348, 349. 6 Mod. 246, 247.

Sect. 3. Yet inasmuch as the king is not expressly named in this statute, and it is a general rule, that he shall not be bound by a statute which doth not expressly name him, it seems to have been generally holden, that wherever the king is a party, it is irregular

(h) F. Nisi Prius, 16.

2 Leonard, 110.

2 Inst. 424.

F. N. B. 241.

B. Nisi Prius, 16.

(i) 2 Inst. 424. F. N. B. 241. Crompton Jur. 211. 6 Mod. 246, 247. S. P. C. 156. Sum. 258. In Cro. Car. 348, 349. in an indictment of barratry, which seemed to require great examination, the court refused to grant a trial by *Nisi prius* at the motion of the attorney-general, till the king by his letters had signified his pleasure that it should be so tried. Vide 6 Modern, 123. (k) But not where the jury is to be from two counties, Dyer, 46. See the books cited to the precedent section under letter (e).

(l) Chap. 7. s. 17, 18. and ch. 23. s. 146.

(m) Ch. 25. from s. 7 to 14.

gular to grant a trial by *nisi prius* without his (h) special warrant, or the (i) assent of his attorney. But I do not find it denied, (h) but that regularly the court may grant it in an appeal in the same manner as in any other action.

Sect. 4. Having shewn already (l), that justices of *nisi prius* have power by 14 Hen. 6. c. 1. to give judgment in felony and treason, and how far they have power to give damages in an appeal, and having also shewn (m) in what cases they may arraign an appellee at the suit of the king, after a nonsuit of the party, I shall refer to what is there said concerning these matters.

CHAP. XLIII.

OF CHALLENGES.

AND now I am to shew in what manner the jurors returned for the trial of a criminal may be challenged.

I shall consider this subject so far as it relates,

1. To all persons in general.
2. With regard to aliens only.

As to the learning of this kind, so far as it relates to all persons in general.

(a) Hob. 235.

(b) Yelver. 23.

C. Car. 291.

Co. Litt. 156.

2 Inst. 431.

22 Edw. 3. 8.

2 R. Ab. 658,

659. 661.

12 H. 4. 10.

F. Chall. 64.

14 H. 7. 6. B. Chall. 73. 9 H. 5. 7. Ab. F. Challenge. 72. B. Chall. 50. 14 H. 7. 19. Ab. F.

Chall. 75. 3 State Trials, 379. Neither can a challenge be taken to the array after any of the jurors

are sworn, Hob. 235. (c) Cro. Car. 291. 3 State Trials, 379. (d) 22 Ed. 3. 8. 2 R. Ab. 658,

659. 661. 12 H. 4. 10. 14 H. 7. 6. B. Chal. 50. 53. 130. F. Chal. 143. 28 Assize, 44. Yelv. 23.

Yet adjudged, that a juror after he is sworn may be peremptorily challenged another day, though not on

the same wherein he is sworn, 32 H. 6. 26. Ab. B. Challenge, 193. 14 H. 7. 19. Ab. Challenge, 75.

S. P. C. 158. 2 Rich. 3. 19. Ab. B. Chall. 194. (e) 22 Ed. 3. 8. Yelverton, 23. 2 R. Ab. 658.

B. Challenge, 130. 28 Assize, 44. Co. Litt. 358. 14 H. 7. 6. B. Challenge, 50. 73. 75. F. Chal.

leuge, 64. 72. 143. 2 Hale, 270.

I shall endeavour to shew,

1. How

1. How jurors may be challenged on the part of the king.

2. How on the part of the prisoner.

And FIRST, viz. How jurors may be challenged on the part of the king.

Sect. 2. It seems (f) agreed, that by the common law the king might challenge peremptorily as many as he thought fit, of any jury returned to try any cause in which he was a party.

(f) Co. Litt. 156.
S. P. C. 162.
1 R. Abr. 645.

But this is remedied by 33 Edw. 1. commonly called An Ordinance for Inquests, which enacts as followeth: "Of inquests to be taken before any of the justices, and wherein our lord the king is party, howsoever it be, it is agreed and ordained by the king and all his council, that from henceforth, notwithstanding it be alleged, by them that sue for the king, that the jurors of those inquests, or some of them, be not indifferent for the king, yet such inquests shall not remain untaken for that cause; but if they that sue for the king will challenge any of those jurors, they shall assign of their challenge a cause certain, and the truth of the same challenge shall be inquired of according to the custom of the court."

Sect. 3. It seems to be clearly settled (g) at this day, that this statute, being general, extends as well to all criminal cases as civil. However, if the king challenge a juror before a panel is perused, it is (h) agreed, that he need not shew any cause of his challenge till the whole panel be gone through, and it appear that there will not be a full jury without the person so challenged. And if the defendant, in order to oblige the king to shew cause, presently challenge *touts paravaile*, (i) yet it hath been adjudged that the defendant shall be first put to shew all his causes of challenge, before the king need to shew any.

(g) Moor, 595.
S. P. C. 162.
Summary, 259.
Co. Litt. 159.
and the books cited to other parts of this section. Yet peremptorily challenges were taken for the queen in Throckmorton's trial, 1 Mar.

1 State Trials, 48. (h) 1 Ventris, 309, 310. S. P. C. 162. 2 State Trials, 744. 3 State Trials, 52. 869. Skinner, 82. Summary, 259. 2 Hale, 271. 4 Com. 347. (i) 3 State Trials, 52. Raym. 473, 474. Skin. 82. See 3 State Trials, 4. 4 State Tr. 177. 407.

As to the SECOND POINT, viz. How jurors may be challenged on the part of the prisoner.

Sect. 4. Having premised that a (k) peer can take no challenge to any of his peers; and that where several are tried on a joint (l) venire, a juror challenged and drawn as to one, cannot but be drawn as to all; † and that by 24 Geo. 2. c. 18. "No challenge shall be taken by a peer, or lord of parliament, to any panel of jurors for want of a knight's being returned in such panel, nor any array quashed by reason of any such challenge taken after that time;"

(k) 2 Rush. 94.
Moor, 621, 622.
Co. Litt. 156.
1 St. Tr. 164.
265.
Tr. per Pais, c. 9.
2 Hale, 275.
(l) Sup. c. 41.
s. 9.
Strange, 1023.

Rex v. B. of Worcester, K. B. Mich. 23 Geo. 2.

I shall farther endeavour to shew, †

1. How jurors may be challenged peremptorily;

2. How they may be challenged for cause.

As to the first particular, viz. How jurors may be challenged peremptorily :

(m) 4 State Tr. 105.
1 St. Tr. 601.
2 State Trials, 743, 744.
Layr's Case, 6 St. Tr. 245.
Townley's Case, Foster, 7. 63.

Having premised that the prisoner must take all such challenges himself, (m) even in such cases wherein he may have counsel ; † and also that before any juryman is brought to the book, the prisoner by leave of the court may have the whole panel once called over in his hearing, that he may take notice who do and who do not appear, in order the better to enable him to take his challenges ;

I shall endeavour to shew,

1. In what cases a peremptory challenge is allowable.

2. How many jurors may be so challenged.

As to the first particular, viz. In what cases a peremptory challenge is allowable.

(n) Co. Litt. 156.
Moor, 12
(o) Moor, 12.
Bndl. 42.

Sect. 5. I take it to be agreed, that a peremptory challenge was allowable by the common law in all (n) capital cases both upon indictments and (o) appeals, and also in (p) misprision of high treason.

(p) 3 Inst. 27. F. Challenge, 72. B. Challenge, 50. 14 H. 7. 7. B. Chall. 74, 75. 211. 3 H. 7. 2. But in no other case that is not capital, 2 State Trials, 254.

But it was enacted by 33 Hen. 8. c. 23 s. 3. " That it should not be allowed in any cases of high treason, or misprision of high treason." Nor do I know that any statute hath revived it to the latter of these ; for it is said, that the statute of 1 Philip and Mary, c. 10. which, by restoring the old course of the common law as to trials of treason, has revived (p) such challenges as to treason, doth not (q) extend to misprision of high treason.

(p) 3 Inst. 227.
S. P. C. 157, 158.

1 Anderson, 107, 108. Co. Lit. 156* 2 State Trials, 761, &c. But this is made a *quare*, Savil, 57.
(q) Yet 3 Inst. 27 a. it is said, that for misprision of treason one may peremptorily challenge, 35.

(r) F. Chal. 153.
105.

(s) S. P. C. 163.
Yet the same point is made a *quare*, S. P. C. 158.

(t) Co. Litt. 157.

(u) Sum. 259.
2 Hale 267.

(v) 1 Lev. 61.
Kelynge, 13.

Sect. 6. It hath been anciently (r) adjudged, and is holden both by (s) Staundforde and (t) Coke, that a man shall have the same peremptory challenges on an issue joined upon collateral matter alleged in avoidance of an outlawry for a capital crime, as he may on the general issue : but the contrary is holden by (u) Hale, and is said to have been (y) adjudged in the case of Okey and Berkstead (1).

But the other books which report the same case take no notice of this point. 1 Sid. 7.

As to the second particular, viz. How many jurors may be challenged peremptorily.

(z) Co. Litt. 156.
Crompt. 114.
9 H. 5. 7.

Sect. 7. It seems to have been the settled (z) rule of the common law. 14 H. 7. 7. B. Chall. 70, 74, 75. 217. 19 E. 4. 33. 3 H. 7. 2. Ab. B. Chall. 211. 17 Assize, 6. 17 Ed. 3. 23. Ab. B. Chall. 105. Trial per Pais, c. 9. S. P. C. 157, 158. See the books cited, c. 30. s. 2. Lamb. b. 4. c. 14. says, that it was doubtful at common law how many might be challenged.

(1) Charles Ratchiffe had been convicted of high treason, and in B. R. Mich. 20 Geo. 2. upon a collateral issue that he was not the same person, a peremptory challenge was insisted on, and refused

by Chief Justice Lee. Vide Foster, 42. Johnson's Case, ibid. 46. and Hargrave's Co. Litt. 157, note 8.

common law, wherever such challenge was allowed, to suffer the prisoner to challenge as many as he thought fit under the number of three full juries, *i. e.* not amounting to more than thirty-five. But if a criminal challenge more than that number, (a) it seems the more prevailing opinion, that he is to be dealt with as one that stands mute. (a) Sup. c. 30. s. 2.

Sect. 8. By 22 Hen. 8. c. 14. s. 7. made perpetual by 32 Hen. 8. c. 3. "No person arraigned for any petit treason, murder or felony, shall be admitted to any peremptory challenge above the number of twenty." But it seems (b) agreed, that 1 and 2 Philip & Mary, c. 10. which restores the course of the common law as to trials of treason, has revived the old challenge of thirty-five in trials of petit treason. (b) B. Chall. 217. 2 Hale, 260. 269. 3 Inst. 227. Vide supra, s. 5. and c. 25. s. 132. 134. S. P. C. 158. Co. Litt. 156.

Sect. 9. It seems to have been holden by Sir (c) Edward Coke, that he who challenges more than twenty upon an arraignment of felony, since the abovementioned statute of 22 Hen. 8. shall (d) neither forfeit his goods, nor have judgment of death, nor of *pain forte et dure*, but shall only be over-ruled as to his challenges so far as they exceed twenty, and put upon his trial. But this seems to have been doubted by Sir Matthew (e) Hale, and the contrary is holden by (f) Crompton, and seems more agreeable to the most natural construction of 22 Hen. 8. which seems to have intended no alteration as to the nature or effect of peremptory challenges, but only as to their number. To which may be added, that nothing is more common than for (g) subsequent statutes, which take from felons the benefit of clergy, (h) expressly to exclude those who challenge more than twenty, which would be needless if their challenge were only to be over-ruled, and did not subject them to judgment of (i) death, &c. (c) 3 Inst. 227. (d) Vide c. 30. s. 19. Stand. Prer. 46. (e) Sum. 260. Sed vide 2 Hale, 270. 345. 399. (f) Crompton, 114. (g) Sup. c. 33. s. 32. 45. 48. 59. 64. 66. 69. &c. (h) Vide sup. c. 33. s. 27. 36. 11 Coke, 31, 32. 35. S. P. C. 126. (i) Vide c. 33. s. 20. The words of the statute are, "that he be not admitted to

challenge, &c." the evident construction of which is, that any further challenge shall be disallowed or prevented, and being null from the beginning and never in fact a challenge, it can subject the prisoner to no punishment, but the juror shall be regularly sworn. 4 Com. 348.

As to the second particular, *viz.* How jurors may be challenged for cause.

Sect. 10. Having premised, that it is a (k) general rule, that wherever (l) the king is a party, as he is in every (m) indictment, and in some sort also in (n) appeals of felony, he who takes a challenge for cause must shew it presently, and shall not have time till the panel is perused, as the king shall where he takes a challenge; as hath been more fully shewn, sect. 3; and having also further premised, that after a prisoner hath challenged a juror for cause, and his cause hath been disallowed, or found against him, he may (o) challenge the same juror peremptorily, before he is (p) sworn; (k) Co. Litt. 158. F. Chall. 123. 3 State Trials, 235. S. P. C. 162. 2 R. Ab. 659. 38 Assize, 22. 1 Siderfin, 244. Cont. 19 Assize, 6. Ab. B. Chall. 107. (l) Except in inquests, F. Chall. (m) That cause must be shewn presently on indictments, Coke Litt. 158. 1 Siderfin, 244. 1 H. 5. 1. Ab. F. Challenge, 70. Skinner, 82. (n) That cause must be shewn presently in appeals, Coke Litt. 158. This is left a *quære*, S. P. C. 162. (o) Coke Litt. 158. 37 H. 6. 8. Ab. F. Chal. 48. B. Chal. 86. Con. 10 H. 4. 9. Ab. F. Chal. 180. (p) Vide sup. s. 1.

I shall endeavour to shew,

1. What shall be a good challenge of a juror, in respect of his honour or insufficiency.

2. What

2. What in respect of his indifferency.

And FIRST, As to the challenge of a juror for his honour or insufficiency.

Having premised that it is agreed to be a good challenge of (q) Co. Litt. 156. this kind that a juror is an (q) alien, (r) a minor, or a (s) villein; Thelwall, b. 1. c. 6. s. 14. 14 H. 4. 19. B. Challenge, 48. F. Challenge, 91. 2 R. Ab. 636. Calvin's case, 18. b. (r) Coke Litt. 157. 172. Litt. s. 259. Vide 7 and 8 Will. 3. c. 32. (s) 2 R. Ab. 657. Co. Litt. 156. 9 Edw. 4. 16. 26 Assize, 28. F. Chall. 135. B. Challenge, 64. 118. But the contrary is holden in the Year Book of 10 H. 7. 20. Ab. B. Challenge, 220. and a *quere* by the reporter and Brook.

I shall more fully endeavour to shew,

1. Where peerage is a good cause of challenge.
2. Where the want of freehold is a good cause of challenge.
3. Where infamy is a good cause of challenge.
4. Whether old age, sickness, or non-residence in the county, be, in any case, a good cause of challenge.

As to the first particular, viz. Where peerage is a good cause of challenge.

(t) 48 Ass. 6.
48 Ed. 3. 30.
B. Chall. 18.
37. 209.
Dyer, 314,
35 H. 6. 46.
Moor, 767.
Reg. 179.

Sect. 11. It is (t) agreed, that if a peer be returned on a jury and bring a writ of privilege, he shall be discharged. Also it seems to have been (u) holden, that even without such a writ he may either challenge himself, or be challenged by the party. *Quere*.

F. N. B. 165. (u) 23 E. 3. 18. B. Chall. 119. 2 R. Ab. 646. but his notes are not warranted by the books at large. Co. Litt. 157. 9 Coke, 49. 27 H. 8. 22. Con. 35 H. 6. 46. B. Challenge, 8. Finch, 506. 6 Coke, 53. F. Chall. 44. 1 Jones, 153. F. N. B. 166. Vide 3 Bac. Ab. 260.

As to the second particular, viz. Where the want of freehold is a good cause of challenge.

(v) Admitted by the statute of 21 Edw. 1. *de his qui ponendi sunt in assisis*, and by the Register. Vide Raymond, 485, 486. 1 Ventris, 366. Infra, sect. 21.

Sect. 12. At the common law there was no (v) necessity that jurors should have any freehold as to inquests before justices in eyre, or in cities or burghs, as hath been more fully shewn, chap. 25. sect. 21.

(x) Keilw. 46.
54. 92.

C. Eliz. 413.
See the citations to the next three letters, Litt. s. 464. and 2 R. Ab. 647, 648.
(y) 10 H. 6. 7.
Ab. F. Chall. 29.

Also it seems (x) agreed, that the common law doth not require that a juror should in any case have a freehold of any certain value; and upon this ground it hath been adjudged, that a freehold worth but (y) twenty shillings or (z) five shillings, or even a (a) penny, is still a sufficient qualification for a juror in such cases as are not within the statutes which require a freehold of a greater value.

B. Chall. 189. 19 H. 6. 9. Ab. F. Challenge, 32. B. Chall. 60. 2 H. 7. 13. B. Challenge, 152. 10 H. 6. 18. B. Chall. 192. (z) 3 H. 4. 4. Ab. F. Chall. 78. B. Chall. 32. (a) Keilway, 46.

(b) 28 Ass. 15. Also it hath been (b) adjudged, that the common law did not require that a jury should in any case have any freehold.

10 H. 7. 13. 3 State Trials, 135 to 140. Vide 16 H. 7. 14. 7 H. 6. 44. Ab. F. Chall. 24. B. Chall. 57. It seems to be holden, that by the common law it is a challenge only to the favour.

But

But this is not only contrary to what seems implied by all the authorities above cited, which, in saying that the common law did not require a freehold of any certain value, plainly seem to suppose that it required some freehold, but it hath been also contradicted by many express (c) authorities; agreeably to which it seems to be (d) settled at this day, that the want of freehold is a good challenge of a juror in all other cases not otherwise provided for by (e) statute, and consequently in a trial for high treason in London, as well as in any other county.

4 H. 4. 1. Vide Keilw. 54. Coke Litt. 156, 157. 2 R. Ab. 647. 7 H. 4. 1. Ab. B. Challenge, 34. F. Challenge, 58. 21 H. 7. 29. Ab. B. Chall. 90. 10 H. 7. 11. It seems taken for granted that issues in all cases are to be returned upon jurors, by which it seems to be implied that they ought to have land, &c. (d) 3 State Trials, 869. 4 State Trials, 874. 6 State Trials, 58. 245. (e) Vide infra, sect. 19, &c.

Sect. 13. But it seems agreed, that wherever the letter of the common or statute law requires that a juror should have a freehold, the meaning is fully satisfied by his having the (f) use of a freehold, and that it is not material whether he hath it in his own or his (g) wife's right, or whether it be (l) absolute or upon condition, or an estate of inheritance, or only (i) for term of one's own or another's life, so that it be in the same (k) county, wherein the suit is brought, and actually continue in the juror (l) till the time when he is sworn.

S. P. C. 160. B. Jurors, 14. (g) F. Chall. 27. 9 H. 7. 1. B. Chall. 157. 12 H. 7. 4. B. Chall. 160. Co. Litt. 156. (h) Co. Litt. 156. Keil. 167, 168. 2 R. Ab. 648. Con. 7 H. 4. 1. F. Chall. 158. But Bro. in abridging this case in title Challenge, 53, says *quod mirum*. (i) 9 H. 7. 1. 12 H. 7. 4. B. Chall. 160. Co. Litt. 156. B. Chall. 157. See F. N. B. 14. 16. (k) 9 H. 7. 1. B. Chall. 157. Co. Litt. 157. Rastall 18. 19 H. 6. 9. (l) 12 H. 7. 4. B. Chall. 160. Coke Litt. 157. 7 H. 4. 3. Ab. F. Challenge, 158.

Sect. 14. But the (m) statutes of Westminster the second, c. 38. and 21 Edw. 1. *de his qui ponendi sunt in assisis*, "None shall be put in assizes or juries, except in cities, burghs, or trading towns, who have not tenements to the yearly value of forty shillings, &c."

But it seems to have been (n) generally agreed, that a juror can neither be challenged by the parties for being returned contrary to these acts, nor allege such matter himself for his discharge, but must take his remedy by action against the sheriff, or by writ of privilege for his discharge.

F. Chall. 78. F. N. B. 166. 2 St. Tr. 744. But 38 Assize, 19. is contrary.

Sect. 15. By 2 Hen. 5. c. 3. "No person shall be admitted to pass in any inquest upon trial of the death of a man, nor in any inquest betwixt party or party in plea real, nor in plea personal, whereof the debt or the damage declared amount to forty marks, if the same person have not lands or tenements of the value of forty shillings (o) above all charges of the same; so that it be challenged by the party, that any such person so impanelled in the same cases, hath not lands or tenements of the yearly value of forty shillings above the charges as afore is paid."

Sect. 16. It hath been (p) adjudged, that this statute extends as well as to a collateral issue, as to the general one, but not to an

(c) Cro. Eliz. 413. Trial per Pais, c. 9. 3 H. 4. 4. Ab. F. Chall. 78. B. Chall. 32.

(f) Keilw. 46. 92. Dyer, 9. F. Chall. 27. 15 H. 7. 7. 5 Edw. 4. 7. B. Chall. 163. Co. Litt. 272. Plowd. 58. 15 H. 7. 13.

(m) Vide c. 25. a. 21, 22. 30.

(n) 2 Inst. 448. 28 Assize, 15. Ab. B. Chall. 106. 3 H. 4. 4. Ab. B. Chall. 32.

(o) Extended by 27 Eliz. c. 6. to 4l.

(p) Keilw. 92. 16 H. 7. 14. 2 R. Ab. 647, an 648.

(q) C. Ellr. 413.
Raym. 485.586.

an indictment or information for a crime not (y) capital; for the words are, "upon trial of the death of a man, nor in any inquest "between party and party in plea real or personal, &c."

(r) Vide sup. a.
13.

(s) Keilway, 92.
and B. Chall.
202.

Jurors, 14.
in an abridg-
ment of the
Year Book of
15 H. 7. 13. pl.

1. But I do
not find this
point in the
book at large.

(t) Keilw. 168.

(u) Vide Keilw.
92.

18 Edw. 4. 13.

Sect. 17. It seems, (r) agreed, that *cestuy que use* of any freehold in the same county of the yearly value of forty shillings is a good juror within this statute. And some have (s) holden, that the law is the same as to a feoffee of such lands in trust for another, or a (t) remainder-man of state of freehold expectant on a release for years. But this seems not to be maintainable, because the statute, in requiring that a juror shall have lands of the yearly value of forty shillings above all charges, plainly seems to intend that he ought to have lands of the clear (u) income whereof at the time he can expend so much; but a man cannot expend any thing out of lands whereof he is enfeoffed to the use of another, or wherein he has only a dry remainder.

19 H. 6. 9. F. Chall. 32. 36 H. 6. 23. 2 R. Ab. 647, 648, 649.

(x) 3 St. Tr.
135 to 140.

(y) Vide c. 25.
s. 132. 142,
143, 144.

Sect. 18. It hath been (x) adjudged, that this statute is repealed as to treasons by 1 (y) and 2 Philip & Mary, c. 10. which enacts, "that all trials for treason shall be according to the common law."

Sect. 19. By 23 Hen. 8. c. 13. it is recited, "That trials of "murders and felonies in cities, boroughs, and towns corporate "within this realm, having authority to proceed in the deliverance of such offenders, had been oftentimes deferred and delayed, by reason of challenge of such offenders, for lack of sufficiency of freehold, to the great hinderance of justice;" and thereupon it is enacted, "That every person and persons, being the king's "natural subject born, which either by the name of a citizen, or "of a freeman, or any other name, doth enjoy and use the liberties and privileges of any city, borough or town corporate where "he dwelleth or maketh his abode, being worth in moveable "goods and substance to the clear value of forty pounds, be "admitted in trial of murders and felonies in every sessions and "gaol-delivery, to be kept and holden in and for the liberties of "such cities, boroughs and towns corporate, albeit they have no "freehold; any act, statute, use, custom or ordinance to the contrary hereof notwithstanding."

Sect. 20. "Provided that this act no way extend to any knight "or esquire dwelling, abiding, or resorting in or to any such city. "&c."

Vide 1 Rich. 3.
c. 4.
27 Eliz. c. 6.

Sect. 21. By 11 Hen. 7. c. 21. and 4 Hen. 8. c. 3. special provision is also made for jurors in London in real and personal actions above the value of forty marks, for which I shall refer to the statutes at large.

Sect. 22. By 4 and 5 Will. & Mary, c. 24. "All jurors (other "than strangers upon trials *per medietatem linguæ*) who are to be "returned for trials of issues joined; any of the courts of king's "bench, common pleas or exchequer, or before justices of assize, "or *nisi prius*, oyer and terminer, gaol-delivery, or general "quarter-sessions of the peace in any county of this realm of "England,

" England, shall every of them have in their own name, or in trust for them, within the same county, ten pounds by the year at least above reprises, of freehold or copyhold lands or tenements, or of lands or tenements of ancient (2) demesne, or in rents, or in all or any of the said lands, tenements or rents in fee-simple, fee-tail, or for the life of themselves or some other person: and that in every county in Wales, (1) every such juror shall have in the same county six pounds by the year at least, in manner aforesaid, above reprises."

See Townley's Case, Foster, 7. that if a juror have freehold and copyhold which together amount to 10l. a year it is sufficient.

(2) But by the common law a freehold in ancient demesne was not sufficient. 9 H. 7. 1. pl. 2. B. Chall. 157. Co. Litt. 156.

Sect. 23. But by 4 and 5 Will. & Mary, c. 24. it is provided, " That it shall be lawful to return any person on a *tales* in England who shall have five pounds by the year, or in Wales who shall have three pounds by the year in manner aforesaid."

Sect. 24. Also there is a saving to " all (a) cities, boroughs and towns corporate, of their ancient usage of returning jurors of such estate, and in such manner as before had been used and accustomed." But there is no express saving of any trial contrary to the purview of this statute and made good by some other; and therefore it may be argued, that the trial of felonies in towns by jurors worth forty pounds in goods by virtue of the above-cited statute of 23 Hen. 8. is no longer lawful, it not being a trial by usage, but by statute. Yet seeing 4 and 5 Will. & Mary seems plainly to have a view to trials in counties only, and the statute of 16 and 17 Car. 2. c. 3. which is penned almost in the very same words, was taken (b) no way to alter the former method of trials in towns, lest it should cause a failure of justice; and it being generally impracticable to get a sufficient number of such freeholders as the statute requires in towns, it seems a reasonable construction of 4 and 5 Will. & Mary, that the trial by 23 Hen. 8. still continues lawful as before.

(a) Vide s. 12. and there is the like exception in 27 Eliz. c. 6. s. 7, and in 16 and 17 Car. 2. c. 3. s. 4.

(b) 1 Vent. 366.

But it hath been (c) agreed, that for trials in London for high treason, every juror ought to have such freehold or copyhold as is required by 4 and 5 Will. & Mary.

(c) 4 St. Tr. 186. and in Francia's Trial.

† By 3 Geo. 2. c. 24. s. 18. made perpetual by 6 Geo. 2. c. 37. " Any person having an estate in possession in land in their own right, of the yearly value of twenty pounds or upwards over and above the reserved rent payable thereout, such lands being held by lease or leases for the absolute term of five hundred years or more, or for ninety-nine years, or any other term determinable on one or more life or lives, the name of every such person shall and may and is hereby directed and required to be inserted in the lists (in the manner directed by 7 and 8 Will. 3. c. 32. and 3 and 4 Ann. c. 18.) in order to their being inserted in the freeholders book, and the persons appointed to make such lists are hereby directed to insert them accordingly, and such leaseholder or leaseholders shall and may be summoned to serve on juries in like manner as freeholders may be summoned and impanelled,

(1) This is the first time that copyholders (as such) were admitted to serve upon juries in any of the king's courts, though they had before been ad-

mitted to serve in some of the sheriff's courts, by 1 Rich. 3. c. 4. and 9 Hen. 8. c. 13.

“panelled to serve on juries by virtue of this or any other act
“or acts of parliament for that purpose, and be subject to the like
“penalties for non-appearance.”

† By 3 Geo. 2. c. 25. s. 19. “The sheriffs of the city of London shall not impanel or return any person or persons to try any issue joined in any of his majesty’s courts of king’s bench, common pleas and exchequer, or to be or serve on any jury at the sessions of oyer and terminer, gaol-delivery, or sessions of the peace, to be had or held for the said city of London, who shall not be an householder within the said city, and have lands, tenements, or personal estate to the value of one hundred pounds; and the same matter and cause alleged by way of challenge, and so found, shall be admitted and taken as a principal challenge, and the person or persons so challenged shall and may be examined on oath of the truth of the said matter.”

† By 3 Geo. 2. c. 25. s. 20. “The sheriffs or other officers to whom the returning of juries doth and shall belong, for any county, city or place respectively, shall not impanel or return any person or persons to serve on any jury for the trial of any capital offence, who at the time of such return would not be qualified in such respective county, city or place to serve as jurors in civil causes (1) for that purpose; and the same matter and cause alleged by way of challenge, and so found, shall be admitted and taken as a principal challenge, and the person or persons so challenged shall and may be examined on oath of the truth of the said matter.”

† By 4 Geo. 2. c. 7. s. 3. made perpetual by 6 Geo. 2. c. 37. it is recited, that by the very frequent occasions there are for juries in Middlesex and by the small number of freeholders that are in the said county the sheriffs may be under difficulties of procuring juries, it is therefore enacted, “That all leaseholders upon leases where the improved rents or value shall amount to fifty pounds per annum or upwards, over and above all ground rents or other reservations payable by virtue of the said leases, shall be liable and obliged to serve upon juries when they shall be legally summoned for that purpose.”

As to the third particular, viz. Where infamy is a good cause of challenge.

Sect. 25. It seems, that it is a good challenge of a juror that he is (a) outlawed, or that he hath been (b) adjudged to any (2) corporal punishment whereby he becomes infamous, or that he hath been convicted of treason, or (c) felony, or (d) perjury, or conspiracy,

(a) Co. Litt.

158.

21 H. 6. 30.

11 H. 4. 41.

B. Indict. 2.

2 R. Ab. 657.

B. Chall. 64.

F. Process. 208. C. Car. 154. Trial per Pais, c. 9. (b) Co. Litt. 6. 156. Trial per

Pais, c. 9. (c) Co. Litt. 6. 158. 2 Bulst. 154. 2 St. Tr. 521 to 524. Trial per Pais, c. 9. Con.

1 Lev. 263. (d) Bracton, lib. 4. c. 19. s. 2. Fleta, lib. 4. c. 8. s. 2. Trial per Pais, c. 9.

(1) For the qualifications of jurors in civil causes, vide sup. 4 and 3 Will. & Mary, c. 24. and 3 Geo. 2. c. 24. sect. 13.

(2) It is now agreed that it is not the mode of

punishment that makes the party incompetent, but the conviction for the crime; and with respect to a conviction for conspiracy, vide vol. 1. p. 41. n. 4.

(e) conspiracy, or of (f) forgery on 5 Eliz. c. 14. or attainted in an (g) attaint for giving a false verdict. And it hath been (h) holden, that such exceptions are not saved by a pardon. And it was anciently (i) holden, that excommunication was also a good challenge. Yet it (k) seems, that none of the above-cited challenges are principal ones, but only to the favour, unless the record of the outlawry, judgment, or conviction be produced, if it be a record of another court, or the Term, &c. be shewn, if it be a record of the same court.

distinction. (f) Coke Litt. 6. and the reason seems to be, because the statute is express, that the offender shall be set on the pillory, &c. But it was adjudged, 33 H. 6. 55. Ab. F. Chall. 41. B. Chall. 15. 2 R. Ab. 649. that a conviction on 1 H. 5. 3. was not a good challenge to a juror, because it was not a conviction on an action at the common law. Vide 41 Ed. 3. 39. F. Dec. tant. 11, 12. (g) See the authorities under the precedent letter. (h) 2 State Trials, 521 to 524. 2 Bulstrode, 151. 2 Hale, 278. Vide c. 37. s. 48 to 53. (i) Co. Litt. 158. (k) Co. Litt. 157. 33 H. 6. 55. 43 Assize, 40. 8 H. 5. 11. 21 Edw. 4. 74. 2 R. Abr. 649, 650, 658. 33 H. 6. 1. B. Chall. 15. 117.

(e) See B. 1. p. 449. Co. Litt. 6. 158. It seems to be holden, that the conviction for conspiracy ought to be at the king's suit. But 33 H. 6. 55. B. Chall. 15. F. Chall. 41. make no such

As to the fourth particular, viz. Whether old age, or sickness, or non-residence in the county, be in any case a good cause of challenge of a juror.

Sect. 26. I take it to be agreed, that notwithstanding the (l) statute of Westminster 2. c. 31. be express, "that neither old (l) 1 Inst. 346. 117, 418. men above the age of seventy years, nor persons perpetually " sick, nor those who are infirm at the time of their summons, " nor those who do not reside in the county, shall be put in juries, " or in the lesser assizes;" and that therefore such persons may sue out a writ of (m) privilege for their discharge, grounded on this statute; yet if they be (n) actually returned and appear, they can neither be challenged by the party, nor excuse themselves from not serving if there be not enough without them.

(m) F. N. B. 165, 166. Reg. 179, 180. (n) 2 State Trials, 744. 2 Inst. 118.

By 7. and 8 Will. 3. c. 32. infants under twenty one are exempted from juries.

As to the SECOND POINT, viz. What shall be a good challenge of a juror in respect of his indifferency.

Sect. 27. It is expressly enacted by 25 Edw. 3. c. 3. which seems to have been made in (o) affirmance of the common law, "That no indictor shall be put in inquests upon deliverance of " the indictees of felonies or (p) trespass, if he be challenged for " that same cause by him which is so indicted." And this exception against a juror, that he hath found an indictment against the party for the same cause, hath been adjudged good, not only upon the trial of (q) such indictment, but also upon the trial of another indictment or action (r) wherein the same matter is either in question, or happens to be material, though not directly in issue.

(o) 12 Ass. 56. 19 Assize, 6. B. Chall. 101. 107. S. F. C. 118. (p) Yet in 7 Edw. 4. 1. Ab. B. Chall. 166. F. Chall. 53. it is holden to be no principal challenge in trespass.

(q) 2 State Trials, 379. 4 State Trials, 186. In the Year Book of 40 Assize, 10. Ab. B. Challenge, 112. an indictor being returned on the petit jury and giving a verdict, was fined because he did not challenge himself. Yet 27 Assize, 13. Ab. B. Challenge, 120. and F. Challenge, 137. it is not allowed to be a principal challenge, even upon the trial of the same indictment. (r) 8 H. 4. 2. Ab. B. Chall. 42. F. Chall. 79. Co Litt. 157. 1 Siderfin, 244. 2 R. Ab. 649.

Sect. 28. It hath been allowed a good cause of challenge on the part of the prisoner, that the juror (s) hath a claim to the forfeiture which shall be caused by the party's attainer or conviction

(s) 1 St Tr. 952.

(t) 21 H. 7. 29. viction; or that he hath declared his (t) opinion before-hand that the party is guilty, or will be hanged, or the like. Yet it hath been (u) adjudged, that if it shall appear that the juror made such declaration from his knowledge of the cause, and not out of any ill-will to the party, it is no cause of challenge. B. Chall. 90. Cooke's case, 4 St. Tr. 748. and ruled, that the prisoner shall not examine a juror concerning such matter on a *voir dire*, because it sounds in reproach. Vide 49 Raw. 3. 1. Ab. B. Chall. 25. F. Chall. 100. (u) 7 H. 7. 25. Ab. B. Chall. 55. F. Chall. 22. 20 H. 6. 40. 2 R. Abr. 657. Vide 49 Edw. 3. 1. Ab. B. Chall. 25. F. Chal. 100. *Sed quare*; for by Treby, Chief Justice, no juror has any right to declare his opinion positively until he has heard the evidence in the cause. Cooke's case, 4 St. Tr. 748.

(z) Kely. 9. Sect. 29. But it hath been (x) adjudged to be no good cause of challenge, that the juror hath found others guilty on the same indictment; for the indictment is, in judgment of law, several against each defendant, for every one must be convicted by particular evidence against himself. 4 St. Tr. 704. Cranbourne's case.

(y) Stapleton's trial, 3 State Tr. 317. Sect. 30. It hath been (y) ruled to be a good challenge of a juror on the part of the king, that he hath given his dogs the names of the king's witnesses.

(i) Co. Litt. 156. Sect. 31. It seems to be (z) settled, that where the king is a party he may take either a principal challenge, or to the favour. 4 H. 7. 8. F. Chall. 63. 44 Edw. 3. 38. B. Chall. 22. 2 R. Abr. 646.

(a) F. Chall. 63. Sect. 32. It is (a) said, that the subject cannot take a challenge for the favour against the king, because every one is bound by his allegiance to favour the king. But if (b) no more be meant by these books, than that such a challenge is not good without shewing some actual partiality in such sheriff or juror, or some particular cause in respect whereof the king may influence them, it seems not clearly settled how the king in this respect hath a greater (c) privilege than the subject, which yet it seems agreed (d) that he hath. Co. Litt. 156. 2 R. Ab. 646. 4 H. 7. 8. Tr. per Pais, c. 9. 3 St. Tr. 235, 236. 3 St. Tr. 661. C. Eliz. 663. (b) 2 R. Abr. 640. 646.

1 Ventris, 309. (c) For in the Year-book of 20 H. 6. 40. ab. 2 R. Ab. 641. it is holden in the case of the subject to be no cause of challenge, that the sheriff hath malice against the party, without shewing some particular instance of partiality. (d) See the books cited to the other parts of this and the next section.

(e) F. Chall. 17. Sect. 33. It hath been (e) said to be no principal challenge where the king is a party, that a juror is of the king's livery, or his immediate tenant: but it is said, that a challenge for such cause ought to conclude to the (f) favour. But these matters seeming to be unsettled, I shall leave them to be farther considered by others.—And for other matters relating to challenges, being not so proper for this treatise, I shall refer to the (g) books which more particularly treat of them. S. P. C. 162. 2 R. Abr. 66. It is said generally in some books, that it is a good challenge of a juror that he is the king's menial servant, or a valet of the crown. Co. Litt. 156. F. Cor. 63. Tr. per Pais, c. 9. 2 R. Abr. 646. But 3 State Tr. 235, 236. 4 State Tr. 70. and in other books, the contrary is ruled. B. Chall. 154. 4 H. 7. 3. Cro. Eliz. 663. (f) Vide sup. a. 33. (g) Co. Litt. 157, 158. Tr. per Pais, c. 9. 2 R. Abr. 635, 666.

And now I am, in the second place, to consider the learning of challenges, so far as it particularly relates to aliens.

Sect. 34. By 28 Edw. 3. c. 13. s. 2. it is enacted, "That in all inquests and proofs to be taken or made amongst aliens and denizens, be they merchants or (h) other, as well before the mayor of the staple as before any other justices or ministers, although

(A) F. Inquest, 82. 3 Ed. 4. 11.

" although the king be party, the one half of the inquest or proof shall be denizens, and the other half aliens, if so many aliens and foreigners be in the town or place where such inquest or proof is to be taken, that be not parties nor with the parties in contracts, pleas, or other quarrels, whereof such inquests or proofs ought to be taken: and if there be not so many aliens, then shall he put in such inquests or proofs, as many aliens as shall be found in the same towns or places which be not thereto parties, nor with the parties, as aforesaid, and the remnant of denizens, which be good men, and not suspicious to the one party nor to the other."

Sect. 35. By 9 Hen. 6. c. 29. the above-recited statute of 2 Hen. 5. which requires that the jurors in certain cases shall have tenements to the yearly value of forty shillings, " shall be no wise prejudicial to this statute of 28 Edw. 3. nor extend itself but only to the inquests to be taken between denizen and denizen."

Also it seems agreed, (i) that the subsequent statutes which require that jurors shall have tenements to a greater value, no way repeal the said statute of 28 Edw. 3. Yet it seems, (k) that the English half of the jury ought to have tenements to the same value as in other cases. And it hath been (l) adjudged, that the words "*quorum quilibet habeat quatuor libratus terrarum*, &c." shall be applied to the English only.

Sect. 36. It seems (m) agreed, that there is no need that any of those who find an indictment against an alien should be aliens.

Sect. 37. Also it hath been adjudged, (n) that the said statute of 28 Edw. 3. is repealed as to trials for treason, by (o) 1 and 2 Philip & Mary, c. 10. which enacts, " That all trials for treason be according to the course of the common law." Yet it seems that the (p) king may, if he think fit, make a special grant to an alien to be tried for treason by a jury whereof the one half shall be aliens.

Sect. 38. Also it hath been adjudged (q), that the said statute of 28 Edw. 3. doth not extend to an appeal, or other action by an alien against an alien, for the words are, " all inquests, &c. between aliens and denizens."

enacted, that in pleas between aliens concerning the staple there shall be a jury of none but aliens. S. P. C. 139.

Sect. 39. It is (r) holden, that by " denizens" in this statute are meant not only those who are born within the king's ligeance, but also those who are made denizens by the king's letters patent.

Sect. 40. It seems to be (s) settled, that no alien, whether he be plaintiff or defendant, can take advantage of the statute, unless he

2 R. 2. 643. F. Inquest, 22. Trial, 71. Summary, 261. B. Panel, 3. Con. 21 H. 7. 32. B. Deniz. 4. S. P. C. 259. It is holden, Cro. Eliz. 866, by two judges against one, that though the defendant appear by the declaration to be alien, yet the common venire is well awarded, unless a venire de medietate be prayed.

(*t*) For the form of such a prayer, *Rast. Ent. 7. 158, 159. 264, 265. Dyer, 144.* he (*t*) pray it in time; ~~and~~ that if he have neglected to pray it before the return of a common *venire*, he can neither except to such *venire*, nor pray *tales* or other process *de medietate linguæ*. S. P. C. 259. Plowden, 2. 2 Hale, 272. 3 Bac. Abr. 263.

(*z*) Dyer, 304.

(*y*) But *quære* of his reason, for it seems contrary to what is admitted in the whole argument of Calvin's case, 7 Coke. See 1 State Trials, 572, 573. 4 St. Tr. 632, &c.

Sect. 41. It was (*z*) holden, even before the union of the two kingdoms under king James the First, that no Scot was an alien within the meaning of this statute, not only because the Scotch language is the same with the English, but also (*y*) because the Scots were never reckoned aliens, but rather subjects.

(*s*) Dyer, 144.

Rast. Ent. 7. 159. 264.

(*a*) *Rastal, 265.*

10 Coke, 104.

(*b*) 3 St. Tr. 3.

(*c*) S. P. C. 158.

B. Denizen, 4.

B. Panel, 3.

Bon. F. Tr. 30.

by five judges,

against one.

Sect. 42. Note, That (*z*) some of the precedents for the award of a *venire* of a jury of half denizens and half aliens, in pursuance of 28 Edw. 3. mention, that the aliens shall be of the same country whereof the party alleges himself; and others direct (*a*) generally, that one half of the jury shall be aliens, without specifying any country in particular. And this form seems most agreeable to the statute, which speaks of aliens in general; and it seems to be confirmed both by late (*b*) practice, and the greater number of (*c*) authorities.

(*d*) 2 R. Abr.

613.

Vide S. P. C.

158.

Sect. 43. If on a *venire* of half denizens and half aliens, the sheriff return twelve as aliens, and among them some who in truth are not such, it seems (*d*) that the party shall not be concluded by such return, but may, notwithstanding, challenge the array for want of a sufficient number of aliens.

(*e*) C. Eliz. 818.

811.

But this being

only a mis-re-

turn is helped

by a verdict in

cases within the statute of jeofails.

Sect. 44. It seems (*e*) agreed, that the return of a *venire* of half denizens and half aliens, ought to specify which of the jurors are denizens and which aliens, and that a full number of each must appear to be sworn.

35 Hen. 8. c. 6.

Sect. 45. If one or more be wanting to make up the full number of six denizens or aliens, the justices of *nisi prius*, by a reasonable (*f*) construction of the statutes which give a *tales de circumstantibus*, may award such a *tales* for so many denizens or aliens as shall be wanting.

(*f*) 10 Co. 104.

Cro. Eliz. 305.

818. 841.

CHAP. XLIV.

OF TRIAL BY PEERS.

AS to the Trial by Peers, having shewn already, ch. 39. s. 1. that a peer has no more privilege than a commoner as to having the benefit of counsel; and ch. 40. s. 4. that a peer cannot challenge any of his peers;

I shall now endeavour to shew,

1. The particular form and solemnity to be observed in such a trial.

2. Who

2. Who are to be triers.
3. Who are to be so tried.
4. As to what crimes.
5. Upon what suits and pleas.
6. Whether a peer can waive a trial by his peers.
7. In what manner the peers may require the opinion of the lord steward or of the judges.
8. Whether the court may be adjourned.

As to the FIRST POINT, viz. The particular form and solemnity to be observed in such trial.

Sect. 1. When an indictment is found against a peer for a crime for which he ought to be tried by his peers, the king by his commission under the great seal, reciting the indictment, constitutes some (a) peer high (b) steward of the kingdom *pro hac vice*, and by the same commission gives him power to receive and proceed on such indictment, and requires the peers to be attendant on him, and the lieutenant of the Tower to bring the prisoner before him.

(a) S. P. C. 152.
Year-book, 13 H. 8. 11.
4 Inst. 59.
Barr. 234.
Ante, c. 2. p. 5.
(b) 1 H. 4. 1.
3 Inst. 28.
13 H. 8. 11.
S. P. C. 152.

The necessity of making a high steward for the trial of an impeachment for high treason was denied by the house of commons in the Earl of Danby's case, 2 State Trials, 198.

Sect. 2. Also (c) a *certiorari*, which may either have the same date with the steward's commission, or a subsequent one, goes out of chancery to certify the indictment before the steward *indilatè*; and the steward by his precept, under his seal, directed to those before whom the indictment was found, appoints a certain day and place at which it shall be certified. And another writ goes out of chancery to the lieutenant of the Tower, &c. to bring the prisoner before the steward at such a day and place as he shall appoint; and thereupon the steward by his precept under his seal directed to the lieutenant, &c. appoints the day and place.

(c) 3 Inst. 128.

Sect. 3. Also the steward makes (d) another precept under his seal to the serjeant-at-arms, appointed to serve him during the time of his commission, to summon the (e) peers before him at such a place, day and hour, &c.

(d) This is to be intended when the parliament is not sitting, but is either dissolved or pro-

rogued. 3 State Tr. 659 to 665. 3 Inst. 28. S. P. C. 152. 13 H. 8. 11. (e) It is said, 13 H. 8. 11. S. P. C. 157. that the steward shall make such precept to cause twenty or eighteen peers to come before him; but Sir Edward Coke, 3 Inst. 28. says, that the precept doth not mention any certain number; and now by 7 Will. 3. all the peers are to be summoned. Kelynge, 56.

Sect. 4. At the time appointed the steward, attended (f) with six or (g) seven serjeants-at-arms, carrying maces before him, and by the king-at-arms, and the usher of the black rod, enters the place of trial uncovered and ascends a chair of state, which always is (h) provided for that purpose, and then the (i) clerk of the crown, or a (k) master in chancery, delivers to him his commission, and he delivers it again to the clerk (l) of the crown, and then a serjeant-at-arms makes three (m) oyes, and a proclamation for silence in the name of the steward, and then the lord steward

(f) 3 Inst. 28.
(g) Rushw. 96.
2 Jones, 94.
(h) 3 Inst. 28.
S. P. C. 152.
1 H. 4. 1.
13 H. 8. 11.
(i) 3 Inst. 21.
(k) 1 Rushw. 96.
(l) 3 Inst. 28.
1 Rushw. 96.
(m) 1 H. 4. 1.
3 Inst. 28.

steward and all the other lords (*n*) standing up uncovered, the commission is read, and the (*o*) usher on his knees delivers to the steward a white *roll*, who delivers it to him or to a serjeant-at-arms, who holds it by him during the trial; then an (*p*) *oyes* is made, and a command given in the name of the steward to all justices and commissioners, to certify all indictments, &c. which being delivered into court, the clerk of the crown reads the return. Another *oyes* is made that the lieutenant of the Tower, &c. return his writ and precept, and bring the prisoner to the bar, and then the prisoner is brought to the bar, the (*q*) gentleman-gaoler of the Tower carrying the axe before him, which being (*r*) done the clerk reads the return.

(*n*) 3 State Tr. 955.
 4 State Trials, 350.
 (*o*) 3 Inst. 28.
 1 Rushw. 96.
 (*p*) 3 Inst. 28.
 (*q*) 3 St. Tr. 955.
 4 State Trials, 355.
 (*r*) By 3 Inst. 28, all this is to precede the call of the peers and their seating themselves; but 1 H. 4. 1. and 13 H. 8. 11. and S. P. C. 152. 1 State Trials, 966. 3 St. Tr. 955, 966. 4 State Trials, 353 to 355. and 2 Jones, 55. are contrary.

Sect. 5. All things being thus prepared, the high steward (*s*) acquaints the prisoner with the nature of the crime, and such like matters proper for such an occasion, and then the clerk of the crown arraigns him, (*t*) but is not to insist on his holding up his hand.

(*s*) 3 Inst. 29.
 S. P. C. 152.
 2 Jones, 55.
 and the other books cited to the precedent section.
 (*t*) Raym. 408. 3 State Trials, 658. 957. 2 State Trials, 702, 703.

Sect. 6. After the prisoner hath pleaded, and put himself upon God and his peers, the king's counsel go through with their evidence; and after the prisoner hath made his defence, and the king's counsel have been fully heard, the prisoner is withdrawn from the bar, and the lords go together to consider of their evidence; and when a majority of them are agreed, they return to the place of trial, and the lord steward demands of them one by one, beginning with the puisne, whether the person arraigned be guilty or not guilty, and they (*u*) all answer one by one, not upon their oaths, but on their (*x*) honours and ligeances. And the lord steward gives judgment according to the determination of the (*y*) majority, being more than twelve, but gives no vote himself on a trial by (*z*) commission, but only on a trial by the house of peers, while the parliament is sitting.

(*u*) 3 Inst. 30.
 2 Inst. 49.
 F. Corone, 31.
 1 H. 4. 1.
 S. P. C. 152.
 13 H. 8. 12.
 2 Jones, 55, 56.
 10 Ed. 4. 61.
 (*x*) See the books above cited, and 1 Coke, 30. 2 Inst. 49. (*y*) 1 H. 4. 1. 13 H. 8. 12. S. P. C. 153. 3 Inst. 30. Moor, 62? (*z*) 2 State Trials, 702. 3 State Trials, 657. 679.

As to the SECOND POINT, *viz.* Who are to be triers.

(*a*) 2 Inst. 48.
 Co. Litt. 150.

Sect. 7. It is agreed, (*a*) that none but lords who have a vote in parliament can pass on such a trial; and before 7 Will. 3. c. 3. when the trial was by commission, it seems to have been the practice for the lord steward to cause as many temporal lords to be summoned as he thought fit; and for the lords so summoned alone to pass on the trial. But this is remedied by that statute, set forth more at large in the next section.

(*b*) Ab. F. Cor. 34. cited S. P. C. 153.
 Brook, in a note of the same case, Corone, 153. says, that they shall make proxies. Sir Edward Coke, 3 Inst. 31. says, that they must withdraw and make their proxies.

Sect. 8. It is agreed, that at a trial before the house of peers, every temporal lord who has a right vote in that house has a right to pass on such trial. But it is said in the Year Book of 10 Ed. 4. 6. (*b*) pl. 17. that upon the trial of a peer in parliament, the bishops shall make a procurator, because they cannot consent

sent to the death of a man: but this is (c) said to be wholly grounded on a canon not in force at that day. Neither do I find any precedent wherein they have been excluded against their consent, or have withdrawn themselves without a protestation of their right, or making a proxy; (d) and the judgment against the Spencers was expressly reversed for this reason among others, because the bishops were not present; and in the precedents chiefly insisted on of the other side, it is not expressly said that they were not present, and it doth not clearly appear but that they might be included under the word "peers."

(c) See Bishop Stillingfleet, Of the Bishop's Jurisdiction in Criminal Cases, c. 2, 3, and Hunt's Argument, c. 9, 10, 11.

(d) Fost. 248.

However, it hath been always (e) admitted that they have a right to vote in a bill of attainder: also in the Earl of Danby's case, they were adjudged (f) by the house of lords to have a right to vote in questions previous to the trial of a peer, though this was strongly opposed by the house of commons. And their right to vote at the trial itself, if they think fit, seems fully implied in 7 Will. 3. c. 3. which enacts, "That upon the trial of any peer or peeress for treason or misprision, all the peers who have a right to sit and vote in parliament shall be summoned twenty days at least before every such trial, to appear at every such trial, and that every peer so summoned and appearing, shall vote at the trial; every such peer first taking the oaths of allegiance and supremacy, and subscribing and repeating the declaration against popery."

(e) See Hunt's Argument for the Right of Bishops &c. c. 12. and Stillingfleet, Of the Bishops Jurisdiction in Capital Cases, c. 1. s. 3. and c. 2.

(f) 2 State Tr. 742.

As to the THIRD POINT, viz. What persons are to be thus tried.

Sect. 9. It is (g) agreed, that no lord of any (h) other country, or even of (i) Scotland, before the union under Queen Anne, or of (k) Ireland, (1) nor the son and heir (l) apparent of any peer, or any other man whatsoever who is not at the time a lord of parliament, hath any right to such a trial in this kingdom; but that every lord of parliament hath a right to such a trial (m) by virtue of that clause in Magna Charta, ch. 29. "*Nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum vel per legem terræ.*"

(g) 2 Inst. 48. 3 Inst. 30.

Co. Litt. 156.

(h) Vide F.

Brief, 473.

20 Ed. 4. 6.

B. Noms de

Dignity, 49.

(i) 9 Coke, 117.

Vide 32 Edw. 3.

35.

B. Noms de

Dignity, 29.

(k) Vide sup. c. 25. s. 50. (l) B. Treason, 2. (m) Such trial is said to be very ancient. 2 Inst. 45, 50.

Sect. 10. It is recited by 20 Hen. 6. c. 9. to have been a doubt in the law of England how ladies of great estate in respect of their husbands, peers of the land, married or sole, that is to say, duchesses, countesses, or baronesses, shall be put to answer and judged upon indictments of treasons and felonies, because they are not mentioned in the said statute of Magna Charta, ch. 29.; and thereupon, to put out such doubts, (n) it is declared, "That such ladies so indicted of any treason or felony, whether they be married or sole, shall thereof be brought to answer, and judged before such judges and peers of the realm, as peers of the realm should be, if they were indicted or impeached of such treasons or felonies."

(n) 2 Inst. 45.

50. and see the

Duchess of

Kingston's case,

11 State Trials.

Sect. 11. It seems agreed, (p) that a queen, the king's con-

(p) 2 Inst. 50.

Crompton,
sort, Juris, 33.

(1) That is before the Union with Ireland, but now, by the Act of Union, the representative peers of Ireland have a right to vote.

(q) See the citations to the next letter.

(r) 2 Inst. 50.
Co. Litt. 16.
6 Coke, 53.
Dyer, 79.

sort, and also a queen dowager, whether she continue sole after the king's death, or take a second husband, be he a peer or a commoner; and also all peeresses by birth, whether they be sole or (q) married to peers or commoners; and also all marchionesses and viscountesses are intitled to a trial by the peers, though none of them be expressly mentioned in this act, or in Magna Charta. But it is (r) agreed, that a peeress by marriage loses her dignity by marrying a commoner.

(s) S. P. C. 152.

(t) 3 Inst. 30.

But in F. Cor.

161. it seems admitted that a bishop shall be tried by the peers, in cases proper for such trial; and B.

Trial, 142. cites a note from F. Chull, 115.

wherein he says it was holden that bishops shall be tried by the peers; but this is mistaken, for there is no such opinion there holden.

(u) Co. Litt. 97.
Fuller's Ch. History, b. 6. f. 292.

Sect. 12. It is said by (s) Staundforde and (i) Coke, that those who are lords of parliament not in respect of their nobility, but of their baronies which they hold of the crown, as bishops now do, and some abbots and priors (u) did formerly, are not within the intent of Magna Charta to be tried by the peers. And (x) Selden seems clear, that this is the only privilege which bishops have not in common with other peers. And those who seem (y) most for the contrary opinion admit that the law hath been generally so taken. Neither do they produce any precedent where a bishop or abbot has been tried by the peers upon a commission; but on the contrary admit that there are (z) two precedents of their being tried by the country. And it is said by (a) others, that there are divers precedents of this kind; yet Selden, with his utmost diligence, seems able to produce but two clearly and fully come up to his point, viz. those of Archbishop Cranmer and Bishop Fisher. However it seems to be (b) agreed, that while the parliament is sitting a bishop shall be tried by the peers.

(r) Selden of Baronage, 152. Titles of Honour, 1st edit. p. 347. (y) Hunt's Argument for the Bishops' Right in Capital Cases, ch. 18. Gibs. Codex, 154. Stillingfleet, Of the Bishops' Jurisdiction in Capital Cases, c. 4. (z) B. Tr. 112. See Hunt's Argument, c. 18. and Stillingfleet, Of the Bishops' Jurisdiction in Capital Cases. (a) S. P. C. 153. Seld. Baron. 112 to 155. Vide 3 Inst. 30. (b) See Hunt's Argument, c. 18. Trials per Pais, c. 2. par. 8. 1 State Trials, 371. Stillingfleet, Of the Bishops' Jurisdiction in Capital Cases. B. Abr. Trial, 142. contrary.

As to the **FOURTH POINT**, viz. As to what crimes a peer is to be tried by his peers.

(c) 3 Inst. 30.

2 Inst. 40.

S. P. C. 153.

1 Bulst. 198.

(d) S. P. C. 158.

1 Bulst. 198.

(e) See the

books above

cited.

2 State Tr. 3.

F. Corone, 161.

(f) 1 Bulst. 198, 199.

3 Inst. 30.

12 Coke, 93.

12 Coke, 93.

Sect. 13. I take it to be (c) agreed, that he has a right to be so tried upon an indictment of treason or felony, (d) whether such treason or felony be made such by the common law or by statute; and also upon an indictment for a misprision of treason or felony; but it (e) seems, that regularly he is to be tried by the country for all other crimes out of parliament, as (f) *præmunire*, (g) riot, (h) seducing a young lady from her parents in order to debauch her, &c.

(x) 3 State Trials, 79. (h) 3 State Trials, 52.

As to the **FIFTH POINT**, viz. Upon what suits and pleas a peer is to be tried by his peers.

(i) 10 Ed. 1. 6.

F. Corone, 51.

B. Corone, 153.

S. P. C. 152.

3 Inst. 49.

3 Inst. 50.

Rastal, 50.

Sect. 14. It hath been (i) adjudged, that he shall not be so tried upon an appeal of felony, but only upon an indictment; and the reason given for it is, that those words in Magna Charta, ch. 29. *nec super eum ibimus*, &c. are to be intended only of the suit of the king, and not of the suit of the subject.

Sect. 15. Also it hath been (k) adjudged, and appears from constant (l) experience, that neither in said clause of Magna Charta, nor any other law, privileges a peer from being indicted by a grand jury of commoners either in the king's bench, or before commissioners of oyer, or the coroner, &c.

(k) 3 Inst. § 6. 28
2 Inst. 49.
(l) 1 H. 4. 1.
3 State Tr. 52.
79. 657. 951.
4 St. Tr. 351, &c.
Skinner, 683.
(m) 3 Inst. 31.
2 Inst. 49.

Sect. 16. Also it seems (m) to be clear, that if a peer absent himself, and cannot be found, he may be outlawed *per judicium coronatorum*, &c.

Sect. 17. Also it is said, that the court of king's bench may allow a (n) pardon pleaded by a peer to an indictment in that court; but that it cannot receive either his plea of not guilty, or confession, but only the lord steward on an arraignment before the lords.

(n) 2 Inst. 49.

Sect. 18. It seems clear, that if a peer be (o) attainted of treason or felony, he may be brought before the king's bench and demanded, what he has to say why execution should not be awarded against him? And if he plead any matter to such demand, his plea shall be discussed, and execution awarded by the said court, upon its being adjudged against him. (1)

(o) 1 H. 7. 22,
23.
B. Corone, 129.
Treason, 18.
F. Corone, 19.

As to the SIXTH POINT, viz. Whether a peer can waive a trial by his peers.

Sect. 19. It hath been (p) adjudged, that if a peer, on an arraignment before the lords, refuse to put himself upon his peers, he shall be dealt with as one who stands mute; for it is as much the law of the land, that a peer be tried by his peers, as a commoner by commoners. Yet if one who has a title to peerage be indicted and arraigned as a commoner, and plead not guilty, and put himself upon his country, it hath been (q) adjudged, that he cannot afterwards suggest that he is a peer, and pray a trial by his peers.

(p) 1 Rush, part
2. f. 94.
3 Inst. 30.
Kelynge, 57.
Yet there is said
to be a record
in 1 Edw. 3.
that T. Ld.
Berkeley put
himself on his
country, and
was tried by a
(q) Dalison, 16.

jury of knights.

As to the SEVENTH POINT, viz. In what manner the peers may require the opinion of the lord steward, or of the judges.

Sect. 20. It was (r) resolved by all the judges in the Lord Dacre's case, who was tried by commission, that no question ought to be asked of the lord steward or of the judges in the absence of the prisoner. And it was (s) adjudged by the lord steward, in the Earl of Warwick's case, who was tried by the house of peers in parliament, that no question ought to be asked of the judges in the absence of the prisoner. But in the Lord Audley's case, who was tried by commission, the lords triers, (t) after they were withdrawn, consulted with the lord chief justice four several times, and also sent to consult with the lord steward.

(r) 3 Inst. 29,
30.
2 Inst. 49.
Kelynge, 57.
3 St. Tr. 679.
(s) 4 St. Tr. 381.

(t) 2 Rush. p. 2.
f. 101.
1 St. Tr. 271.

Yet

(1) In the case of Earl Ferrers, 1760, it was determined by all the judges, that a peer, indicted of felony and murder, and tried and convicted thereof before the lords in parliament, ought to receive judgment for the same according to the provisions of 25 Geo. 2. c. 37. (vide infra, c. 51, s. 10.) And, secondly, supposing the day appointed by the judgment for execution should lapse

before such execution done, that a new time may be appointed for the execution, either by the high court of parliament before which such peer shall have been attainted, although the office of high steward be determined, or by the court of king's bench, the parliament not then sitting, and the record of the attainder being properly removed into that court. Foster, 139.

(u) Kely. 54.
7 State Trials,
422, 423.
See vide 3.
Inst. 29 and 30.

Yet, notwithstanding this precedent, the judges (u) resolved in the Lord Morley's case, who was likewise tried by commission, that if after the lords were withdrawn they should send for any of the judges to desire their opinions on a point in law, and the lord steward should permit them to go, they would tell the lords, if they should ask them any question, that they were not to give any private opinion without conference with the rest of the judges, and that openly in court. But they resolved, that if the lord steward should ask them any question in open court, though in the absence of the prisoner, they would answer it, because they are called to assist the court, and the demand of any question in such case is to be referred to the discretion of the lord steward.

(r) 3 State Tr.
679.

Sect. 21. When a peer is tried before the house of peers in parliament, the lord steward (r) withdraws with the rest of the lords, and consults with them.

As to the EIGHTH POINT, viz. Whether the court may be adjourned.

(y) 2 St. Tr.
954.
3 St. Tr. 677 to
680.

Sect. 22. It is agreed, (y) that where a peer is tried by the house of lords in full parliament, the house may be adjourned as often as there is occasion, and the evidence taken by parcels.

Foster, 143.
(z) Rush, p. 2.
f. 95.
1 St. Tr. 265.
But Moor, 622.
seems contrary.
Foster, 140.

Sect. 23. Also it hath been (z) adjudged, that where the trial is by commission, the lord steward, after a verdict is given, may take time to advise upon it, and that his office continues till he has given judgment.

(a) Kely. 57.
But Moor, 622.
in a report of
the very same
case, it is said
that the contrary
was holden.

Sect. 24. Also it was (a) said to have been agreed by the judges in the Lord Dacre's case, that on such a trial the court might be adjourned; and that if the lords triers did not agree, it was holden by some they ought to be kept together all night, and by others that they might go to their several houses.

(b) 3 St. Tr. 678.
But see Moor,
622.

Sect. 25. But it is said, (b) that there is no precedent of the lords triers ever having separated upon a trial by commission, after the evidence has been given for the king.

(c) 3 Inst. 30.
in the margin.

Sect. 26. And it is said to have been (c) resolved by all the judges in the case of the Duke of Norfolk, that the peers in such case must continue together till they agree to give verdict, and the like was (d) adjudged by the lord steward in the Lord Delamere's case. (1)

(1) During a trial before the house of peers in parliament, every peer present on the trial is to judge both of the law and the fact. Foster, 112; and a lord high steward is usually, though not necessarily, appointed, rather in the nature of a speaker to regulate the proceedings, than as a judge.

Foster, 115. But in the court of the high steward, which is held in the recess of parliament, he alone is judge in all points of law and practice, and the peers triers are merely judges of the fact. Foster, 142.

CHAP. XLV.

OF TRIAL BY BATTLE. (1)

A TRIAL by battle, at the (a) defendant's choice, is allowable in appeals (b) of treason before the constable and marshal, and in appeals (c) of felony, whether by appellants or (d) approvers.

c. 2. s. 19. (b) Vide c. 23. s. 29. Crompton, Jur. 82. b. 88. B. Battle, 15. C. Eliz. 69. Dyer, 120. S. P. C. 176. (d) Rastal, 42. S. P. C. 178. 9 Coke, 31.

(a) Finch, 421. S. P. C. 176. Fleta, l. 1. c. 34. s. 27. Tr. per Pais, (c) Rastal, 50.

Sect. 2. For the manner of waging battle in an appeal of treason, being according to the civil law, I shall refer to Rushworth's Collections, part 2. volume 1. folio 112 to 128.

Sect. 3. When an appellee of felony wages battle, he pleads (c) that he is "not guilty, and that he is ready to defend the same by his body," and then (f) flings down his glove; and if the appellant will join battle, he replies, "That he is ready to make good his appeal by his body upon the body of the appellee," and takes up the glove: and then the appellee lays his (g) right hand on the book, and with his left hand takes the appellant by the right, and (h) swears to this effect, "Hear this, thou who callest thyself John by name of baptism, that I who call myself *Thomas* by the name of baptism, did not feloniously murder thy father *W.* by name (on the — day of — in the year of — at B.) as you surmise, nor am any way guilty of the said felony; so help me God;" and then he shall kiss the book and say, "and this I will defend against thee by my body, as this court shall award." And then the appellant lays his right hand on the book, and with his left hand takes the appellee by the right, and swears to this effect, "Hear this, thou who callest thyself *Thomas* by the name of baptism, that thou feloniously (on the — day of — in the — year of — at B.) didst murder my father *W.* by name; so help me God;" and then he shall kiss the book and say, "and this I will prove against thee by my body, as this court shall award."

(c) C. Eliz. 62. Rastal, 42. 50. Dyer, 120. 9 H. 4. 3. (f) S. P. C. 178. F. Corone, 385. 1 H. 6. 6. (g) B. Batt. 1. 6. 9 H. 4. 1. 17 Assize, 1. 17 Edw. 3. 2. Britton, 41. S. P. C. 178. (h) Fleta, b. 1. c. 3. 4. s. 28, 29. 9 H. 4. 3. 17 Assize, 1. B. Batt. 1. 6. 17 Edw. 3. 2. Britton, 41. Bracton, b. 3. c. 21. s. 2.

And then the court shall (i) appoint a day and place for the battle, and in the mean while the appellee shall be kept in the (k) custody of the marshal, and the appellant shall find (l) sureties to be ready to fight at the time and place, unless he be an approver, in which case (m) he shall also be kept by the marshal.

(i) Rastal, 42. S. P. C. 178. (k) Fleta, b. 1. c. 33. s. 28. Rastal, 42. 9 H. 4. 3. S. P. C. 178.

B. Batt. 1. F. Corone, 78. 111. (l) Fleta, b. 1. c. 34. s. 28. 9 H. 4. 3. 17 Assize, 1. S. P. C. 176. F. Corone, 78. 111. B. Battle, 1. 6. 17 Edw. 3. 2. Bracton, b. 3. c. 21. s. 3. says, that both parties shall be kept in custody. (m) Rastal, 42.

And the (n) night before the day of battle, both parties shall be arraigned by the marshal, and shall be brought into the field before the (o) justices of the court where the appeal is depending,

(n) 9 H. 4. 3. B. Batt. 1. (o) Fleta, b. 1. c. 34. s. 30, 31. Dyer, 301. at B. Batt. 15.

S. P. C. 177, 178. Bracton, b. 3. c. 21. s. 4, 5. Britton, 40. Con. 37 H. 6. 20.

(1) Trial by battle cannot now take place since the abolition of appeals by 59 Geo. 3. c. 46.

(p) Britton, 41. By some the appellant's head shall be covered. 9 H. 4. 3. B. Battle, 1. Vide 1 H. 6. 6, 7. Dyer, 301. (q) Fleta, b. 1. c. 34. s. 30. Bracton, b. 3. c. 21. s. 4. Britton, f. 40.

at the rising of the sun, (p) bare-headed, and bare-legged from the knee downwards, and bare in the arms to the elbows, and armed only with bastons an ell long, and four-cornered targets, and before they engage they shall both take this (q) oath, "Hear this ye justices, that I, A. B. have neither eat nor drank, nor done any thing else, nor any other for me, by which the law of God may be depressed, and the law of the Devil exalted."

(r) Fleta, b. 1. c. 34. s. 31. (s) S. P. C. 178. b. See where this is done accordingly, 19 H. 6. 35. F. Corone, 6. B. Corone, 46. Bracton, b. 1. c. 21. s. 6. (t) Trials per Pais, c. 2. s. 19. 3 Inst. 221. Fleta, b. 1. c. 34. s. 32. Bracton, b. 3. c. 21. s. 5. (u) Sup. c. 23. s. 140. and c. 35. s. 6. F. Cor. 98. Fleta, b. 1. c. 34. s. 32. (x) 3 Inst. 221. Co. Litt. 6. (y) F. Corone, 98.

And then after (r) proclamation for silence under pain of imprisonment for a year and a day, &c. they shall begin the combat; wherein if the appellee be so far vanquished that he cannot or will not fight any longer, he may be adjudged to be (s) hanged immediately; but if he can maintain the fight till the stars appear, he shall have (t) judgment to go quit of the appeal. And if the appellant become recreant, that is, a crying coward or craven, the appellee shall not only recover his damages, but may also, as it (u) seems, plead his acquittal in bar of a subsequent indictment or appeal, and the appellant (x) shall for his perjury lose his *liberam legem*. Yet if there be other appellees in the same appeal, it hath been adjudged, (y) that it shall still stand in force against them. But for these matters I shall refer to ch. 24. sect. 24.

(s) Finch, 421, 422. 9 Coke, 31. 3 Inst. 221. Plowden, 355. Trials per Pais, c. 2. sect. 19. (u) Keilway, 120. Fleta, b. 1. c. 34. sect. 25. S. P. C. 180. (b) Britton, 40. (c) Keilway, 120. Finch, 423. F. Droit, 3. S. P. C. 60. 180. 22 Ed. 4. 20. Fleta, b. 1. c. 34. s. 25. (d) S. P. C. 60. 180. F. Corone, 385. 22 Ed. 4. 20. Trials per Pais, c. 2. s. 19. Fleta, b. 1. c. 34. s. 25. (e) Finch, 423. F. Corone, 230. 268. S. P. C. 180. 22 Edw. 4. 20. Trials per Pais, c. 2. s. 19. Fleta, b. 1. c. 34. s. 25. (f) F. Droit, 57. 3 Inst. 158, 159. (g) F. Droit, 57. 3 Inst. 158, 159. (h) 3 Inst. 158, 159.

Sect. 4. In appeals each party must fight in proper (z) person, and not by champions. And therefore if the appellant be under an apparent disability of fighting, as being a (a) woman, or in (b) holy orders, or under (c) age, or of the age of (d) sixty, (e) or maimed, or (f) blind, he may counterplead the wager of battle, and compel the appellee to put himself upon his country. (g) Also if an appellant become blind by the act of God after he has waged battle, the court will discharge him of the battle; and in such case it is (h) said, that the appellee shall go free.

(i) Finch, 423. S. P. C. 152. Plowden, 385. Fleta, b. 1. c. 34. s. 25. (k) S. P. C. 180. F. Cor. 125, 187.

Sect. 5. Also if a (i) peer of the realm, and much more if the king bring an appeal, the defendant shall not be admitted to wage battle, by reason of the dignity of the persons.

Sect. 6. Also the citizens of London have a special (k) privilege by charter, that in appeals brought by any of them, there shall be no wager of battle.

(l) Finch, 423, 424. S. P. C. 179. F. Corone, 100. 125. 144. 157. 230. 268. 375. 4 Assize, 1. 22 Ed. 4. 19. B. Battle, 5, 7. B. App. 114. 20 H. 7. 8. pl. 18. Vide sup. c. 15. s. 11. (m) Finch, 424. S. P. C. 179. F. Cor. 411.

Sect. 7. Also any plaintiff may counterplead a wager of battle, by alleging such matters against the defendant as induce a violent presumption of guilt; as in an appeal of robbery, by shewing (l) that the defendant was taken with the manner, &c.; and in an appeal of death, that he was found lying upon the deceased (m) with a bloody knife in his hand; and in any appeal, by shewing that

that the defendant being under an arrest for the crime charged against him, (n) brake the prison, or (o) escaped, unless such breaking or escape be (p) pardoned. For the law will (q) not oblige a plaintiff to make good his accusation in so extraordinary a manner, when in all appearance he may prove it in the ordinary way. It is also a good counterplea of battle, that the defendant hath been (r) indicted for the same fact, unless the indictment were insufficient.

(n) Finch, 422. S. P. C. 180. 1 Assize, 3. 6. Hobart, 82. F. Corone, 154. 157. 164. 251. 281. (o) Finch, 422. Hobart, 82. S. P. C. 80. B. Battle, 3. F. Corone, 164. 251. (p) S. P. C. 100. Hobart, 82. F. Corone, 154. 281. B. Bat. 3. 1 Assize, 3. (q) Trials per Pais, c. 2. s. 19. (r) Finch, 422. 22 Edw. 4. 19. B. Battle, 7. 11. Appeal, 114. 20 Edw. 4. 6. Rastal, 50.

Sect. 8. It is enacted by 6 Rich: 2. that the defendant shall not be received to wage battle in an appeal of rape.

CHAP. XLVI.

OF EVIDENCE.

As to the nature of evidence, so far as it more particularly concerns criminal cases, I shall consider the following points:

1. In what cases the evidence must be given in the presence of the prisoner.
2. How many witnesses are required in criminal cases.
3. In what cases the deposition of witnesses out of court may be allowed as evidence.
4. In what cases the confession of the defendant may be given in evidence.
5. Of parol evidence; and how far hearsay shall be admitted.
6. Of written evidence; and whether similitude of hands shall be admitted.
7. How far it is necessary for the evidence to be the best that the thing will admit of.
8. Whether husband and wife may be witnesses for or against one another.
9. Whether a judge or juror may be a witness.
10. Whether a counsellor or attorney may be a witness.
11. How far an accomplice may be a witness.
12. Whether a person attainted or convicted shall be a witness.

13. How

13. How far an interested person may be a witness.
14. How far religious sectaries may be witnesses.
15. How far infants, aliens, and persons deaf and dumb, may be witnesses.
16. In what manner witnesses are to give their evidence.
17. In what manner witnesses are compellable to attend.
18. In what cases witnesses may be allowed their expenses.
19. What evidence maintains an indictment.
20. What may be given in evidence on the part of the defendant.
21. In what cases the character of witnesses may be supported or impeached.
22. Whether a bill of exceptions to evidence lies in criminal cases.

As to the **FIRST POINT**, viz. In what cases the evidence must be given in the presence of the prisoner.

4 St. Tr. 277.
310.

Sect. 1. It is a settled rule, that in cases of life no evidence is to be given against a prisoner but in his presence.

As to the **SECOND POINT**, viz. How many witnesses are required in criminal cases: I shall inquire,

1. How many witnesses are required in treason.

† 2. How many on an indictment for perjury.

As to the first particular, viz. How many witnesses are required in treason.

(a) Ante, c. 25.
s. 129.

(b) The following authorities,
3 Inst. 26.
Hale's Sum. 262.
1 Hale, 296 to 306.

2 Hale, 286.
2 State Trials,
144. 171. 177.
Kely. 9. are examined by Mr.
Justice Foster,
232 to 240. and
in his opinion
confirm the as-

Sect. 2. Having already endeavoured to shew that the common law did (a) not require any certain number of witnesses for the trial of any crime whatsoever, I shall only add in this place, that it seems to have been the more prevailing opinion, that 1 Edw. 6. c. 12. and 5 and 6 Edw. 6. c. 11. which required two witnesses in treason, were not repealed by 1 and 2 Philip & Mary, c. 10. (b) which ordered that all trials of treason should be according to the course of the common law; and therefore that it was still necessary in all trials of high treason, not concerning the coin, (c) to have either two witnesses to the (d) same overt act, or one witness to one, and another (e) witness to an overt act of the same kind of treason, or at least one witness to an overt act, and (f) another to a material circumstance to prove it.

assertion of Hawkins, that the statutes of Edward the Sixth are not repealed by those of Philip and Mary. See c. 25. s. 130 to 146. (c) Gilb. Law Ev. 153. 2 Stra. 1116. Cases in Cro. Law, 39. (d) Raym. 407, 408. 2 St. Tr. 533. 3 St. Tr. 688. (e) 1 St. Tr. 697. 723, 724. 2 St. Tr. 317. 695. 783. 829. 830. 3 St. Tr. 149. 156. 228. 4 St. Tr. 86, 87, 88. 117. Raym. 407. 408. Kely. 9. (f) 2 St. Tr. 408. 3 State Trials, 228, 229. 688, 689. 894 to 901. 928, 929, 930. 1 State Trials, 636. But 1 St. Trials, 180, 181. it is holden that circumstantial evidence alone is sufficient.

Vide ch. 25. s.
134 to 146.
Foster, 233.

Sect. 3. But in relation to these matters it will be needless, at this day, to examine how far these opinions were reconcilable with

with the first of Philip & Mary, the law seeming to be settled by 7 Will. 3. c. 3. s. 2. which is express, "That no person or persons whatsoever shall be indicted, tried, or attainted of high treason, whereby any corruption of blood may or shall be made to any such offender or offenders, or to the heir or heirs of any such offender or offenders, or of misprision of such treason, but by and upon the oaths and testimony of two lawful witnesses, either both of them to the said overt-act, or one of them to one, and the other of them to another overt-act of the same treason (g); unless the party indicted and arraigned or tried shall willingly, without violence, in open court, confess the same, or shall stand mute, or refuse to plead; or in cases of high treason shall peremptorily challenge above the number of thirty-five of the jury."

(g) A collateral fact not tending to the proof of the overt-acts may be proved by one witness. Foster, 240. 242. Salkeld, 654. per Holt. Vaughan's Case, 5 St. Tr. 17.

Sect. 4. And by 7 Will. 3. c. 3. s. 4. it is further enacted "That if two or more distinct treasons of divers heads or kind, shall be alleged in one bill of indictment, one witness produced to prove one of the said treasons, and another witness produced to prove another of the said treasons, shall not be deemed or taken to be two witnesses to the same treason within the meaning of this act."

Sect. 5. But it is said, that the statute of 1 Edw. 6. c. 12. which, both in petit and high treason, requires two witnesses upon the indictment and at the trial, and the 5 and 6 Edw. 6. c. 11. which, in all treasons, requires that the witnesses, if living, shall be examined in person at the trial in open court, are not altered as to petit treason by 7 Will. 3. c. 3.

Foster, 232. 238. 240.

Sect. 6. However it was (h) agreed in Sir John Fenwick's case, that the information of a witness taken upon oath before a justice of peace, being joined with the evidence of one other witness only *viva voce*, could not, in the ordinary course of justice, amount to sufficient evidence within the 7 Will. 3. which requires two witnesses in high treason; and therefore it was thought necessary to proceed in that case by bill of attainder in parliament, whose power can be restrained by no rules but those of natural justice.

(h) 4 St. Tr. 237, &c. 5 St. Tr. 17. Salkeld, 634. Foster, 242.

But wherever the overt-act of the treason is the assassination or killing of the king; or in any attempt upon his life, or upon his person, whereby his life may be endangered; the parties may be convicted upon the like evidence as if they stood charged with murder.—Vide vol. i. p. 19.

As to the second particular, *viz.* How many witnesses are required on an indictment of perjury.

On an indictment for perjury the evidence of one witness is not sufficient to convict the defendant; because then there would be only one oath against another. "To convict a man of perjury," said C. J. Parker, in *Queen v. Muscott*, (10 Mod. 193.) "there must be strong and clear evidence and more numerous than the evidence given for the defendant." It does not appear to be laid down that two witnesses are necessary to disprove the fact sworn to by the defendant; nor does that seem to be absolutely requisite.

But

But at least one witness is not sufficient, and, in addition to his testimony, some other independent evidence ought to be adduced. (1)

As to the THIRD POINT, viz. In what cases the depositions of witnesses taken out of court may be read in evidence.

† Sect. 12. By the statute 1 and 2 Philip & Mary, c. 13. s. 4. “Justices of the peace, when any person is brought before them for manslaughter or felony, or suspicion of manslaughter or felony, being bailable by law, shall, before any bailment or mainprise, take the examination of the said prisoner and the information of them that bring him of the fact and circumstances thereof; and the same, or as much as may be material thereof to prove the felony, shall put in writing before they make the said bailment; which said examination, together with the said bailment, the said justices shall certify at the next general gaol-delivery to be holden within the limits of their commission.”

† Sect. 13. By 1 and 2 Philip & Mary, c. 13. s. 5. “Every coroner upon any inquisition before him found, whereby any person or persons shall be indicted for murder or manslaughter, or as accessory or accessories to the same before the murder or manslaughter committed, shall put in writing the effect of the evidence given to the jury before him being material; and as well the said justices as the said coroner shall bind all such by recognizance as do declare any thing material to prove the same, to appear at the next general gaol-delivery, and shall certify as well the same evidence as the recognizance in writing, &c.”

† Sect. 14. By 2 and 3 Philip & Mary, c. 10. “The said justice or justices, before he or they shall commit or send such prisoner to ward, shall take the like examination of the prisoner and the information of those who bring him, and shall put the same in writing within two days after the said examination, and the same shall certify in such manner and form, and at such time as they should and ought to do, if such prisoner so committed or sent to ward had been bailed, &c.”

(i) Kelynge, 55. Sum. 262, 263. 1 Levinz, 180. Salkeld, 281. 2 Keble, 19. Vide C. Eliz. 901. Dalton, c. 111, 112, 113. (k) 1 St. Tr. 265. Sum. 262, 263. (l) Sum. 262, 263. (m) Supra, c. 9. sect. 31. (n) See the books above cited; but 2 Jon. 53. it is adjudged that depositions before a coroner may be read, but said that those taken before a justice of peace can in no case be read. (o) Sup. c. 15. s. 59, 60, 61. (p) Supra, c. 16. s. 11. (q) Kelynge, 55. 1 Levinz, 180. 1 Hale, 305. 2 Keble, 19. Summary, 263. (r) Kely. 55. (s) Kely. 55. In Harrison's Case, 3 State Trials, 941. such an examination was read in evidence, upon proof that the witness had been enticed away, though it did not directly appear to have been done by the procurement of the prisoner.

very same (t) that was sworn before the coroner or justice, without any alteration whatsoever.

(t) Kely. 55.
2 Keble, 19.
Sum. 263.

2 Hale, 284, 285. 1 Hale, 305.

† Sect. 16. But in petit treason, these depositions, it is said, are not sufficient to convict the offender if the party be living, although he is unable to travel, or is kept out of the way by the procurement of the prisoner.

Foster, 337.

Sect. 17. It hath been (u) adjudged, that it is not sufficient to authorise the reading such an examination, to make oath that the prosecutors have used all their endeavours to find the witness, but cannot find him.

(u) Kely. 55.
Benson v. Olive,
2 Strange, 920.

Sect. 18. Also it hath been (x) adjudged, that depositions taken before a coroner upon an inquisition of death *super visum corporis*, cannot be given in evidence upon an appeal for the same death, because it is a different prosecution from that wherein they were taken.

(x) 2 Roll. 460,
461.
Vide 1 Sid. 525.
2 Keble, 384.

Sect. 19. There are many (1) (y) instances in the reigns of queen Elizabeth and king James the First, wherein the depositions of absent witnesses were allowed as evidence in treason and felony, even where it did not appear but that the witnesses might have been produced *viva voce*.

(y) Fost. 234.
Dyer, 99, 100.
1 State Trials,
Duke of Norfolk's Trial, 84,
Abington's Tr.
118, 119.

Udal's Trial, fol. 148, 149. Earl of Essex's Trial, fol. 166. Sir Walter Raleigh's Trial, fol. 181, 182. and the like was admitted in the Lord Audley's Case, on an indictment for a rape on his own lady, 1 St. Trials, 268, 269. 1 Rushworth, Strafford, fol. 231. 526 to 531.

Sect. 20. And it was adjudged in (z) the Earl of Strafford's trial, that where witnesses could not be produced *viva voce*, by reason of sickness, &c. their depositions might be read for or against the prisoner on a trial of high treason, but not where they might have been produced in person.

(z) 3 St. Tr. 204.
Ld. Raym. 407.

Sect. 21. And it was admitted (a) in the Lord Stafford's trial, that the depositions taken by a witness before a justice of the peace might, at the prisoner's desire, be read at the trial, in order to take off the credit of the witness, by shewing a variance between such depositions and the evidence given in court *viva voce*.

(a) 2 St. Tr.
622 to 627.
644, 647, 651.
1 St. Tr. 911.

Sect. 22. And for the same reason it seems (b) agreed, that where a witness at one trial varies from his own evidence at another, in relation to the same matter, such variance may also be given in evidence to invalidate his testimony at the second trial.

(b) 2 St. Tr. 343,
344, 528, 529.
See acct. 12.

Sect. 23. But it is (c) said to have been adjudged in Paine's case, in the seventh year of William the Third, by the court of king's bench upon advice with the justices of the common pleas, upon an indictment for a libel, that depositions taken before a justice of peace relating to the fact cannot be given in evidence, though the deponent be dead; and that the reason why such depositions may be given in evidence in felony, depends upon the statutes

(c) Salk. 281.
Sup. sect. 3.

(1) These instances, it is conceived, when examined, will not warrant the continuance of the practice.

statutes of Philip and Mary; and that this cannot be extended farther than the particular case of felony (*d*). But in the report of this case in (*e*) Fifth Modern it is said that the reason why such depositions could not be read, was because the defendant was not present when they were taken, and therefore had not the benefit of a cross-examination.

(*d*) See *Rex v. Eriswell*, 3 Term Rep. 707.
(*e*) 5 Mod. 186.
Vide *Rushw. Stafford*, 524 to 531.
2 St. Tr. 420. 4 St. Tr. 261. and 2 Roll. 460, 461.

Rex v. Will. Woodcock, Cases Cro. Law, 397.
George Dingler's Case, at the Old Bailey, Sept. Sess. 1791, *coram* Gould and Grose, Justices.

† *Sect. 24.* And it has been held, that an examination of a person murderously wounded, taken by a justice of the peace, at the poor-house of the parish, on oath, and regularly signed, but in the absence of the prisoner, cannot be read in evidence on the subsequent trial of the prisoner for murder, for it is taken extrajudicially, and not as the statutes of Philip and Mary direct, in a case where the prisoner is brought before him in custody, and he has the opportunity of contradicting or cross-examining as to the facts alleged.

(*f*) 12 Viner Abr. 118.
(*g*) 4 St. Tr. 303.
9 St. Tr. 161.

† *Sect. 25.* But the depositions thus extrajudicially taken may in the particular case of murder be read as the dying declarations of the deceased (*f*) if *in extremis* (*g*), or in such a state of mortality as to render the apprehension of approaching dissolution probable (*h*).

10 St. Tr. 501. (*h*) Cases in Crown Law, 397.

Westbeer's Case, Cases Cro. Law, 12.

† *Sect. 26.* So the depositions of an accomplice taken by a justice of the peace in the presence of the prisoner, pursuant to the statutes of Philip and Mary, may be read in evidence on the trial of the prisoner, if it be proved that the accomplice is dead.

(*i*) 4 St. Tr. 265 to 272.
Sup. s. 9.
1 Sid. 325.
2 Kéble, 384.

Sect. 27. But in Fenwick's case it was (*i*) agreed, that the evidence given by a witness at one trial, cannot in the ordinary course of justice be made use of against a defendant, on the death of such witness, at another trial.

Welch's Case, 2 Hale, 285.
1 Hawk. c. 42.
Lit. Rep. 167.
2 Roll. Ab. 679.

Sect. 28. Also it seems clear, that depositions taken in the spiritual court in a cause of divorce of a forcible marriage cannot be given in evidence upon an indictment for such marriage on the statute of 3 Hen. 7. c. 2.—† For it is a general rule, that depositions taken in a court not of record shall not be allowed in evidence elsewhere, though the witness be dead.

As to the FOURTH POINT, *viz.* In what cases the confession of a prisoner may be given in evidence.

(*k*) Sum. 102.
193. 262. 264.
1 Hale, 304.
3 St. Tr. 15. 131.
(*l*) Ante, c. 15.
s. 11. 58.
(*m*) 1 St. Tr. 89.
186. 964.

Sect. 29. It seems that the confession of the defendant himself, taken upon an (*k*) examination before justices of peace, in pursuance of the statutes of Philip and Mary, upon (*l*) a bailment or (*m*) commitment for felony, hath always been allowed to be given in evidence against the party confessing.

(*n*) Kely. 18. 19.
(*o*) 5 Mod. 164.
2 St. Tr. 426.

† *Sect. 30.* It seems also that the confession of the defendant himself taken by the common law upon an examination before a secretary of state or other magistrate for treason (*n*), or other crimes (*o*) not within those statutes, may likewise be given in evidence against the party confessing.

Sect.

† **Sect. 31.** So also the confession of the defendant himself, made in discourse with private persons, hath always been allowed to be given in evidence against the party confessing.

Dyer, 215. 4 St. Tr. 33. 3 St. T. 8. Francia's Tr. 1 St. Tr. 68.

† **Sect. 32.** But it is agreed that the confession of one person cannot be given in evidence against others.

1 State Tr. 265. But see the contrary practised

in Ellis's Case, 1 St. Tr. 341. Throckmorton's Case, 1 St. Trials, 63. 78. Duke of Norfolk's Case, 1 St. Trials. Earl of Essex's Case, 1. St. Trials, 198. Sir Walter Raleigh's Case, 1 St. Tr. 212.

† **Sect. 33.** It seems also that the confession of a prisoner taken by a magistrate on an examination and reduced into writing cannot be given in evidence until its identity be proved; for a confession being the strongest proof of guilt, requires the highest authenticity.

Sum. 263. 2 Hale, 285.

† **Sect. 34.** And as the human mind under the pressure of calamity is easily seduced, and liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail, a confession, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted, is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction.

Warrickshall's Case, Cases C. L. 222. Gilb. 1. E. 137.

† **Sect. 35.** It also seems clear, that if the confession of a prisoner be taken upon oath, it cannot be read in evidence against him. (1)

Bull. N. P. 242.

† **Sect. 36.** But it is adjudged, that if any facts arise in consequence of even such a confession, they may be given in evidence; because they must ever be immutably the same, whether the confession which disclosed them be true or false; and justice cannot suffer by their admission. The truth of these contingent facts, however, must be proved independently of, and not coupled with, or explained by, the conversation or confession from which they are derived.

Maxey's Case, Cases Cro. Law, 224, *notis*.

† **Sect. 37.** But if a confession be voluntarily made and regularly proved on the trial, it is sufficient, if the jury believe it to be true, to convict the prisoner without any corroborating evidence to support it. But a confession does not amount to a conviction until the party plead *not guilty* in open court; for the trial of the confession must be by the petit jury.

Fisher's Case, Cases Crown Law, 286.

Gilb. L. E. 137.

† **Sect. 38.** So also of a person who by means of an extorted, and of course inadmissible, confession, is discovered to have purchased stolen goods, may, notwithstanding he was discovered by means of such confession, give evidence against the principal felon.

Rex v. Lockhart, Cases C. L. 300.

† **Sect. 39.** But it hath been determined, that if a prisoner be taken

Rex v. B. Laube, Croydon Summer

Assizes, 1791, on a case reserved by Mr. Justice Wilson.

(1) In the King v. Smith, where the confession in point of fact, the prisoner was not sworn. purported on the face of it to be taken on oath, 1 Starkie, 242.

Mr. J. Le Blanc refused to receive evidence, that,

taken before a magistrate on a charge of felony, and on his examination make a voluntary confession, which the magistrate reduces into writing, and afterwards reads it over to the prisoner, who answers "it is all true enough," but refuses to sign it, such written confession may be read in evidence, though not signed either by the prisoner or the justice; for a confession under such circumstances is admissible at common law, and the statutes of Philip and Mary make no alteration whatever respecting the admissibility of evidence: and accordingly in *Layer's Case*, (a) the prisoner's confession taken down before the privy council but not signed by him was admitted in evidence.

(a) 8 Mod.

(b) 5 Mod. 165.
Cont. 1 State
Trials, 53.
Throckmorton's
trial.

† Sect. 40. It (b) seems an established rule, that wherever a man's confession is made use of against him, it must all be taken together, and not by parcels.

Fearshire's
Case, Cases C.
L. 184.
Rex v. Jacobs,
Cases C. L. 254.
Trowton's Case,
Easter Term,
8 Geo. 1. B. R.
12 Viner, 119.
(c) Bull. N. P.
298.
Meux v. Ansel,
3 Will. 275.

† Sect. 41. It also seems to be agreed, that as the statutes of Philip and Mary positively enact, that the justices of peace shall take the examination of the prisoner and reduce the same into writing, the court will presume that the confession of a prisoner was reduced into writing; for the law presumes that every man does his duty until the contrary be proved (c), and will not permit oral testimony of such confession to be given until it be proved that it was not put into writing as the statute requires; for it is a general rule, that no parol evidence of any fact shall be admitted where there is written evidence of such fact; for written evidence speaks for itself, is liable to no perversion or misconstruction, and is more accurate than memory can be, which is uncertain and fallible.

Hall's Case,
Stafford Lent
Assizes, 1790,
before the
Judges.

† Sect. 42. But if a confession be not taken in writing, parol testimony may be given of it, and the prisoner thereon convicted, although it is totally uncorroborated by any other evidence.

(d) Kelynge, 18.
Sup. c. 25. sect.
140.
1 Hale, 304.
2 And. 67.
3 Inst. 25.

† Sect. 43. Also it was (d) holden, that two witnesses of a confession of high treason, upon an examination before a justice of the peace, were sufficient to convict the person so confessing, within the meaning of 1 Edw. 6. c. 12. and 5 and 6 Edw. 6. c. 11. which required two witnesses in high treason, "unless the offender should willingly without violence confess the same:" but this is remedied by 7 Will. 3. c. 3. (1) which requires two witnesses, "unless the party shall willingly, without violence, in open court confess, &c."

As to the FIFTH POINT, viz. Of parol evidence; and how far hearsay shall be admitted.

(e) 9 St. Tr.
332. 414. 415.
761. 802. 803.
8 St. Tr. 145.
110. 252. 4 St. Tr. 38. (f) Vide sup. sect. 3.

† Sect. 44. It seems (e) agreed, that what a (f) stranger has been heard to say is in strictness no manner of evidence either for

(1) This statute prevents such confession, as above mentioned, from having the force of a conviction; but does not destroy the admissibility of it as evidence for any purpose, except to prove the overt-acts laid in the indictment. The overt-acts must still be proved by two lawful witnesses, notwithstanding the admission of any such confession

as to collateral matters; for no confession, unless made in open court, which in *Francis's case* was determined to mean upon the arraignment of the party, can be a sufficient ground for a conviction in treason. Foster, 240 to 244. *Francis's Case*, 6 St. Tr. 58. *Willis's Case*, 8 St. Tr. 254. 255. 268. 263. Sed vide *Berwick's Case*, Foster, 11.

for or against a prisoner, not only because it is not upon oath, but also because the other side hath no opportunity of a cross-examination; and therefore it seems a settled rule, that it shall never be made use of but only by way of inducement (y) or illustration of what is properly evidence.

(y) 2 State Trials, 325.

326. 332, 333.

411, 415. 3 State Trials, 144, 145, 209, 210.

Sect. 45. Yet it seems, (z) that what the prisoner had been heard to say at another time, may be given in evidence for him, (1) as well as against (a) him.

(z) 4 St. Tr. 33.

3 St. Tr. 251.

255.

(a) Vide sup. sect. 3.

† *Sect. 46.* And also, (b) what a witness hath been heard to say at another time, may be given in evidence in order either to invalidate or confirm the testimony which he gives in court.

(b) 1 Hale, 285.

1 Mod. 283.

† *Sect. 47.* In the case of murder also, what the deceased was heard to say after the mortal wound was given, and in the extremity of death, may be given in evidence on the trial of an indictment against the murderer.

Rex v. Ely, coram King, C. J.

O. B. 1720.

Cases Cro. Law,

2d edit. 363.

597. 3 Burr. 1253.

† *Sect. 48.* So also in ejectment, where a will was produced on the part of the plaintiff, subscribed by three witnesses, two of whom were dead, and the third witness on her cross-examination swore that while she was attending one of the deceased witnesses in his last illness, and about three weeks before his death, he pulled the will in question from his bosom and acknowledged and declared to her that the said will was forged by himself, this was held good evidence.

Clymer v. Lit-

tler, 3 Burr.

1245.

† *Sect. 49.* But the declaration of a convict at the place of execution cannot be given in evidence as the declaration of a dying man; for the principle upon which these declarations are received is that the mind of the person dying, impressed by the awful idea of approaching dissolution, acts under a sanction equally powerful as that which it is presumed to feel by a solemn appeal to God upon an oath; but an attainted convict is not an admissible witness even on oath.

Drummond's

Case, Cases C.

L. 275.

As to the SIXTH POINT, viz. Of written evidence; and whether similitude of hands shall be admitted.

† *Sect. 50.* It is observable, that similitude of hands with other circumstances, in (c) Algernon Sidney's case, was ruled to be good evidence of his having written a paper charged against him as an overt-act of high treason: yet in the trial of the seven (d) bishops, the court was divided in opinion, whether similitude of hands were evidence of the defendants having signed the paper charged against them as a libel; and the parliament having declared an opinion, in the reversal of Algernon Sidney's attainder, that comparison of hands is no evidence of a man's handwriting in criminal cases, it seems to have been generally holden

(c) 3 State

Trials, 213, 216,

217, 226, 230.

(d) 3 St. Tr.

762 to 767.

since

(1) The declarations of a prisoner may be given in evidence against him, but not for him; therefore a witness, for this purpose, cannot be called in his defence; but he may cross-examine any of the

witnesses on the part of the prosecution as to any thing which they may have heard him say relating to the fact he is charged with. Bull. N. P. 294.

Attorney-General v. Le Merchant, 2 Term Rep. 201.

(a) Aicle's case. Cases C. L. 241.

(b) Gordon's case, Cases C. L. 245, *notis*.

is now settled, that there is no distinction, in this respect, between civil and criminal cases, and that a prosecutor may, without having given notice to produce the original writing, give attested copies, or, if no copies are taken, parol evidence of it in evidence; and on this ground parol testimony of a bill of exchange has been admitted on an indictment for forging it, on its being proved to be in the prisoner's possession (a). So also an attested copy of a letter directed to a prisoner, containing a challenge, may be given in evidence on a trial for murder, if sufficient proof be laid before the court to raise a presumption that the original reached his hands (b).

† Sect. 65. It is also a general rule, that copies are admissible evidence where the originals are of a public nature (c); as the journals of the two houses of parliament (d); the transfer-books of the East India Company (e); the poll-books of an election (f); the city books of the boundaries of public markets (g); the rolls of a court-baron (h); the customary of a manor (i); the parish-register of christenings, marriages, and burials (k); the public books and papers of a corporation (l); the daily-book kept by the clerk of the papers of the prison of Newgate (m).

(c) 3 Salk. 154. (d) Doug. 569. (e) Doug. 572. (f) 1 Stra. 387. (g) 2 Stra. 954. (h) Bull. N. P. 247. (i) 1 Term Rep. 466. (k) 2 Str. 1073. Salkeld, 281. Sed vide Bull. N. P. 247. (l) 1 Str. 93. 401. (m) Cases C. L. 330.

(n) 2 Stra 1005. * Sect. 66. It is also a general rule, that where it is necessary to prove that a person is in a public capacity, as an officer of the post-office (n), a farmer of the post-horse duty (o), a benedicted clergyman (p), an attorney (q), an excise or custom-house officer (r), a captain of a man of war (s), a constable (t), it is sufficient to shew that they acted upon the occasion as officers in their respective capacities, without producing the written instrument by which they were severally appointed.

(o) 3 Term Rep. 632. (p) 3 Term Rep. 935. (q) 4 Term Rep. 366. (r) Cases Cro. L. 278, *notis*. (s) 1 Show. 6. (t) Gordon's case, Cases C. L. 412.

As to the EIGHTH POINT, viz. Whether husband and wife may be witnesses for or against one another.

Sect. 67. It seems (u) agreed, that husband and wife, being as one and the same person in affection and interest, can no more give evidence for one another in any case whatsoever than for themselves; and that regularly the one shall not be admitted to give evidence against the other, nor the examination of the one be made use of against the other, by reason of the implacable dissension which might be caused by it, and the great danger of perjury from taking the oaths of persons under so great a bias, and the extreme hardship of the case.

(u) Co. Litt. 6. 112. 187. 2 R. Ab. 686. 2 Hale, 279. 2 Ven. 79. 2 Term Rep. 265. 4 Term Rep. 679.

(x) Raym. 1. and the same point was admitted in Fielding's Trial, St. Tr. vol. 4. f. 754.

Sect. 68. And therefore it hath been (x) adjudged, that the husband cannot be a witness against the wife, nor the wife against the husband, to prove the first marriage, on an indictment on the statute of 1 Jac. 1. c. 11. for a second marriage.

Rex v. Cliviger, 2 Term Rep. 263. S. P. 2 Lord Raym. 752.

† Sect. 69. So also where a settlement was claimed by a person as the wife of J. W. and after a proof of a marriage in fact, the wife of J. W. was called to prove a previous marriage to her, the wife was rejected as an incompetent witness, because her evidence went to criminate her husband by proving him guilty of bigamy.

† Sect.

† *Sect. 70.* So also if a husband be charged with having concealed his effects as a bankrupt contrary to 5 Geo. 2. c. 30. his wife cannot be examined as to any thing that may tend to criminate him. Field v. Curtis,
Cowp. 829.

† *Sect. 71.* So also it seems, that in questions between other parties, the evidence of a wife shall not be admitted, if it directly tend to charge or criminate her husband; but she may give evidence touching his estate. Hill v. Hill,
2 Str. 1092.

† *Sect. 72.* So in an information against two, one for perjury, and the other for subornation of perjury, in swearing, on the trial of an ejectment, that a child was supposititious, the husband of one of the defendants was admitted to give evidence of the birth, but his testimony as to the subornation of perjury was rejected. Sid. 377.
3 Keble, 403.
Mar. 120.

† *Sect. 73.* But no other relations, as parent and child, brother and sister, &c. are excused from giving evidence for or against each other. Co. Lit. 6.
Sayer, 45.
1 Wils. 332.

Sect. 74. And some exceptions have been allowed to this general rule in cases of evident necessity. As in the Lord Audley's case, (z) who held his wife's hands and legs while his servant, by his command, ravished her; the wife was admitted to give evidence against him. (z) State Tr.
vol. 1. f. 388.
265. 209. 366.
Hutt. 116.
Rushw. Collec-
tions, part 2.
vol. 1. f. 94. 99.
But this case is denied to be law, Raym. 1.

Sect. 75. So also where a man is indicted for a (a) forcible marriage against the (b) purport of 3 Hen. 7. c. 2. the wife may be admitted an evidence against her husband. (a) Cro. Ca.
488.
State Trials,
vol. 4. f. 588.
3 Keble, 193. pl. 43. (b) See Felonies by Statute, bk. 1.

† *Sect. 76.* And it seems also, that on an indictment for a forcible marriage, the wife is an admissible witness for her husband; as to prove that the elopement and marriage were voluntary and not forced. Rex v. Perry,
at Bristol, 1794.

Sect. 77. So also where either a husband or wife have cause to demand (c) sureties of the peace against the other, each may give evidence against the other of the cause on which such sureties are demanded. (c) See Bk. 1.
"Surety of the
Peace,"
Hutt. 110.
See Rex v. Mary
Mead, 1 Burr.
542.

† *Sect. 78.* So in an indictment against a husband for an assault on his wife, the wife is an admissible witness against him. Rex v. Azir,
1 Stra. 633.

† *Sect. 79.* But it does not seem to be clearly settled, whether a wife may be admitted as a witness against her husband in high treason. Raym. 1.
1 Brownl. 47.
1 Hale, 301.

As to the NINTH POINT, viz. Whether a judge or juror may be a witness.

Sect. 80. It seems (d) agreed, that it is no exception against a person's giving evidence either for or against a prisoner, that he is one of the judges or jurors who are to try him. And in the case of Hacker, two of the persons in the commission for the trial came off from the bench, and were sworn and gave evidence, and did not go up to the bench again during his trial. (d) 2 St. Tr.
257. 632. 674.
Kelynge, 12.
1 Sid. 138.

As to the Tenth Point, viz. Whether a counsel or attorney may be a witness.

Lindsay v. Talbot, Stra. 140.
Bull. N. P. 284.

† Sect. 81. It is a rule of law that counsel and attorneys ought not to be permitted to give evidence of any facts communicated to them by their clients in the practice of their profession; for that it is contrary to the policy of the law to permit any person to betray a secret with which the law has intrusted him: but this is to be considered as the privilege of the client, and not of the counsel or attorney, and is confined to such facts as have been communicated to them respectively in receiving professional instruction in the cause in which they are retained.

Bull. N. P. 284.

† Sect. 82. A counsel or attorney therefore may give evidence of facts which they knew before they were retained.

Bull. N. P. 284.

† Sect. 83. So also a counsel or attorney may be called to prove a fact of which they might have had knowledge without being retained in the cause; as whether a deed erased was ever in a different plight; for that is a fact of their own knowledge, but they cannot disclose a confession of their client concerning it.

Doe v. Andrews, Cowp. 843.

† Sect. 84. So also if a counsel or attorney be witness to a deed produced in the cause, he shall be examined as to the true time when it was executed.

Stra. 1122.
Bull. N. P. 284.
Cowp. 846.
Espin. Dig. 717.

† Sect. 85. So also on an indictment for perjury in an answer in chancery, if the defendant's attorney was with him when he took the oaths, he may be called to prove the identity of the person; for this is collateral matter, and not communicated to him by his client professionally, but a fact which he might have known from his own observation.

Cobden v. Kendrick, 4 Term Rep. 131.

† Sect. 86. So also an attorney may be called to give evidence of facts communicated to him in a conversation between him and his client touching the justice of his suit after a compromise of the suit; for the purpose of the suit having been obtained, the communication was not made by way of instruction for conducting his cause.

Wilson v. Rastal, 4 Term Rep. 733.

† Sect. 87. And this privilege is strictly confined to persons acting in the situation of attorneys or counsel in the cause; and therefore if a person consult with an attorney as a friend, such attorney may be called upon to disclose the facts which came to his knowledge on such consultation; but if he be consulted as attorney, he cannot disclose facts communicated to him in any case whatever.

Cesar Hawkins's case, in the trial of the Duchess of Kingston, 11 State Trials, 243.

† Sect. 88. So also this privilege of secrecy does not extend to persons of other professions, as physicians, surgeons, &c.

12 Vin. Abr. 38.

† Sect. 89. But a clerk attending upon a grand jury shall not be allowed to reveal that which was given in evidence before the inquest.

As to the ELEVENTH POINT, viz. How far an accomplice may be a witness.

Sect.

Sect. 90. It has been long settled (a), that it is no exception against a witness that he hath confessed himself guilty of the same crime, if he have not been (b) indicted for it; for if no accomplices were to be admitted as witnesses, it would be generally impossible to find evidence to convict the greatest offenders.

4 St. Tr. 12. 33. 1 Hale, 303, 304. See Hale's opinion to the contrary arguendo. 1 St. Tr. 724, and Bracton, 118. (b) 1 St. Tr. 96. 2 St. Tr. 501.

(a) 1 St. Tr. 26, 696, 697, 723.
2 St. Tr. 334, 501.
3 St. Tr. 161, 217, &c. 595, 698, 669.

Sect. 91. Also it hath been often (c) ruled, that accomplices who are indicted, are good witnesses for the king, until they be convicted.

3 Keble, 136. Vide vol. 1. fol. 697.

(c) 1 St. Tr. 966.
4 State Tr. 12.
Kelynge, 17, 18.
10 State Tr. 190.

† **Sect. 92.** It hath also been determined, that a prisoner may be legally convicted on the evidence of an accomplice, though unconfirmed by any other evidence (d). But it seems to be the general opinion, that unless some fair and unpolluted evidence corroborate and give verisimilitude to the testimony of an accomplice, a person convicted under such circumstances ought to be recommended to mercy.

(d) Atwood's case, Cases Q. L. 367.

† **Sect. 93.** It seems also, that an accomplice may give evidence before a grand jury against a *particeps criminis*, though such accomplice be not previously admitted a witness for the crown, and was carried before the grand jury by a surreptitious and illegal order from the prison to which he had been committed for the same offence.

Dr. Dodd's case, Cases C. L. 142.

Sect. 94. Also it hath been (e) adjudged, that such of the defendants in an information against whom no evidence is given, may be witnesses for the others.

(e) 1 Sid. 237.
Vide Trial per Pais, 149.
Style, 401.
12 Assize, 12.
Savil, 34.

Sect. 95. It hath been also (f) adjudged, that where A. B. and C. are sued in three several actions on the statute for a supposed perjury in their evidence concerning the same thing, they may be good witnesses in such actions for one another.

(f) 2 R. Abr. 685.

† **Sect. 96.** So also in an action of trespass, or in an information for bribery on the statute of 2 Geo. 2. c. 24. a *particeps criminis* is a good witness, though left out on purpose to enable him to give evidence, and though a recovery against the defendants in the action is a good bar, and in the information a good discharge of himself.

Sayer, 290.
Cowp. 199.

As to the TWELFTH POINT, viz. Whether a person attainted or convicted may be a witness.

Sect. 97. It seems agreed, that a conviction, and therefore *a fortiori* an attainder or judgment of (g) treason, (h) felony, (i) piracy, (k) *præmunire*, (l) perjury, forgery, (m) 5 Eliz. c. 14. and also a (n) judgment in attain for giving a false verdict, or in conspiracy at the suit of the (o) king, and also (p) judgment for any

(g) 5 Mod. 16-74.
Kelynge, 33.
(h) Raym. 369.
(i) Co. Litt. 6.
2 Bulstrode, 154.
crime (j) 2 Roll. Ab.

o86. (k) Co. Litt. 6. (l) Ray n. 52. Infra, sect. 22, 23. Supra, c. 37. s. 52. Co. Litt. 6. Sum. 263. (m) Co. Litt. 6. Vide sup. c. 43. s. 25. 33 H. 6. 53. 2 Hale, 277. But Sum. 263, it is said in general, that one attainder of forgery cannot be a witness. (n) Co. Litt. 6. 2 Roll. 684. (o) 33 H. 6. 53. 24 E. 3. 34. Vide 1 Hale, 306. Sup. c. 43. s. 25. B. 1. tit. "Conspiracy," p. 449. Co. Litt. 6. 2 Hale, 277. But Sum. 263, it is said in general, that one attainder of conspiracy cannot be a witness. (p) That it is not material whether such judgment were actually executed, 2 Salk. 689. 3 Inst. 219. 3 Levinz, 426. But Co. Litt. 6. Kely. 37, 38. Sum. 263. 2 Hale, 277. 5 Mod. 75, 76. seem to make the execution of the judgment material.

(r) 2 Salk. 689. (r) crime whatsoever to stand in the pillory, (1) to be whipt or branded, being in a court which had a (s) jurisdiction, are good causes of exception against a witness, while they continue in force. 3 Lev. 426. This point is made a *quere*, 5 Mod. 15, 16, 75, 76. Skin. 578, 579. And it is said, that by the civil and canon law no such judgment disables a witness, unless the nature of the crime be infamous. 3 Lev. 426, 427. (s) 1 Sid. 51. Raym. 38.

† Sect. 98. And as the common punishment inflicted on the *crimen falsi* was the pillory, it was formerly held, that no man who had been set on the pillory, whatever might be the cause, could legally be a witness (t): but the rigour of this rule is now reduced to reason (u); and it is now held, that it is the nature of the crime and not the species of punishment, which renders the party infamous and creates his disability of being a witness; and therefore a person convicted of barratry and fined, is incapacitated from being a witness, although not sentenced to the pillory (x); but where the sentence of pillory is passed, if the crime be of an infamous nature, it is not necessary that he should have actually stood there in order to render him an incompetent witness, for it is the judgment which creates the infamy, and not the infliction, of the punishment (y).

(t) Co. Litt. 6. Bull. N. P. 292.
(u) Gilb. L. E. 143.
Prin. P. L. 62.
(x) Rex v. Ford, Salk. 690.
(y) Rex v. Crosby, 2 Salk. 689.

† Sect. 99. It hath been ruled, that a conviction of perjury doth not disable a man from making an affidavit in relation to the irregularity of a judgment in a cause where such person is a party; for otherwise he must suffer all injustice, and would have no way to help himself. But it can only be read in defence of a charge, and not in support of a complaint.

Davis's Case, Salk. 461.
Walker v. Kearney, 2 Stra. 1148.

Sect. 100. But it is (z) agreed, that no such conviction or judgment can be made use of to this purpose, unless the record be actually produced in court.

(z) 1 St. Tr. 268.
2 St. Tr. 307.
436. 455.
3 St. Tr. 425.
4 State Trials, 130. Salkeld, 461.

Sect. 101. Also it is a general rule, that a (a) witness shall not be asked any question the answering to which might oblige him to accuse himself of a crime; and that his credit is to (b) be impeached only by general accounts of his character and reputation, and not by proofs of particular crimes, whereof he never was convicted.

(a) 2 St. Tr. 268. 472.
3 St. Tr. 387.
1010.
4 St. Tr. 44.
Con. Rushw. Stafford, 605.
et ibid. 551.

one was not admitted to speak to clear himself. Nor are witnesses permitted to give evidence of their own infamy or turpitude. 3 St. Tr. 427. 4 Inst. 279. 2 Sess. Cases, 175. Stra. 1148. Salk. 461. 689. (b) Kely. 38. 3 St. Tr. 256. 280. 4 St. Tr. 129. 3 St. Tr. 151. 267. 297. Bull. N. P. 291.

† Sect. 102. But on an application to bail a person accused of grand larceny, the bail may be asked whether he has not stood in the pillory; for his answer in the affirmative cannot subject him to any punishment.

Rex v. Edwards, 4 Term Rep. 440.

Sect. 103. It seems clear (c) at this day, that outlawry in a personal action is not a good exception against a witness, as it is against a juror.

(c) Co. Litt. 6. 1 Hale, 303.
But 33 H. 6. 38. pl. 2. taken notice of 2 R. Abr. 675. seems contrary.

Sect. 104. It also seems clear, that a person convicted of felony who is admitted to his clergy and (d) burnt in the hand, is thereby re-enabled

(d) Sup. c. 33. s. 129. c. 37. sect. 49.
Ld. Raym. 370.
80. Godb. 288. Sty. 388. Kely. 38. Vent. 349. Skin. 578. 5 Mod. 15. 2 Sid. 51. Hob. 8.

re-enabled to be a witness ; for the burning in the hand operates as a statute pardon.

† *Sect. 105.* But as a person convicted of petit larceny, not being liable to be burned in the hand, was disqualified from being a witness, although he had suffered the punishment inflicted on him, it is enacted by 31 Geo. 3. c. 35. " that a conviction of " petty larceny will not incapacitate a person from being a " witness." Mackender's Case, 2 Wils.

Sect. 106. It seems (e) agreed, that the king's pardon of treason or felony after a conviction or attainder, restores the party to his credit. (e) Snp. c. 37. s. 48, 49, 50.

† *Sect. 107.* And it is decided, that the pardon of a person convicted on the statute of 31 Geo. 2. c. 10. for taking a false oath to obtain probate of a seaman's will, restores the convict to his competency ; for that a pardon not only clears the offence itself, but all disabilities incident to it. Reiley's Case, Cases Crown Law, 360.

Sect. 108. Also it was holden by the late Chief Justice (f) Holt, that the king's pardon will remove a man's disability to be a witness in all cases whatsoever, wherein it is only the consequence of the conviction or judgment against him, and not an express part of the judgment, as it is in conspiracy (g) at the suit of the king, and in perjury on the statute. But this matter (h) seems not to be fully settled. (f) 2 Salkeld, 514. 689. But see 2 Bro. 47. (g) R. 1. c. 72. s. 9. Hale thinks that a convict of conspiracy, perjury or forgery, may

be a good witness, if pardoned. 1 Hale, 306. (h) Vide sup. c. 37. s. 52.

† *Sect. 109.* But it is settled, that where a convict has been pardoned, and afterwards produced as a witness and objected to on the ground of his having been convicted, he must produce his pardon under the great seal ; for that letters under the king's sign manual are not sufficient, being rather evidence of the king's intention to pardon, than a pardon itself. Gulley's Case, Cases Crown Law, 94.

As to the THIRTEENTH POINT, viz. How far an interested person may be a witness.

Sect. 110. FIRST, It seems to be an uncontested rule, in all cases whatsoever, that if a person is either to be a gainer or a loser by the event of the cause, whether such advantage be direct and immediate, or consequential only, he is incompetent to be a witness. Co. Lit. 6. 1 Sid. 237. 1 Keb. 836. 1 Hale, 302. 2 Hale, 279. Loft. Gilb. 221. 225. 2 Atk. 229. Peer. Wms. 239.

† *Sect. 111.* Therefore a person who is bail for the defendant cannot be a witness for him without consent (i) ; for as he would become immediately liable on a verdict being given against the principal, he is directly and immediately interested (k). (i) 3 St. Tr. 253. (k) Per Buller, Justice, 1 Term Rep. 164.

† *Sect. 112.* So also where an infant sues, his *prochein ami* cannot be a witness ; for he is liable to the costs, and therefore immediately interested in the event of the cause. Hopkins v. Neale, 2 Stra. 1026.

† *Sect. 113.* So also in an information on a penal statute, where the informer is intitled to the whole or to part of the penalty, the informer is an incompetent witness, for he is directly interested in the event. Rex v. Tilly, 1 Stra. 316.

† *Sect.*

† Sect. 114. And for this reason a party injured cannot be a witness on an indictment for perjury on the statute of 5 Eliz. c. 9. because the statute gives him ten pounds.

† Sect. 115. But by 27 Geo. 3. c. 29. "The inhabitants of any place or parish are good witnesses, in actions on penal statutes, notwithstanding the penalty be given to the poor, or otherwise for the benefit of the parish or place, provided the penalty does not exceed twenty pounds."

† Sect. 116. By 1 Ann. c. 18. "Inhabitants of a county may be examined as witnesses on indictments for not repairing county bridges."

† Sect. 117. By 8 Geo. 2. c. 16. s. 15. "In actions brought on the statute of Winton, persons inhabiting within the hundred may be witnesses."

By 54 Geo. 3. c. 170. s. 9. The rated inhabitants of a parish are all competent witnesses in parish appeals.

Onsl. N. P. 257. † Sect. 118. So also all those persons who by several acts of
Espinass. N. P. parliament are intitled to rewards on the conviction of offenders
713. are competent witnesses, notwithstanding the rewards.

Rex v. Whitney, † Sect. 119. SECONDLY, It seems also to be agreed, that a per-
Salk. 253. son who is only consequentially interested in the event of a cause, is an incompetent witness.

Sect. 120. It was formerly ruled, that he who by a slight had been imposed upon to set his hand to a note for more money than he intended, was no good witness on an information for the same; because the conviction might be a means to avoid the note, by being made use of by the party when sued upon it, as a motive to influence the jury, which cannot well be prevented, though in law it be no evidence. † And some other cases of the same sort have been decided on the like principle (a). But it seems now to be settled, that to destroy the competency of a witness he must have an interest, and that where there is influence only, it shall only go to his credit (b).
(a) Rex v. Nunes, 2 Stra 1043.
Rex v. Ellis,
2 Stra. 1104.
(b) 4 Bur. 2255.

Corporation of † Sect. 121. As where an action was brought against a person
Carpenters in for following a trade in a corporation without being a freeman,
Shrewsbury v. contrary to the custom of the corporation; another person who
Haywood, had carried on a trade under the like circumstances could not be
Douglas, 359. admitted to give that fact in evidence in order to disprove the
custom, because, having been guilty of a breach of it, he would,
in consequence of the custom being disproved, have exonerated
himself from the liability of an action.

Rex v. Black- † Sect. 122. So also on an information where the statute of
man, Sitt. Hilary 17 Geo. 2. c. 40. against embezzling naval stores, gives a moiety
Term, 34 Geo. 3. of the penalty to the informer, but leaves it in the discretion of
Espinass. Nisi such judge to inflict a corporal punishment in lieu of such penalty;
Prius, 93. yet if a witness acknowledge on a voir dire that he expects a part
of the penalty in case the defendant is convicted, he is an incom-
petent witness, although his interest is only consequential on the
penalty being recovered.

† Sect.

† Sect. 123. It seems to be clearly agreed, that a witness shall not be taken to have such a consequential interest in the event of a prosecution as will destroy his competency, unless the judgment in the criminal prosecution on which he is examined may be given in evidence either for or against him in a civil action on the same subject; and therefore it hath been decided upon great deliberation, contrary to former determinations on the subject, that the borrower of money on a pawn at usurious interest is a competent witness, in an action for usury against the pawnbroker, to prove not only the repayment of the money, but the usurious transaction, for the judgment in this action could not be given in evidence against him in an action to recover the money lent.

Per Lord Mansfield, in the case of *Abraham v. Bunn*, 4 Burr. 3255.

Bull. N. P. 288, 289.

† Sect. 124. But if the lender of money, on such action being brought against him, produce a security, or prove the pledge to be remaining in his custody, it seems that the borrower cannot be examined to contradict this (a); and therefore it has been determined, that if it appear upon the *voir dire* of the borrower that he is a bankrupt and has not repaid the money borrowed, and obtained his certificate, he cannot be a witness in a *qui tam* action against his assignee, notwithstanding he is ready to release to his assignee all benefit which may arise from the discharge of this debt in particular, and all claim to surplus and allowance in general, and notwithstanding the assignee has proved his demand for the money lent under the commission.

(a) 4 Burr. 3256.

Masters qui tam v. Drayton, 2 Term Rep. 496.

† Sect. 125. THIRDLY, But the interest to render a witness incompetent must be a certain benefit or advantage arising to him from the event of the cause, or a certain charge or loss to which he may be liable; for a future or contingent interest, or a future or contingent loss which he may derive or suffer from the event of the cause, will not render him incompetent.

1 Peer. Wins. 287.
1 Term Rep. 163.
Doug. 134.

† Sect. 126. Therefore on an indictment for forging a bank note, signed in the usual form by one of the cashiers, &c. viz. "For the Governor and Company of the Bank of England, W. L." the cashier is a competent witness to prove that the name subscribed is not his hand-writing; for the cashier, by signing the note, does not make himself immediately responsible.

Newland's Case, Cases Crown C. L. 256.

† Sect. 127. FOURTHLY, A remote or trifling interest shall not destroy the competency of a witness.

† Sect. 128. And therefore it seems agreed, that it is no good exception against a witness, that he has a maintenance from the king; for every one may maintain his own witnesses.

2 St. Tr. 334. 691.

† Sect. 129. So also it hath been adjudged to be no good exception against a witness, that he has received a reward for having made a discovery of the crime to be proved against the prisoner.

1 St. Tr. 723.
2 St. Tr. 334.
4 St. Tr. 121.
Kelynge, 18.

† Sect. 130. Also it hath been (a) ruled to be no good exception, that a witness hath the promise of a pardon or other reward on condition of giving his evidence, unless such reward be promised by way of contract for giving such and such particular evidence, or full evidence, or any way in the least to bias him to go beyond

(a) *Kely*. 18.
2 St. Tr. 334, 335. 693.
3 St. Tr. 221, 222.
1 Hale, 304.
3 Hale, 280.
Kelynge, 18.
4 St. Tr. 121.

beyond the truth; which not being easily avoided in promises or threats of this kind, it is certain that too great caution cannot be used in making them.

Fotheringham v. Greenwood, 1 Stra. 129.

† *Sect. 131.* FIFTHLY, If a witness think himself interested, although in point of fact he is not, he should not be examined as a witness.

1 Term Rep. 296.

† *Sect. 132.* SIXTHLY, But it is an established rule, that a person who has signed a deed, or any negotiable instrument for the payment of money or performance of a duty, shall not be permitted to give testimony to invalidate it.

Dr. Dodd's Case, Cases C. L. 144.
Loft. Gilb. 222.
Bull. N. P. 288.

† *Sect. 133.* Therefore it has been held, that the person whose name is forged to a bond, cannot, on an indictment for the forgery, be admitted to prove that the name signed is not his signature, except he has a release from the supposed obligee of the bond.

Russell's Case, Cases C. L. 8.

† *Sect. 134.* So also on an indictment for forging a receipt for the payment of money, the person whose name is signed to the receipt is not an admissible witness to prove the forgery.

Rex v. Rhodes, 2 Stra. 728.
Parr's Case, Cases C. L. 345.

† *Sect. 135.* So also on an indictment for forging a letter of attorney whereby the prisoner transferred stock, the proprietor of the stock is not a competent witness to prove the forgery; but it seems, that he may be admitted to prove the amount of the stock and the interest that was due.

Waller v. Shelley, 1 Term Rep. 296.

† *Sect. 136.* So where A. the indorsee of a promissory note, indorsed it to B. who gave it up to C. in consideration of his bond given for the amount of it, and on an action on this bond being brought against C. the defendant produced A. as a witness to prove that the consideration given for the note was usurious; the court decided, that the indorser of a note, independent of any question of interest, could not be permitted to prove a note void which he himself had indorsed.

Bull. N. P. 289.

† *Sect. 137.* But where the person whose hand is forged is not directly interested in the question, he may be admitted to prove the forgery; as in the case of *Rex v. Wills*, who was indicted for forging a receipt from a mercer at Oxford, the mercer having before recovered the money in an action against Wills, he was admitted to prove the forgery.

SEVENTHLY, In criminal cases, witnesses though apparently interested are admitted from necessity.

Rex v. M'Carty, Salk. 286.

† *Sect. 138.* As in an indictment for a cheat, by imposing on A. B. a spurious liquor as genuine port wine, A. B. is a competent witness; for as such cheats are seldom practised except between the parties themselves, they would otherwise be committed with impunity.

Rex v. Moise, Stra. 595.

† *Sect. 139.* So where the indictment charged the defendant with tearing a note in which the defendant promised to pay so much to A. B. the payee of the note was admitted a witness, although it was objected that he was swearing to set up his own demand.

† *Sect. 140.* So also it is said, that if an indictment charge the defendant with having defrauded a woman of a bond or note, by persuading her that he could secure the affections of a man she loved by a certain spell or charm, the woman is a competent witness, although her evidence tends to destroy the validity of the bond or note, by shewing that it was given for an illegal consideration.

Per Holt, Chief Justice;
7 Mod. 119.

† *Sect. 141.* So on an indictment for an assault, the person assaulted is a competent witness to prove the assault, although he has laid a wager that he would convict the defendant.

Rev v. Fox,
1 Str. 652.
See 3 Term
Rep. 27.

† *Sect. 142.* In an action also on the statute of Winton against the hundred, the party robbed may himself be a witness.

Bull. N. P. 289.

As to the **FOURTEENTH POINT**, viz. How far religious sectaries may be witnesses.

† *Sect. 143.* It seems agreed to be a good exception that a witness is an infidel; that is, as I take it, that he believes neither the Old nor New Testament to be the word of God; on one of which our law requires the oath should be administered (a).

(a) It is said by Lord Coke, that an infidel cannot

be a witness, Co. Lit. 6. and the construction which Hawkins has made upon this passage is warranted by the same authority. 2 Inst. 179. 3 Inst. 165. 4 Inst. 279. See also Fleta, b. 5. c. 22. p. 144. Bract. 116. But Lord Hale doubts whether it be essential to the validity of an oath, that it should be taken upon the Old or New Testament, 2 Hale, 279. And it is now settled, that all persons professing to believe in a God, though neither believing in the Old or New Testament, may be witnesses, if sworn according to the ceremonies of their own religion. 1 At. 21. 2 Eq. Abr. 397. 1 Wils. 84. Co. Lit. 6. note (2). Cowp. 389.

† *Sect. 144.* It has been determined, that a subject of the Great Mogul, professing the Gentoo religion, sworn according to the ceremonies of that religion, is an admissible witness; for the Gentoos believe in a God as the creator of the universe, and that he rewards those who do well, and punishes all those who do ill.

Omichund v. Barker, 1 Atk. 21.

1 Atk. 46.

† *Sect. 145.* So also a Moor sworn upon the Koran according to the ceremonies of the Mahometan religion, is a good witness.

Fackenor v. Sa blue.

† *Sect. 146.* And it is said, that a heathen has been admitted a witness.

1 Atk. 39.

† *Sect. 147.* It hath also been determined, that a covenanter who, instead of being sworn in the usual manner by laying his right hand on the New Testament and afterwards kissing it, takes an oath by causing the book to be held open before him, and lifting up his right hand, takes as strong an oath as any other witness: the form of the oath in this case is, "You swear, according to the custom of your country and the religion you profess, that the evidence you shall give between our sovereign lord the king and the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth, so help you God."

Dutton v. Cole,
1 Sid. 6.

Mildrone's
Case, Cases in
Cro. Law, 319.

† *Sect. 148.* And it is now settled, that a Jew may be sworn in a criminal case on the Pentateuch, according to the ceremonies of the Jewish religion; and it is said that this practice is the ancient usage of the common law, and that Jews were thus

Wells v. Williams, 1 Ld. Raym. 282.
Vern. 263.
Per Ld. Mansfield, Cowp. 389.

sworn prior to the eighteenth year of Edward the First, when they were expelled the kingdom.

1 Atk. 27.

† Sect. 149. But it is said, that an atheist, who has no belief of a God, and an imprecation of the Divine Being upon him if he swear falsely, cannot be a witness; for persons denying the being or attributes of the Deity, cannot consider themselves as bound by the obligation of an oath, and therefore are not credible.

Bull. N. P. 202.

White's Case.
Cases Cro. Law.
See *Lee v. Lee*,
1 Atk. 43. 45.
Lord Kenyon,
Sitt. after
Hilary, 1791.

† Sect. 150. So also if it appear that a person has no idea of a God or religion, is altogether ignorant of the obligation of an oath, a future state of rewards and punishment, the existence of another world, or what becomes of wicked people after their death, he ought not to be sworn: but a person sworn on the New Testament, who, on being asked if he believed in the holy gospels, answered, after some prevarication, that he believed in them as far as he understood them, was allowed to give evidence.

Buller, 292.

† Sect. 151. And it is held, that persons excommunicated cannot be witnesses, because being excluded out of the church, they are supposed not to be under the influence of any religion.

† Sect. 152. The statute 3 Jac. 1. c. 5. enacts, "That every popish recusant convict shall stand to all intents and purposes disabled, as a person lawfully excommunicated," and therefore Lord Coke refused to admit them as witnesses between party and party (a); but it is said, that this is too severe, and that the purport of the statute is satisfied by the disability to bring an action.

(a) 2 Bulst. 155.
Bull. N. P. 293.

† Sect. 153. But by 7 and 8 Will. 3. c. 34. s. 6. which allows the affirmation therein described to be accepted instead of an oath, it is enacted, "That no quaker or reputed quaker shall by virtue of this act be qualified or permitted to give evidence in any criminal causes, &c."

(b) 2 Str. 854.
(c) 1 Strn. 441.
(d) 2 Burr. 1117.
(e) 1 Stra. 527.

† Sect. 154. And on this statute it hath been decided, that a quaker is not an admissible witness upon making affirmation in an appeal of murder (b), or on a motion for an attachment for not performing an award (c), on a motion for a misdemeanor (d), or on exhibiting articles of the peace (e).

As to the FIFTEENTH POINT, viz. How far infants, aliens, and persons deaf and dumb, may be witnesses.

(f) Co. Litt. 6.
(g) Sum. 263.
2 Hale, 278.
1 Brownl. 47.
Foster, 70.

Sect. 155. It is (f) certain, that want of discretion is a good exception against a witness; on which account alone (g) it seems, that an infant may be excepted against; for in some cases an infant of nine years of age has been allowed to give evidence.

(h) 1 Hale, 302.
634.
2 Hale, 279.

† Sect. 156. And in the case of a rape committed upon a female infant of such tender years that she has not sufficient understanding to be admitted to give testimony on oath, it was formerly held, that the information she gave to others of the facts and circumstances might be given in evidence by those to whom she made the communication (h), but this was never practised but

but upon extraordinary occasions (i), and the doctrine was soon overruled (k); and it is now settled, that if an infant appear, by answers to questions propounded by the court for the purpose, to entertain sufficient sense of the danger and impiety of falsehood, she may be sworn and examined, however young in years she may be (l); but that unless infants have such sufficient discretion, they cannot give their testimony; for no evidence can be received, under any circumstances, except upon oath (m).

Sect. 157. But it seems agreed, that it is no good (n) exception against a witness, that he is an alien; or villein, or bondman, &c.

Sect. 158. Also it seems, that a man deaf and dumb, with whom communication can be made by means of signs, &c. may be admitted to give material evidence against a prisoner.

As to the SIXTEENTH POINT, viz. In what manner witnesses are to give their evidence.

Sect. 159. It hath always (o) been agreed, that the evidence for the king must in all cases be upon oath, and also that the evidence for the defendant in an (p) appeal, whether capital or not capital, or in an indictment or information for a (q) misdemeanor, must also be upon oath. And it is said by Sir Edward (r) Coke, "That he never read in any statute, ancient author, book, case, or record, that in criminal cases, the party accused should not have witnesses sworn for him, and therefore that there is not so much as *scintilla juris* against it." And it is said by Sir (s) Matthew Hale, that there is no known law against it.

Sect. 160. However, there having been a constant immemorial (t) practice not to suffer witnesses to be sworn against the king upon indictments of capital crimes (u), except in some cases specially provided for by statute; and the judges being always tender of departing from the settled practice of their predecessors, and generally choosing rather to presume it originally founded on some statute or other good foundation, than to suffer the reasonableness of it to be nicely inquired into, which might be an inlet to endless uncertainties; it was thought necessary to enact by 1 Ann. c. 9. s. 3. "That every person who shall be produced or appear as a witness on the behalf of the prisoner, before he or she be admitted to depose, or give any manner of evidence, shall first take an oath to depose the truth, the whole truth, and nothing but the truth, in such manner as the witnesses for the queen are by law obliged to do; and if convicted of any wilful perjury in such evidence, shall suffer all the punishments, penalties, forfeitures, and disabilities, which, by any of the laws and statutes of this realm, are or may be inflicted upon persons convicted of wilful perjury."

† **Sect. 161.** It seems, that peers of the realm have no privilege in criminal cases (x), as they have in civil cases, of being examined upon their honour but that the evidence they give

as well before the grand jury as the petit jury, must be upon oath, and if they refuse to be sworn, may be fined and committed for a contempt of the court (a).

(a) 1 Salk. 278.

Dyer, 53. notis.

(b) Sed vide
vol. 1. tit.
"Perjury,"
contra.

† Sect. 162. It is said also, that it is not sufficient for a witness to depose "as he thinks or persuades himself:" First, Because the court must give an absolute sentence, and therefore ought to have more sure ground than thinking. Secondly, Because the witness cannot be prosecuted for perjury (b). Thirdly, Because the judges, as judges, are always to give judgment *secundum allegata et probata*, notwithstanding private individuals think otherwise.

(c) 5 St. Tr. 445.

(d) Phillips v.
Perkins, 3 Term
Rep. 749.

7 Mod. 119.
Rex v. Edwards,
4 Term Rep.
440.

† Sect. 163. It seems also, that a witness shall not be permitted to read his evidence (c), but he may refresh his memory from any book or paper, if he can afterwards swear to the fact from his own recollection; but if he cannot swear to the fact from recollection any further than as finding it entered in a book or paper, the original book or paper must be produced (d).

† Sect. 164. It is a general rule, that a witness cannot be asked any question the answering of which may oblige him to accuse himself of a crime, or subject him to penalties or punishment; and therefore a witness may be asked if he has ever stood on the pillory, for the answer cannot subject him to any punishment. (1)

As to the SEVENTEENTH POINT, viz. In what manner witnesses are compellable to attend.

(e) 1 St. Tr. 969.
3 State Trials,
238. 252. 420.
(f) Vide 1 St.
Tr. 969.
3 St. Tr. 1002.
(g) St. Tr. 995.

Sect. 165. I take it, that in prosecutions for (e) misdemeanors the defendant may take out *subpœnas* of course; but that in capital cases he hath no (f) right, by the common law, to any process against his witnesses without a special order of the court. And it is said in Turner's case (g), that the court cannot grant the prisoner any precept to bring in his witnesses, &c.

Sect. 166. But by 7 Will. 3. c. 3. s. 7. "All persons accused and indicted for any high treason, whereby any corruption of blood may ensue, shall have the like process of the court where they shall be tried, to compel their witnesses to appear for them at any such trial or trials, as is usually granted to compel witnesses to appear against them."

(h) The compulsory process to bring in witnesses in criminal causes is either by subpœna issued in the king's name

Sect. 167. And it seems, that since the statute of 1 Ann. c. 9. set forth more at large in the precedent section, which ordains, "That the witnesses for the prisoner shall be sworn," process may be taken out against them of course in any case whatsoever (h).

by the justices where the plea of not guilty is to be tried; or the justices or coroner who take the examination of the person accused, and the information of the witnesses, may at that time (and this is the usual way), or at any time after, and before the trial, bind over the witnesses to appear at the sessions, and if they refuse to be bound over, may commit them for contempt. 2 Hale, 52. 282. Where a witness is a prisoner in execution for debt, he must be brought up by *habeas corpus ad testificandum*, to give his evidence. 2 State Trials, 580. 4 State Trials, 37.

(1) See stat. 46 Geo. 3. c. 37. by which a witness is obliged to answer questions relevant to the issue, which has no tendency to accuse himself, or to expose him to penalty or forfeiture.

As

As to the EIGHTEENTH POINT, viz. In what cases witnesses may be allowed their expenses.

Sect. 168. It seems, that in civil proceedings a witness is not obliged to attend, unless his expenses are tendered to him pursuant to 5 Eliz. c. 9. and if after such tender he neglect to appear, he may be fined according to the directions of that statute, or punished by attachment for a contempt of the court, as the circumstances of the case shall appear to be. (h) But in criminal proceedings the demands of public justice supersede every consideration of private inconvenience; and witnesses are bound, unconditionally, to attend the trial upon which they may be summoned, and be bound over to give their evidence. To persons of opulence and public spirit this obligation cannot be either hard or injurious; but indigent witnesses grew weary of expensive attendance, and frequently bore their own charges to their great hinderance and loss; and Sir Matthew Hale (i) complains of the want of power in judges to allow witnesses their charges, as a great defect in this part of judicial administration.

(h) Ld. Raym. 1529.
Strange, 1054.
1150. 510.
Black. 36.
B. R. H. 313.

(i) 2 Hale, 282.

By the 38 Geo. 3. c. 70. s. 4. the court, before whom any person shall be tried for felony, are authorised to direct payment to the prosecutor and his witnesses and persons concerned in the apprehension of the felon, such sums as the court shall think reasonable to reimburse the prosecutor and his witnesses their expenses of prosecuting and to compensate them for their loss of time, &c.

Ante, p. 127.

As to the NINETEENTH POINT, viz. What evidence maintains an indictment.

Having already shewn, (k) that, according to the later opinions, where one is indicted upon a statute, and the evidence doth not bring the case within the statute, but yet proves the offence in the indictment as it is an offence at the common law, the defendant may be found guilty at the common law, and the words *contra formam statuti* rejected as surplus.

(k) Ch. 25.
sect. 115.
Ch. 30. sect. 9.

Having also shewn, (l) that it is strongly holden, that a man cannot be found guilty of an indictment against him as principal, upon evidence which only proves him to have been accessory before, but shall be discharged of the indictment,

(l) Ch. 35.
sect. 11.

I shall in this place take notice only of the following particulars.

Sect. 169. FIRST, That it is a settled rule (m) in all cases, whether capital or not capital, that the day laid in the indictment or (n) appeal is not material upon evidence, but that the defendant may be convicted upon proof of a fact at any other time, whether before or after the day laid, so (o) that it were before the time when the indictment or appeal were preferred: and agreeably hereto Sir (p) Henry Vane was found guilty of an indictment of high treason laid on the thirtieth of May, in the eleventh of Charles the Second, upon evidence of a fact done the thirtieth of January, in the first year of Charles the Second.

(m) Sum. 264.
1 Hale, 361.
2 Hale, 179.
291.
3 Inst. 230.
1 Salk. 288.
Kelynge, 16.
2 Inst. 318,
319.
4 State Tr. 9.
(n) Sum. 187.
(o) 1 Salk. 288.
4 State Tr. 9.
3 Kelynge, 16.
(p) Sum. 264.

Sect. 9 St. Trials, 587.

2 Inst. 318. 3 Inst. 230. Confirmed by all the judges in the case of Lord Balmerino, and Townley's case, Foster, 7, 8.

Sect. 170. SECONDLY, That where the time proved varies from that laid in the indictment or appeal, the jury may either find the defendant guilty generally, in which case the forfeiture shall relate to the time laid, till the verdict be falsified by the party intereted (as it may be in this (q) respect, though not as to the point of the offence); or they may (r) specially find him guilty on the day on which the fact is proved, whether before or after the day laid in the indictment or appeal, in which case the forfeiture shall relate to the day so specially found. But where a verdict expressly finds a defendant guilty before the time laid in the indictment or appeal, whether it may be falsified, as to the time, by the party interested, as it may be where it finds him guilty generally of the offence in the indictment or appeal, upon evidence of a fact after the time laid, may deserve to be considered.

(q) Sum. 264.
270.
3 Inst. 230. and
infra, Ch. 51.
(r) Kely. 16.
Summ. 264.
1 Hale, 361.
2 Inst. 318.
3 Inst. 230.

(s) Salk. 185.
661.
Vide Fielding's
Penal Law, 317.

Sect. 171. THIRDLY, That where a certain (s) place is made part of the description of the fact which is charged against the defendant, the least variance as to such place between the evidence and indictment is fatal; as where a trespass in taking away goods, or any other offence is alleged in such a parish in the house of J. S. or in such a parish in a play-house in Lincoln's-inn-fields, and upon evidence it appears to have been done at the house of a different person, or that there is no play-house in Lincoln's-inn-fields.

(t) Sum. 261,
265.
Salk. 282.
4 St. Tr. 9.
Kely. 15. 33.
(u) 2 Hale, 291.
See the books
above cited, and

Sect. 172. But it is a settled (t) rule, that a place laid only for a venue in an indictment or appeal is no way material upon evidence; but that a proof of the same crime at any other place in the (u) same county, maintains the indictment or appeal as well as if it had been proved in the very same place.

supra, ch. 25. sect. 35 to 54. and Cro. Eliz. 911.

(x) Kely. 33.
and Lord Pies-
ton's case,
4 St. Tr. 410.
confirmed by
Lord Mansfield
in Hensey's case, 1 Burrow, 650.

Sect. 173. Also it hath been (x) adjudged, that after a crime hath been proved in the county in which it is laid, evidence may be given of other instances of the same crime in another county, in order to satisfy the jury.

(y) Kely 14, 15.
4 State Tr. 78.
(z) For it is ne-
cessary that
some overt-act
be proved in the
same county, for
otherwise the
compassing
could no way be
said to be
proved in the
county wherein it is laid. See the books above cited. (a) Kelynge, 15. and Deacon's case, 9 St. Trials, 558. Foster, 9.

Sect. 174. Also it was (y) adjudged, in Sir Henry Vane's case, that where one is indicted for high treason in compassing the king's death in one county, and the levying of war in the same county is laid as an overt-act of such treason, and (z) proved in the same county by one witness, the levying of war in another county may also be proved by another witness. But it seems to have been (a) agreed at the same time, that where the levying of war is the treason for which the party is indicted, it must be fully proved in the county in which it is laid.

(a) Kelynge, 15. and Deacon's case, 9 St. Trials, 558. Foster, 9.

Sect. 175. Also it seems, that at this day the levying of war can in no case be given in evidence as an overt-act in any county in which it is not laid, unless it tend to prove some overt-act that is expressly laid; for it is enacted by 7 Will. 3. c. 3. s. 8. "That

(b) Post. 245.

"no (b) evidence shall be admitted or given of any overt-act that

"is not expressly laid in the indictment against any person or persons whatsoever,"

Sect. 176. In the construction whereof it hath been (c) adjudged, that where one is indicted for high treason in adhering to the king's enemies, and certain acts of hostility done by him in a certain ship called the Clencarty, are laid as the overt-acts of such adherence, no evidence can be given of any other distinct act of adherence, having no relation to, nor any way tending to prove, what was done in the Clencarty, though it conduce to prove the same species of treason; and therefore that on such an indictment no evidence can be given of the prisoner's having run away to the enemy in a custom-house boat, &c.

(c) Captain Vaughan's case, 5 State Tr. p. 17 to 38.

Sect. 177. But it hath been (d) adjudged, that where one is indicted for high treason in compassing the king's death, and a consult and agreement to assassinate the king is laid as one of the overt-acts of such treason, the defendant's giving about among the conspirators a list of the persons names who were intended to be employed in the assassination, may be given in evidence against him upon such indictment, because it naturally tends to prove his agreement to the intended assassination, which agreement is one of the overt-acts laid in the indictment.

(d) Rookwood's case, 4 State Tr. 661 to 697.

Sect. 178. Also it hath been (e) adjudged, that where the writing of several treasonable letters is laid as an overt-act of high-treason in compassing the king's death, and the purport of such letters is only set forth in the indictment without a particular recital or description of any of them, the particular letters making good such charge may be read at the trial.

(e) Francia's case, 6 State Tr. 58 to 102.

Yet in some indictments the very words charged to have been treasonable have been set forth. 2 St. Tr. 746. 219.

Sect. 179. FOURTHLY, That where several overt-acts are laid in an indictment of high treason, the proof of any (f) of them maintains the indictment as much as if every one of them were proved.

(f) Lowick's case, 4 State Tr. 718. and Laver's case, 6 St. Tr. 226. 1 Hale, 122. Foster, 194.

Sect. 180. FIFTHLY, That where one is indicted for writing a (g) libel *secundum tenorem sequentem*, or for forging a deed so and so described, any the least variance between the libel recited, or deed described, and those given in evidence, is fatal; but that where the substance only of a libel is set forth, it is sufficient if the libel be proved to have the same sense as is set forth (1).

(g) Salk. 660. Hobart, 272.

Sect.

(1) The word "aforesaid" implies, and binds the party to an exact recital, Dougl. 97. So also the words "as follows, that is to say," are altogether as certain as if it had been said, "in the words and figures following, that is to say," Powell's case, 3 Bl. Rep. 788. But the words "in manner and form following, that is to say," do not bind the party to recite the instrument *verbatim*, nor render mere formal omissions or mistakes fatal, May's case, Douglas, 193. In perjury, on an affidavit recited to the "tenor and effect, &c." where "understood" was inserted in the indictment instead of "understood," the variance was held not fatal, Beach's case, Cowper, 229. So also in forgery, where the bill given in evidence was "value re-

ceived," and the recital in the indictment was "value received," the variance was determined by all the judges to be immaterial; for it is impossible to mistake it, Hart's case, Cases Cro. Law, 131. The true distinction is said by Lord Mansfield to be, that where the omission or addition of a letter does not change the word so as to make it another word, the variance is not material; but that where the mis-recited word is in itself a word not intelligible with the context, there the variance is fatal. Salk. 660. Cowp. 230. Douglas, 194. note 25. But by Powys, if the court once give into solutions of variances, they will never know where to stop, and being once at sea will find it difficult to reach the harbour again. 2 Str. 231, 232.

(*h*) Hobart, 294. *Sect.* 181. Yet it seems (*h*) agreed, that it is no evidence in any criminal case, that the defendant said so and so, or words to the like effect; because the court must know the very words, to judge of their force and effect.

(*i*) 9 Coke, 67.
2 Hale, 105.
291. 185.
2 Inst. 319.
3 Inst. 135. 50.
Summary, 265.
Gilb. 270. 277. *Sect.* 182. SIXTHLY, That a variance between an indictment or appeal of death, and the evidence, as to the instrumental cause mentioned in such indictment or appeal, is no (*i*) way material, so that the party be proved to have died by the same kind of death as is alleged in the indictment or appeal.

(*k*) See the books above cited, and sup. c. 23. s. 84. *Sect.* 183. And therefore it is (*k*) agreed, that if one be indicted or appealed for killing another with a sword, and upon evidence it appear that he killed him with a staff, hatchet, bill, or hook, or any other weapon with which a wound may be given, he ought to be found guilty, for the substance of the matter is whether he gave the party a wound of which he died; and it is not material with what weapon he gave it, though, for form's sake, it be (*l*) necessary to set forth a particular weapon. And on the same ground it hath been also (*m*) adjudged, that an indictment or appeal for poisoning a man with one kind of poison, may be maintained by evidence of a different kind of poison; for the substance of the matter is, whether the defendant did poison the deceased,

(*l*) Vide sup. c. 23. s. 84.
(*m*) 3 Inst. 135.
Summary, 265.
3 Inst. 319.
(*n*) 2 Hale, 291.
2 Inst. 319.
1 St. Tr. p. 118.
Overbury's case.
(*o*) 4 St. Tr. 9.
2 Hale, 291.
Mackally's case,
9 Coke, 67. or not. (*n*) Yet it seems clear, that evidence of poisoning, burning, or famishing, or any other kind of killing wherein no weapon is used, will not maintain an indictment or appeal of death by killing with a weapon; and that evidence of killing with a weapon will not maintain an indictment or appeal of poisoning, &c. because they are different kinds of deaths; and in like manner that an indictment of treason could (*o*) never be maintained by evidence of treason of a different species.

(*p*) Sum. 265.
2 Hale, 292.
3 Inst. 165. *Sect.* 184. SEVENTHLY, That it seems a (*p*) general rule that, wherever a variance between an indictment or appeal, and the evidence brought to support them, is material or immaterial in respect of the principal; in the same cases also it will be material or immaterial in respect of the accessory.

(*q*) But there were anciently some opinions to the contrary, sup. c. 29. s. 7. Gilb. L. E. 271. 2 Hale, 185. 292. 344, 345. S. P. C. 41.
(*r*) Plowden, 98. 100. *Sect.* 185. EIGHTHLY, That it is (*q*) settled at this (*r*) day, that if an indictment or appeal against A. B. and C. for the death of D. charge A. as having given the mortal blow, and B. and C. as having been present, procuring and abetting, and the evidence prove that B. and C. gave the blow, and that A. was only present, procuring and abetting, yet it maintains the indictment; because in such a case, in the (*s*) judgment of law, the act of any of them is the act of all.

1 Salkeld, 334, 335. Wallis's case. 3 Mod. 121. 9 Coke, 67. 4 H. 7. 18. Ab. F. Corone, 60. B. Appeal, 85. Corone, 140. S. P. C. 41. 1 Hale, 437, 438. 2 Summary, 292. Sup. c. 23. sect. 76 c. 23. sect. 64.
(*s*) See the books above cited, and B. 1. chap. 14. sect. 6. chap. 13. sect. 31. and 50. Douglas, 210.

(*t*) Sancher's case, 9 Coke, 119. 2 Hale, 292. Vide Keilw. 107. and sup. c. 29. s. 46, 47.
(*u*) 2 Inst. 183. *Sect.* 186. NINTHLY, That it hath (*t*) been resolved, that if one be indicted as accessory to two, and upon evidence appear to have been accessory to one of them only, yet he shall be found guilty. But it is holden by Sir Edward Coke (*u*), that if an appeal be brought against two as principals, and against another as accessory

accessary to them, and one of those charged as principals be found not guilty, the accessary is discharged; for which he gives this reason, that because the plaintiff made him accessary to two, he cannot be found accessary to one: but no authority is cited for the maintenance of this opinion; neither doth it seem easy to reconcile it with the resolution above-mentioned, unless the rules of evidence on an appeal differ from those on an indictment, which I do not (x) find that they do as to other variances.

(x) Vide sup.
s. 32, 34, 37,
38, 39.

Sect. 187. TENTHLY, That it hath been (y) agreed, that if a person be generally indicted for the murder of another *ex malitiâ præcogitatâ*, and no express malice appear upon the evidence, but only (z) malice implied by law, yet he shall be found guilty.

(y) 9 Coke, 67.
C. Jac. 280.
(z) See B. 1.
c. 13. s. 18, 19.
and s. 40 to 43.

Sect. 188. Also it hath been (a) adjudged, that where an indictment sets forth all the special matter in respect whereof the law implies malice, a variance between the indictment and evidence as to the circumstances doth no hurt, so that the substance of the matter be found: as (b) where an indictment for the murder of a serjeant at mace in London upon an arrest, supposes that the sheriff made a precept to such serjeant for the arrest, and upon the evidence it appears that there was not any such precept, but that the serjeant made the arrest *ex officio* at the plaintiff's request upon the entry of the plaint, according to the custom of the city; for the substance of the matter is, whether the defendant killed an officer in the lawful execution of legal process.

(a) 9 Coke, 67.

(b) 9 Coke, 62.
Vide the case of
Rex v. Baker,
Cases Cro. Law,
100.

Sect. 189. ELEVENTHLY, That violent (c) presumption from plain circumstances is in some cases taken for full proof; as where a man is stabbed in a house, and another runs out with a bloody knife in his hand, and no one else is in the house at the time. Also it is (d) said, that a probable presumption is of some weight, but that a light one is not to be regarded at all.

(c) Co. Litt. 6.
S. P. C. 179.
Vide sup. c. 45.
s. 10. and 1 St.
Tr. 181, 636.
2 State Tr. 408.
3 State Tr. 228,
229, 688, 689.

894. 901. 928, 929, 930. (d) Coke on Littleton,

Sect. 190. TWELFTHLY, That it was enacted by 21 Jac. c. 27. "That if any woman be delivered of any issue of her body, male or female, which being born alive should by the laws of this realm be a bastard, and that she endeavour privately, either by drowning, or secret burying thereof, or any other way, either by herself or the procuring of others, so to conceal the death thereof, as it may not come to light, whether it were born alive or not, but be concealed; in every such case, the said mother so offending shall suffer death as in case of murder, except such mother can make proof by one witness at the least, that the child whose death was by her so intended to be concealed was born dead."

Evidence as to
death of bastards.

This statute is now repealed by 43 Geo. 3. c. 58. s. 3. and from thenceforth, "The trials in such cases shall proceed and be governed by such and the like rules of evidence and of presumption as are by law used and allowed to take place in respect to other trials for murder, and as if the said act had never been made."

Repealed by
43 Geo. 3. c. 58.
s. 3.

By

By sect. 4. The jury may acquit the prisoner for the murder and find her guilty of endeavouring to conceal the birth of the child—which subjects the offender to imprisonment not exceeding two years (vide vol. 1. p. 95.)

As to the TWENTIETH POINT, viz. What may be given in evidence on the part of the defendant.

(e) B. 1. tit.
"Assault."

Sect. 191. It seems (e) agreed, that *son assault demesne* may be given in evidence on the general issue in an indictment, but not in an action of battery.

(f) Savil, 32.
1 Jones, 151.
2 R. Abr. 683.
(g) 2 R. Abr. 683.
But this is left a
quære, Savil, 32.
B. Gen. Issue, 3.
Vide sup. c. 25.
s. 113.
(h) 2 R. Abr. 683.

Sect. 192. Also it seems to have been always (f) agreed, that the defendant in an information on a penal statute may give in evidence any exception in his favour in the body of the act. And it hath also been (g) holden, that he may give in evidence any such exception in a proviso of the act (because any such exception shews that he did not act against the form of the statute); but that he cannot (h) give in evidence any clause of exemption in a latter statute, but ought to plead it.

† As to the TWENTY-FIRST POINT, viz. In what cases character may be given in evidence.

Bull. N. P. 296.

† Sect. 193. If the defendant's character is put in issue by the prosecution, the prosecutor may examine to particular facts; for it is impossible without it to prove his charge; but in the particular case of an indictment for barratry, this cannot be done without giving notice to the defendant what particular facts are to be given in evidence.

Bull. N. P. 296.

Sect. 194. But, except in these instances, the prosecutor cannot enter into the defendant's character, unless the defendant enable him to do so, by his calling witnesses to support it, and even then the prosecutor cannot examine to particular facts.

Bull. N. P. 296.

† Sect. 195. The character of a witness also can only be impeached by examinations into general character, and not to particular facts.

Determined in
Hastings' Trial
in House of
Lords, 11th
June, 1789.

† Sect. 196. It is also decided, that a party shall never be permitted to bring general evidence to discredit his own witness, for that would enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hands of destroying his credit, if he spoke against him.

Bull. N. P. 297.

† Sect. 197. But if a witness prove facts in a cause which make against the party who called him, yet the party may call other witnesses to prove that these facts were otherwise.

As to the TWENTY-SECOND POINT, viz. Whether a bill of exceptions lies to evidence in criminal cases.

St. Henry Vane's
Case, wherein it
is said, that such
bill never was nor
ought to be allowed
in any capital case,
2 St. Tr. Harg. edit.
450. And as this case
is reported in 1 Sid. 85.
1 Keb. 384. it seems
to have been holden,
that it is not grantable
on any indictment;
and as it is reported
in 1 Lev. 68. and Kely.
15. it is not grantable
in any criminal case
whatsoever. Vide 2 Inst.
427. and the Rioters
Case, 1 Vern. 175.

Sect. 198. It hath been adjudged, that no bill of exceptions is grantable

And as this case is reported in 1 Sid. 85. 1 Keb. 384. it seems to have been holden, that it is not grantable on any indictment; and as it is reported in 1 Lev. 68. and Kely. 15. it is not grantable in any criminal case whatsoever. Vide 2 Inst. 427. and the Rioters Case, 1 Vern. 175.

grantable on an indictment of treason or felony; the statute of Westminster the second, 13 Edw. 1. st. 1. c. 2. s. 31. *cum aliquis implacitatur coram aliquibus justiciariis proponat exceptionem, &c.* having never been thought to extend to any such case, it being plain that it could not but cause an infinite delay of justice if it should.

† Sect. 199. It hath also been determined, that a bill of exceptions will not lie to the court of quarter-sessions, upon an appeal against an order of removal; for that it must be such a proceeding as in construction of law is an impleading of the party.

Rex v. Preston
on the Hill,
Burr. S. C. 77.

CHAP. XLVII.

OF VERDICT.

FOR the general learning of verdicts I shall refer to other books, and in this place take notice only of the following particulars.

Sect. 1. FIRST, That it seems to have been (a) anciently an uncontroverted rule, and hath been allowed, even by those (b) of the contrary opinion, to have been the general tradition of the law, that a jury sworn and charged in a capital (c) case, cannot be discharged (without the (d) prisoner's consent) till they have given a verdict. And notwithstanding some (e) authorities to the contrary in the reign of king Charles the Second, this hath been holden for clear law both in the reign of king (f) James the Second, and (g) since the Revolution.

member, 3 Institute, 110. Co. Litt. 227. b. But as to cases of an inferior nature, the contrary hath been adjudged. Raymond, 84. Vide 1 Ventris, 69. (d) 1 Andr. 103, 104. Foster, 36. (e) Kely. 47. 26. 52. Comberbach, 401. 1 State Trials, 978. 2 State Trials, 155. 277. 389. Raymond, 84. (f) 3 St. Trials, 678. Vide sup. c. 44. s. 22. (g) 4 St. Tr. 110. 178, 179. Sed vide Rookwood's Case, 4 State Trials, 649. and this was confirmed by the declaration of Lord Mansfield at the trial of Lord George Gordon for high treason. But see this point argued at large, Foster 29 to 30. where certain cases there may be an exception to this general rule.

(a) Co. Lit. 227.
(b) 3 Institute, 110.
(c) 1 Andr. 103, 104.
(d) 2 Hale, 294.
(e) 2 St. Tr. 827.
(f) 1 Andr. 103.
(g) Raym. 84.
(h) And the same is holden by Coke as to larceny, and any case of

Sect. 2. SECONDLY, That it seems to have been (h) always agreed, that in all (i) capital cases the jury must give their verdict openly in court, and cannot give a privy verdict.

1 Hale, 598. 2 Hale, 300. (i) The same is holden by Sir Edward Coke as to larceny, and any case of member, 3 Inst. 110. Coke Lit. 227. And it is said in Raymond, 193. that no privy verdict can be given in any case where the jury are to look upon the prisoner when they give it.

(h) Co. Lit. 227.
(i) 3 Inst. 110.
Raym. 193.
2 Hale, 300.

Sect. 3. THIRDLY, That it is settled, (k) that the jury may give a special verdict in any criminal case, whether capital or not capital, as well as in a civil.

1 Bulstrode, 87. Vide infra, s. 6. But it is said, Kely. 29, 30. that it is dishonourable for the court to suffer a special verdict in a plain case.

(k) S. P. C. 168.
2 Hale, 301,
302.
9 Coke, 12. 68.

Sect. 4. FOURTHLY, That (l) hath been (l) adjudged, that where (l) C. Eliz. 276. the 296. 464.

the jury find a man not guilty of an indictment or appeal of murder, they are not bound to make any inquiry, whether he be guilty of manslaughter, &c.; but that if they will, they may, according to the nature of the evidence, find him guilty of (m) manslaughter or (n) homicide *se defendendo* or *per infortunium*; for the killing is the substance, and the malice but a circumstance, a (o) variance as to which hurts not the verdict. Yet the books seem to make this difference, that where the jury find the defendant guilty of manslaughter on an indictment of murder, they may give their verdict (p) generally, without setting out any of the circumstances of the fact; but that they shall not (q) be received to find him guilty generally of homicide *se defendendo*, or *per infortunium*; but must set out the whole circumstances of the fact, and in the (r) conclusion shew of what crime they find the defendant guilty, wherein if they be mistaken, it is (s) said, that the court may notwithstanding give such judgment as shall appear to be proper from the circumstances of the fact specially set forth.

(m) Dyer, 261.
4 Coke, 43.
9 Coke, 81.
Dalison, 14.
Litch, 126.
Plowden, 101.
Cro. Eliz. 276.
290. 464.
Moor, 407.
B. Corone, 121.
But 2 Roll. 461.
this was questioned as to an appeal of death.
(n) B. Cor. 267.
1 Hale, 302.
Dalison, 14.
S. P. C. 165.
See the book

cited to the following section. (o) 1 Bulst. 87. It is holden by two judges against one, that where the appeal mentioned three wounds, and the verdict found but one, yet the variance was immaterial. Vide c. 46. s. 37. and the case of Stephen Self, Cases C. L. 127. (p) See the books cited *supra*, lett. m. (q) 2 Hale, 302. S. P. C. 15. 165. 3 Inst. 56. 26 H. 8. 5. Aleyn, 12. (r) F. Cor. 264. 286. 287. 305. Vide Benlowe, 47. 1 Anderson, 41. (s) 43 Assize, 31. F. Cor. 226. Crompt. 114. S. P. C. 165. Vide Benlowe, 47. 1 Anderson, 41.

(t) 1 Anderson, 103, 104. And note, that in all the books cited under the fourth section to letter m, where the defendant is found guilty of manslaughter on an indictment of murder, he is expressly acquitted of the murder; but other books which speak of this matter, say in general that the defendant may be found guilty of manslaughter on an indictment of murder, without saying any thing as to the necessity of giving an express verdict upon the murder. 9 Coke, 67. Crompton, 114. 1 Hale, 267. 2 Hale, 302. See 4 Coke, 40. 46. (u) F. Corone, 284. 286, 287. Sed vide 44 E. 3. 44. F. Corone, 94. Benlowe, 47. 1 Anderson, 41.

Sect. 5. FIFTHLY, That it hath been (t) adjudged, that if the jury on an indictment or appeal of murder find the defendant guilty of manslaughter, without saying any thing expressly as to the murder, it is insufficient and void, as being only a verdict for part. And *quære* if the law be not the same where the jury upon such an indictment find that the defendant killed the deceased *se defendendo*, or *per infortunium*, and do not expressly find that he did not murder him, according to the generality of the ancient (u) authorities.

(x) F. Corone, 115. 177. 451.
16 Assize, 14.
2 Hale, 392.
S. P. C. 165.
Compton, 114.

Sect. 6. SIXTHLY, That it is agreed, that on an indictment for stealing goods of a certain value above 12*d.* the (x) jury may find the defendant guilty, but that the goods are but of the value of tenpence, &c.

B. 1. tit. "Petit Larceny." s. 2. p. 152.

1 Hale, 560.
Vide the King v. Summers, Tri. Term, 1706.
Rex v. Francis, Comyns, 478.

On an indictment for burglary *quòd felonice et burglariter fregit et intravit*, and certain goods *felonice et burglariter cepit et asportavit*, the offender may be acquitted of the burglary and found guilty of the larceny. But on the contrary, it seems that he cannot on such an indictment be acquitted of the larceny and found guilty of the burglary; because though where the indictment comprises burglary and larceny the indictment is good, though it be not supposed in the indictment that it was *ea intentione ad bona furandum*, for the act of theft being charged at the same time, it is sufficient evidence of his intention; but when he is acquitted of larceny, there being nothing expressly charged in the indictment that *burglariter fregit, &c. ea intentione ad bona,* &c.

&c. felonice furandum, it stands single, as if the indictment had been of single burglary; in which case the clause of *ea intentione ad furandum*, &c. had been necessary to complete the single burglary. (1)

† SEVENTHLY, Upon the 10 and 11 Will. 3. c. 23. for stealing to the value of 5s. (2) from a shop, &c. if the offence should appear to have been committed in such a place as the act was intended to protect, yet a jury may find a verdict for the larceny only, as under five shillings.

But it seems that if a man be indicted for a felony generally, and upon the evidence it (y) plainly appear that the fact amounts to no more than a bare trespass, he cannot be found guilty of the trespass, but ought to be indicted anew. Yet if the special circumstances of the case be set forth in an indictment for an offence laid as felony, and the defendant be found guilty generally, and afterwards the Court be of opinion that the fact doth not amount to felony, but only to an enormous trespass, it seems (z) agreed, that judgment may be given as for a trespass only. Also, if the jury find a special verdict on a general indictment for felony, and the crime be adjudged upon such verdict to be but a trespass, (a) judgment may be given upon it as for a trespass only. Also, if on an indictment of trespass the fact appear to have been felonious, it hath been (b) adjudged, that the defendant may be found guilty of the indictment as it is laid, because the king may proceed against the offender as he thinks fit, either as a trespasser or a felon. But the contrary is (c) said to have been holden by the late chief justice HOLT; and it hath been (d) adjudged, that if it appear in an action of trespass that the taking was felonious, no verdict ought to be taken unless the defendant have been before tried for felony, because the suffering of such actions might be a means to prevent prosecutions for felonies.

c. 36. s. 6. than an acquittal or judgment against a man in an action or indictment of trespass is no bar on an indictment or appeal of larceny. Kelynge, 30. (c) 6 Mod. 77. (d) 2 R. Abr. 556. 557. Noy, 18. Vide 1 Jones, 147. Noy, 82. Latch. 145. 1 Mod. 283. Cont. Bracton, cited S. P. C. 28. 83.

Sect. 7. EIGHTHLY, That if hath been holden, that a verdict acquitting a defendant of the death of a man, found against him by the coroner's inquest, ought not to be received unless it shew what other person did the fact; but for this I shall refer to chapter nine, section thirty-three.

Sect. 8. NINTHLY, That on an indictment for a riot against three or more, if a verdict acquit all but two, and find them guilty;

(1) Comer was indicted for burglary, "and that he one diamond necklace, &c. did feloniously and burglariously steal, &c." The verdict was "guilty of stealing in the dwelling house. Not guilty of the burglary." On 30th November, 1744, all the judges agreed, that the fact of larceny being laid to constitute the burglary, and not the intention of felony, vide 1 Hale, 599. 560. the acquittal of the burglary included an acquittal of the larceny in the dwelling-house, and that he was intitled to clergy on this manner of taking the verdict. But if the verdict had acquitted him of breaking and entering the house in the night-time, and found him guilty of the rest of the indictment, this finding would have included the offence of

(y) Kelynge, 29. 30. C. Car. 332. It is made a *quare* 2 H. 7. 28. and 10. whether, where an indictment of larceny is insufficient as to the felony, the party may be found guilty of the same taking as for a trespass.

(z) Kelynge, 29. 30. C. Car. 376. 377. 1 Jones, 351. (a) C. Jac. 497. 498. Sed Vide Westbeer's case, Stra. 1133, where this is denied to be law.

(b) 18 Edw. 4. 10. 2 Levins, 208. Vide sup. c. 35. s. 8. and Commonly it is a business of form, for they usually say, persons unknown did it. 2 Hale, 301. 305.

stealing goods in the dwelling-house, and then by 12 Ann. he would have been excluded from clergy. And in the King v. Withal and Overhand at Guildford Assizes, 1772, for burglary, the jury found a verdict "not guilty of breaking," but "guilty of stealing in the dwelling-house." It was objected that the prisoners could not be ousted of clergy by 12 Ann. because there was no separate count to support that charge. But all the judges were unanimous that the prisoners were ousted of clergy; for an indictment for burglary contains every charge that is necessary on the twelfth of Ann. M.S.

(2) Now £15 by 1 Geo. 4. c. 117.

(c) Popham, 202. 1 Salkeld, 385. 2 St. Tr. 60. 61. 4 St. Tr. 160. 161. In the Year-Book of 11 H. 4. s. pl. 3. Ab. F. Verdict, 18. It is agreed that such a verdict is repugnant, and therefore the Court would not receive it, but sent the jury back again, whereupon they found both of the defendants guilty. (f) 4 St. Tr. 160, 161.

(g) 4 St. Tr. 160, 161.

(h) Yet it hath been holden, That on an indictment of burglary and other felony against A. and B. the jury cannot, upon the very same evidence against both, find A. guilty of the burglary, and B. of the felony only. 1 Sid. 171. Vide 2 Hale, 293. (i) Vide sup. c. 26. s. 75. (k) Vide sup. c. 26. s. 75. 4 St. Tr. 160. 161.

(l) Vide Rex v. Messenger and others, Kely. 72. Rex v. Plummer, Kely. 111. Rex v. Royce, 4 Burr. 2073. Rex v. Francis, Str. 1015. Comy. 748. Rex v. Borthwick, Doug. 207. Rex v. Phillips, Cowp. 830. for the precision with which special verdicts must find the necessary facts.—N. B. On a special verdict for murder the Court are judges of the malice. Ld. Raym. 1485. Str. 766.

guilty; or on an indictment for a conspiracy, if the verdict acquit all but one, and find him guilty, it is repugnant and (e) void as to the two found guilty in the first case, and as to the one found guilty in the second, unless the indictment charge them with having made such riot or conspiracy *simul cum aliis juratoribus ignotis*; for otherwise it appears that the defendants are found guilty of an offence whereof it is impossible that they should be guilty; for there can be no riot where there are no more persons than two, nor can there be a conspiracy where there is no partner. Yet it seems (f) agreed, that if twenty persons are indicted for a riot or conspiracy, and any three found guilty of the riot, or any two of the conspiracy, the verdict is good (1).

And (g) where several are indicted for treason or felony, or other crime, which may be as well done by one only as by more, a verdict (h) may find one of the defendants only guilty, and acquit all the rest. And in like manner it seems (i) agreed, that a verdict on an information on a penal statute against several persons jointly charged with the offence against the statute, may acquit some and find others guilty; because though the words of the information be joint, yet in judgment of law, each defendant is severally charged for his own offence. And in like manner (k) it seems, that the defendant in such information may be found guilty for a less time or degree than is laid, unless the offence consist in doing some entire thing, which must be precisely proved in the same manner as it is laid.

SECT. 9. TENTHLY, That the Court in judging upon a special verdict is confined to the facts expressly found, and cannot supply the want thereof, as to any material part, by any argument or implication from what is expressly found (2); and therefore where an indictment set forth that the defendant discharged a gun against J. S. and thereby gave him a mortal wound, &c. and the special verdict found that he discharged a gun and thereby killed J. S. but did not expressly say that he discharged it against J. S. it was (l) adjudged, that the Court could not take it

(1) It has been determined, where only two are found guilty of riot, or only one found guilty of conspiracy, they having, in both cases, been indicted with others, that judgment shall be given against them; Strange, 199; even though the others who were indicted do not come in to trial. Strange, 1227. 13 Mod. 262. So where six were indicted for a riot, and two of them died before trial; two were acquitted, and two only found guilty; yet judgment was given upon this verdict; for by Lord Mansfield, they must have been found guilty with one or both of those who had not been tried, or it could not have been a riot. Burrow, 1282.

(2) If the verdict do not sufficiently ascertain the fact, a *scire facies de novo* ought to issue, Skln.

667. Ld. Raym. 1521. for a special verdict cannot be amended in capital cases, per Ld. Holt, Ld. Raymond, 141. Yet in the case of Sarah Hazel, Lord Mansfield said it might if there were minutes to amend it by, M.S. Easter, 24 Geo. 3. and in forgery a special verdict was amended because the fault was committed by the defendant, Strange, 844.—If a special verdict find only part of the matter in issue, or do not take in the whole, issue, or if the imperfection be such that judgment cannot be given, it is bad. Ld. Raym. 1522. Cro. Jac. 31. But if there be several issues, and the jury find only some of them, the Court may give judgment, Stra. 845. for in a general verdict upon several counts, if any one of them is good, it is sufficient in criminal cases. Salk. 384. Doug. 730.

it from the other circumstances of the fact, which were expressly found, though they were as full to the purpose as possible they could well be, that the defendant discharged the gun against J. S.

Sect. 10. ELEVENTHLY, That it hath been (m) adjudged, that where an indictment found at the assizes is removed into the king's bench by *certiorari*, and there the defendant pleads not guilty, *et de hoc ponit se super patriam, et T. F. miles, coronator et attornatus dom' regis, &c. similiter*, and thereupon the defendant is found guilty of the offence in indictment *prædict' interius ei imposit' prout prædict' T. F. interius versus eum queritur*, the verdict is good; for these words *prout prædict' T. F. interius versus eum queritur* shall be rejected as surplus, (n) repugnant and void, and the verdict is complete without them.

(m) Saunders, 308.

(n) See B. 1. c. 12. s. 9. What is a good verdict on an indictment of forgery, B. 1. c. 21. s. 27. p. 301,

Sect. 11. TWELFTHLY, That it hath been (o) adjudged, that if the jury acquit a prisoner of an indictment of felony against manifest evidence, the court may, before the verdict is recorded, but (p) not after, order them to go out again and reconsider the matter; but this is by many thought hard, and seems not of late years to have been so frequently practised as formerly. Also there are (q) instances where defendants acquitted against plain evidence, of felonies and other enormous crimes, have been bound to their good behaviour.

(o) 1 Ander. 104. Cromp. 114. Aley, 12. 2 St. Tr. 2. 60. (p) Cromp. 14. F. Coro. 108. 2 Hale, 299. 310. Foster, 30. (q) C. Car. 292. against the opinion of Croke and Berkeley, defendants of the

and Cro. Jac. 507. Vide 2 St. Tr. 60. 611. where the Court upon the acquittal of the indictment against them for a riot, committed them for their contempt to the Court during the trial.

Sect. 12. However, it is settled, that the court cannot set aside a verdict which (r) acquits a defendant of a prosecution properly criminal, as it seems that they may a verdict that (s) convicts him, for having been given contrary to evidence, and the directions of the judge, or any verdict whatever for (t) mis-trial.

(r) Agreed in the case of the King v. Bennet, Hilary, 4 Geo. 1. wherein it was holden by six of the judges against six, that

a new trial was not grantable upon an acquittal on an information in the nature of a *quo warranto*, because it sounds in the criminality. 1 Keble, 124. 2 Keble, 403. 404. Whether it be grantable for a corrupt practice in obtaining a verdict, 1 Levinz, 9. 10. 124. Sid. 153. 154. 1 Keble, 546. 568. 590. 3 Keble, 179. 409. Show. 336. That it is not grantable where the acquittal was occasioned by a slip in an indictment of perjury in varying from the original record, 2 Keble, 409. See the case of Norris v. Tyler, Cowp. 37. (s) Adjudged 2 Jones, 163. 3 Keble, 525. 1 Levinz, 9. But it is doubted, 1 Keble, 124. 127. 5 Mod. 350. 1 Sid. 49. and the contrary is ruled, 2 Keble, 396. 403. (t) See Coke, 44. 1 Keble, 546. Supra, c. 23. s. 92. and c. 30. s. 15. Vide 2 Hale, 310. 4 Comm. 354. 1 Levinz, 9. T. Jones, 163. 10 St. Tr. 416. See Gibson's case cited in the case of Eddows v. Hopkins, Doug. 377.

† **Sect. 13.** And whereas persons acquitted on their trials, or having no indictments found against them, are frequently detained in prison, by gaolers on account of their fees, it is enacted by the 14 Geo. 3. c. 20. "That every prisoner charged with any felony or other crime, or as an accessory thereto, before any court holding criminal jurisdiction in England and Wales, against whom no bill of indictment shall be found by the grand jury, or who on trial shall be acquitted, or who shall be discharged by proclamation for want of prosecution, shall be immediately set at large in open court without the payment of any fee or sum of money to the sheriff, gaoler, or keeper of the gaol or prison from whence

How prisoners shall be discharged on a verdict of acquittal.

"such

“such prisoner shall be so discharged and set at liberty. And the treasurer of every county, &c. on receiving a certificate from the judge, &c. shall pay out of the county rate, a sum not exceeding 13s. and 4d. for every prisoner so discharged, to the sheriff, gaoler, or keeper as aforesaid.”

CHAP. XLVIII.

OF JUDGMENT.

Ch. 26. s. 76.

(a) Ch. 25. 147.

(b) Algernon

Sidney's Case,

3 St. Trials, 794.

Rosewell's Case,

3 St. Tr. 999.

Knightley's

Case, 4 St. Tr.

777.

(c) 3 St. Tr. 77.

(d) 4 St. Tr.

210.

(e) But in

Saund. 301.

302. chief jus-

tice Hale refused

to hear any

motion in arrest of judgment of a scandalous conspiracy; but in my own experience I never knew such a

motion refused to be heard. (f) 4 St. Tr. 217. Yet in the Lord Grey's case, 7 St. Tr. 63. the court

would not give judgment on a conviction for a misdemeanor, because there were not four days left of the

term. (g) Summary, 269. 2 Hale, 395. Sup. c. 37. sect. 2.

HAVING shewn already what judgment is good on an information, or action *qui tam*; where it may be saved by an award of transportation; (a) and that judgment in high treason, not being for counterfeiting the coin or seal, &c. shall not be arrested for miswriting or misspelling, or false or improper *Latin*: having also premised, that by the course of the court of king's bench, upon every conviction in that court of a crime (b), capital or not (c), whether by (d) verdict or confession, the party is to have four days to move in (e) arrest of judgment, if there be so many days remaining of the term; and if not, (f) then the longest time that can be had in the term; having also premised, that on a conviction of homicide *se defendendo* or *per infortunium*, no (g) judgment at all is to be given, but the party let to mainprize in order to purchase his pardon:

I shall further endeavour to shew the nature,

1. Of judgment by express sentence to the punishment proper for the crime.

2. Of judgments without any such sentence.

Of judgments by such express sentence in criminal cases there are two kinds,

1. Such as are fixed and stated, and always the same for the same species of crime.

2. Such as are discretionary and variable according to the different circumstances of each case.

And FIRST,—Of fixed and stated judgments.

(h) 2 St. Tr.

704. 3 Inst. 51.

Sect. 2. As to which it seems (h) agreed, that the law makes no distinction between a peer and a commoner, or between a common

common or ordinary case, and one attended with extraordinary circumstances; for which reason it was (i) adjudged in Felton's case, who was convicted, by confession, of the murder of the Duke of Buckingham, that the Court could not order his hand to be (k) cut off, nor make it part of the sentence that his body should be hanged in chains, but that the body, after execution, being at the king's disposal, might be hanged in chains, (h) or otherwise ordered, as the king should think fit.

(i) Hetley, 126. Litt. Rep. 237. Rushw. Collections, 640. 6.
(k) Agreed, 3 Inst. 140.
12 Coke, 71.
that the Court cannot order the hand to be cut

off in any case wherein it is not the stated judgment. See Bk. 1. p. 61. (l) Vide infra, c. 51. s. 12.

Of such fixed and stated judgments, the most remarkable are those for,

1. Judgment for treason.
2. Judgment for felony.
3. Judgment for *præmunire*.
4. Judgment for misprisions.

Sect. 3. FIRST, The settled (m) judgment at (n) this day against a man for high treason, not relating to the coin, seems to be, that "he shall be (o) carried back to the place from whence he came, from thence to be (p) drawn to the place of execution, and be there hanged by the (q) neck, and cut (r) down alive, (1) and that his (s) entrails be taken out and (t) burnt before his face, and his head cut off, and his body divided into four quarters, and his head and quarters disposed of at the king's

(m) 3 Inst. 210, 211.
1 Hale, 350, 351.
2 Hale, 397.
S. P. C. 182.
Plowden, 387.
Co. Ent. 361.
(n) In the time of Will. Rufus, judgment was given against two convicted of

high treason, that one should have his eyes put out, and the other *in cruce[m] tollatur*. Mad. Exchequer, fol. 6. (o) S. P. C. 182. But this clause is wholly omitted in Summary, 268. and 3 Inst. 210. and in Plowden, 387. it is thus expressed, *quod prad' R. D. duceretur per præfat' constubular' usque dictam turrim London, et deinde, &c.* And in Coke's Entries, 361. b. it is thus, *quod prad' T. B. ducatur per præfat' Maresc. usque prisonam Mar' Maresc. Domini Regis, &c.* (p) S. P. C. 182. it is expressed, that he shall be drawn upon an hurdle; and Plowden, 387. it is, that he shall be drawn through the middle of the city of London to the gallows at Tyburn: also in Coke's Entries, 361. and 3 Inst. 310. a particular place of execution is mentioned. (q) S. P. C. 182. and 3 Inst. 110. But Plowden, 387. Co. Ent. 361. and Summary, 268. it is only said *quod suspendatur*, without adding *per collum*. (r) 3 Inst. 110. S. P. C. 182. Plowden, 387. Co. Ent. 361. But this is omitted, Summary, 268. (s) This clause is thus expressed, 3 Inst. 210, 211. Plowden, 387. Coke's Entries, 361. *quod interiora sua extra ventrem suum capiantur*, without mentioning the cutting off of the privy members; and so is Summary, 268. 2 Hale, 397. and the latter precedents. But S. P. C. 182. is express, that they shall be cut off. (t) S. P. C. 102. But in Plowden, 387. Coke's Entries, 361. 3 Inst. 211. it is thus expressed, *ipsaque vivente comburantur*.—Vide also Skinner, 442. Carthew, 318. 349.

(1) This judgment, as to cutting down alive, &c. is altered by the st. 54 G. 3. c. 146. which passed "to alter the judgment in certain cases of high treason," and which recites, that "in certain cases of high treason, as the law now stands, the sentence or judgment required by law to be pronounced or awarded against persons convicted or adjudged guilty of the said crime, in such case is, that they should be drawn on an hurdle to the place of execution, and there be hung by the neck, but not until they are dead, but that they should be taken down again, and that while they are yet alive their bowels should be taken out and burnt before their faces, and that afterwards their heads should be severed from their bodies, and their bodies be divided into four quarters, and their heads and quarters be at

the king's disposal; and that it is expedient in the said cases of high treason to alter the sentence or judgment now required by law;" and then enacts, "That in all cases of high treason in which, as the law now stands, the sentence or judgment ordained by law is as aforesaid, the sentence or judgment to be pronounced or awarded, from and after the passing of this act, against any person convicted or adjudged guilty, shall be, that such person shall be drawn on an hurdle to the place of execution, and be there hanged by the neck until such person be dead, and that afterwards the head shall be severed from the body of such person, and the body, divided into four quarters, shall be disposed of as his majesty and, his successors shall think fit."

"king's pleasure." And I find little or no variation in substance from this judgment, but only in some circumstances, for which I shall refer to the notes in the margin and the State Trials.

(u) S. P. C. 182.

3 Inst. 17.

Summary, 268.

1 Hale, 351.

2 Hale, 397.

C. Car. 383.

19 H. 6. 47.

Ab. F. Cor. 8.

B. Treas. 9.

(x) Fleta, b. 1. c. 22.

(y) S. P. C.

182. 3. Inst. 17.

Summary, 19.

(z) B. 1. c. 7.

sect. 4.

(a) See 2 Jo.

233. Sup. 25.

sect. 145.

(b) Dyer, 230.

2 Levinz, 98.

2 Jones, 233.

3 Keble, 278.

Raymond, 234.

1 Ventris, 251.

Sect. 4. It hath been always agreed to be proper judgment against a man for high treason at common law, in counterfeiting the king's (u) coin or (x) seal, that he shall be drawn to the place of execution, and there hanged by the neck till he be dead. But there have been (y) great opinions, that the judgment against a man for clipping, and other offences against the coin, made treason by statute, shall be, to be drawn, hanged and quartered, as for other high treasons; because it is a general (z) rule, that where a statute makes an offence treason or felony, it gives it the like incidents that belong to a treason or felony, by the common law; yet inasmuch as high treason at common law in counterfeiting the coin had judgment only of drawing and hanging; and it is a reasonable construction, that the makers of the statutes, which made other offences concerning the coin high treason, intended to give such offences the like (a) incidents with high treasons against the coin at the common law, and not to make inferior offences of this kind subject to heavier punishment than the greater; it seems to be (b) settled at this day, that the judgment for such offences shall be the same as for counterfeiting the coin, &c. at the common law, *i. e.* of drawing and hanging without quartering.

(c) But Bract.

104. it is said,

that they are

burnt, *qui saluti*

dominorum suo-

rum insidiave-

runt. (d) 3 Inst. 211.

1 Hale, 382.

2 Hale, 399.

S. P. C. 182.

19 H. 6. 47.

Ab. F. Corone, 7.

B. Treason, 8.

33 Assize, 7.

Ab. B. Treason, 15.

F. Corone, 210

(e) See 21 E. 3. 17.

Ab. F. Co-

rone, 447.

B. Corone, 38.

where an approver, becoming nonsuit, had judgment to be hanged only, and not drawn, though he stood indicted of petit treason. But the case is obscure both in the Reports and

Sect. 5. It hath been (c) long (d) agreed, that the judgment against a man for petit treason is the same with that for counterfeiting the coin, *viz.* that he shall be (e) drawn to the place of execution, and there hanged by the neck till he be dead.

(d) 3 Inst. 211. 1 Hale, 382. 2 Hale, 399. S. P. C. 182. 19 H. 6. 47. Ab. F. Corone, 7. B. Treason, 8. 33 Assize, 7. Ab. B. Treason, 15. F. Corone, 210 (e) See 21 E. 3. 17. Ab. F. Corone, 447. B. Corone, 38. where an approver, becoming nonsuit, had judgment to be hanged only, and not drawn, though he stood indicted of petit treason. But the case is obscure both in the Reports and Abridgments.

(f) Preface to

the 6th Report,

3 Inst. 211.

S. P. C. 182.

F. Corone, 383.

23 Assize, 2.

Ab. Bro. Treas. 26.

12 Assize, 30.

Ab. B. Corone, 74.

B. Treas-

on, 12.

F. Corone, 170.

1 Rich, 3. 4.

Ab. F. Corone, 46.

Sect. 6. The judgment against a (f) woman, in all cases of treason, whether high or petit treason, is, that she shall be drawn to the place of execution, and there burnt.

But this judgment of burning women is altered by the stat. 30 Geo. 3. c. 48. which recites, that it is expedient that the judgment which is required by law to be given and awarded against any woman or women in the cases of high treason or of petit treason should be no longer continued; and then enacts, "That from and after the fifth day of June, one thousand seven hundred and ninety, the judgment to be given and awarded against any woman or women convicted of the crime of high treason, or of the crime of petit treason, or of abetting, procuring, or counselling, any petit treason, shall not be, that such woman or women shall be severally drawn to the place of execution, and be there burned to death; but that such woman or women, being so convicted as aforesaid, shall be severally drawn

Burning of women in treason abolished.

"drawn to the place of execution, and be there hanged by the neck until she or they be severally dead; any law or usage to the contrary thereof in anywise notwithstanding."—*Sect. 1.*

If any woman or women shall be convicted of the crime of petit treason, or of abetting, procuring, or counselling any petit treason, then and in every such case such woman or women shall be subject and liable to such further pains and penalties as are particularly specified and declared with respect to persons convicted of wilful murder, in an act passed in the twenty-fifth year of the reign of king George the second, [25 Geo. 2. c. 37.] "and the court before whom any such woman or women shall be convicted, shall pass sentence at such time, and shall give such orders with respect to the time of execution, the disposal of the convict's body after execution, and all such other matters and things as are directed to be given by the said act with respect to persons convicted of wilful murder."—*Sect. 2.*

Sect. 7. SECONDLY, The judgment against a man or (g) woman for felony, of death, hath always been the same (h) since the reign of Henry the First, viz. that he or she be (i) hanged by the (k) neck till (l) dead, which in the Roll (m) is shortly entered thus, "*sus. per coll.*" (1)

(g) 1 Rich. 3. 4.
Ab. F. Cor. 46.
(h) 3 Inst. 53.
(i) S. P. C. 182.
2 Hale, 399.
3 Inst. 211. F.
Corone, 227.

See the citations to the next letter. (k) The words *per collum* are omitted Coke's Entries, 60. 352, 353. 355. 360. Rastal, 42. 53. 55. (l) 3 Inst. 53. 211. Sum. 268. 6 E. 4. 4. But this is omitted, 6 H. 4. 6. S. P. C. 182. Rastal's Entries, 42, 53. 55. the precedents in Coke's Entries cited to letter k, come only under an &c. (m) S. P. C. 182. 5 Modern, 22. For the judgment and proceedings in murder, vide 25 Geo. 2, c. 37. Post, ch. 51. sect. 10.

The judgment in cases of murder differed not at common law from the judgment in other cases of capital felonies. But by the above cited statute of 25 Geo. 2. c. 37. for the purpose of exciting a greater horror against that crime, it is enacted, "That

(1) From the variety of offences which are declared by statute to be felonies without benefit of clergy, if the judgment were always carried into effect, the sanguinary consequences of our penal code would be revolting to humanity. It has happened, therefore, that the comparatively few instances in which the sentence of the law has been executed, had rendered the pronouncing the judgment of death a mere *brutum fulmen*, and had totally destroyed the solemn effect which such a judgment should impress upon its hearers, as well as upon the unhappy convict himself. To remedy this, the stat. of 4 Geo. 4. c. 48. reciting, "That it is expedient in all cases of felony, except murder, the court before whom the offender shall be tried and convicted shall be authorised to abstain from pronouncing sentence of death, if such court shall be of opinion the offender is a fit object for the Royal mercy," enacts, "That from and after the passing of this act, whenever any person shall be convicted of any felony, except murder, and shall by law be excluded the benefit of clergy, in respect thereof, and the court before which such offender shall be convicted shall be of opinion that, under the particular circumstances of the case, such offender is a fit and proper subject to

"be recommended for the Royal mercy, it shall and may be lawful for such court, if it shall think fit so to do, to direct the proper officer then being present in the court to require and ask, whereupon such officer shall require and ask, if such offender hath, or knoweth any thing to say, why judgment of death should not be recorded against such offender; and in case such offender shall not allege any matter or thing sufficient in law to arrest or bar such judgment, the court shall and may and is hereby authorised to abstain from pronouncing judgment of death upon such offender; and instead of pronouncing such judgment, to order the same to be entered of record, and thereupon such proper officer as aforesaid shall and may and is hereby authorised to enter judgment of death on record against such offender, in the usual and accustomed form, and in such and the same manner as is now used, and as if judgment of death had actually been pronounced in open court against such offender by the court before which such offender shall have been convicted." By s. 2. the judgment thus recorded is to have the same effect as if pronounced; and by s. 3. this act is not to extend to Scotland.

(n) Beccaria,
c. 19.

"That all persons (1) who shall be found guilty of wilful murder, be executed according to law on the day next but one after sentence passed (n), unless the same shall happen to be the Lord's day, commonly called Sunday, and in that case on the Monday following—That the body of such murderer so convicted shall, if such conviction and execution shall be in the county of Middlesex or within the city of London (2) or the liberties thereof, be immediately conveyed by the sheriff, or sheriffs, his or their deputy, or deputies, and his or their officers, to the hall of the Surgeons Company, or such other place as the said Company shall appoint for this purpose, and be delivered to such person as the said company shall depute or appoint, who shall give to the sheriff or sheriffs, his or their deputy or deputies, a receipt for the same; and the body so delivered to the said Company of Surgeons shall be dissected and anatomized (3) by the said surgeons or such person as they shall appoint for that purpose. And in case such conviction and execution shall happen to be in any other county or other place in Great Britain, then the judge or justice of assize, or other proper judge, shall award the sentence to be put in execution the next day but one after such conviction (except as is before excepted), and the body of such murderer shall in like manner be delivered by the sheriff, or his deputy and his officers, to such surgeon as such judge or justice shall direct for the purpose aforesaid."

(a) It was held by the twelve judges in Mich. Term, 10 Geo. 3. That, except in the cases within this act, the time and place of execution are by law no part of the judgment.

4 Com. 397. See also 3 Burr. 1812. in what manner sentence shall be pronounced against a murderer.

† Sect. 8. By 25 Geo. 2. c. 37. s. 3. and 4. it is also enacted, "That the sentence shall be pronounced in open court immediately after the conviction of such murderer, and before the court shall proceed to any other business, unless the court shall see reasonable cause for postponing the same; in which sentence shall be expressed, not only the usual judgment of death, but also the time (a) appointed hereby for the execution thereof, and the marks of infamy hereby directed for such offenders, in order to impress a just horror in the mind of the offender, and in the minds of such as shall be present, of the heinous crime of murder. But it is provided, that after such sentence is pronounced as aforesaid, in case there shall appear reasonable cause, it shall and may be lawful to and for such judge or justice, before whom such criminal shall have been so tried, to stay the execution of the sentence, at the discretion of such judge or justice, regard being always had to the true intent and purpose of this act."

† Sect.

(1) A peer indicted of felony and murder, and tried and convicted thereof before the lords in parliament, ought to receive judgment for the same according to the provisions of this act. The Earl of Ferrers' case, Foster, 159. 10 State Trials, p. 478.

(2) Upon all executions in London, the Recorder, after reporting to the King in person the case of the several prisoners, and receiving his royal pleasure that the law must take its course, issues his warrant to the sheriffs, directing them to do execution on the day and at the place assigned.

(3) At a meeting of the judges in 1752, to consider of this act, it was agreed by much the greater part, that the judgment for dissecting and anatomizing, and touching the time of execution, ought to be pronounced in cases of petty treason, though murder is only mentioned, except in the case of women, and in that case too the time of execution may be a part of the judgment. Foster, 107.

† *Sect. 13.* And by 25 Geo. 2. c. 37. s. 5. "It shall be in the power of any such judge or justice to appoint the body of any such criminal to be hung in chains. (b) But that in no case whatsoever the body of any murderer shall be suffered to be buried, unless after such body shall have been dissected and anatomized as aforesaid; and every such judge or justice shall, and is hereby required to direct the same either to be disposed of as aforesaid to be anatomized, or to be hung in chains in the same manner as is now practised for the most atrocious offences."

4 Comm. 202.
xxi Deut. v. 23.
Ff. 48. 19. 28.
s. 15.
4 State Tr. 203.
(b) Upon a conference of the judges there was some doubt whether hanging in chains might ever be made part of the judgment.

But on debate it was agreed by nine judges, that in all cases within the act, the judgment for dissection and anatomizing only, should be part of the sentence. And if it should be thought advisable, the judge might afterwards direct the hanging in chains by special order to the sheriff, pursuant to the power given for that purpose in the *proviso*. Foster, 107. and 10 St. Tr. 39. *notis*. See also Hall's case, Cases Cro. Law, 21.

† *Sect. 9.* By 25 Geo. 2. c. 37. s. 6. it is enacted, "That from and after such conviction, and judgment given thereupon, the gaoler or keeper to whom such criminal shall be delivered for safe custody, shall confine such prisoner to some cell, or other proper and safe place within the prison, separate and apart from the other prisoners; and that no person or persons whatsoever, except the gaoler or keeper, or his servants, shall have access to any such prisoner, without license being first obtained for that purpose under the hand of such judge or justice before whom such offender shall have been tried, or under the hand of the sheriff, his deputy or under-sheriff."

How a condemned murderer shall be confined.

† *Sect. 10.* But by 25 Geo. 2. c. 37. s. 7. it is provided, "That in case any such judge or justice shall see cause to respite the execution of such offender so condemned as aforesaid, such judge or justice may relax or release all or any of the restraints or regulations hereinbefore or hereinafter directed to be observed by the gaoler or keeper of the prison where such prisoner shall be confined, by any license in writing signed by such judge or justice for that purpose, for and during the time of such stay of execution."

Judges may relax the restraints of the act.

† *Sect. 11.* And by 25 Geo. 2. c. 37. s. 8. it is further enacted, "That after sentence passed as aforesaid, and until the execution thereof, such offender shall be fed with bread and water only, and with no other food or liquor whatsoever (except in case of receiving the sacrament of the Lord's Supper, and except in case of any violent sickness or wound, in which case some known physician, surgeon, or apothecary, may be admitted by the gaoler or keeper of the said prison to administer necessaries; the christian and surname of such physician, surgeon, or apothecary, and his place of abode, being first entered in the books of the said prison or gaol, there to remain)."

Convicts for murder to be fed on bread and water only.

† *Sect. 12.* By 25 Geo. 2. c. 37. it is also enacted, "That in case such gaoler or prison-keeper shall offend against or neglect to put in execution any of the directions or regulations hereby enacted to be observed, such gaoler or prison-keeper shall for such offence forfeit his office, and be fined in the sum of twenty pounds, and suffer imprisonment until the same be paid."

Penalty for not executing the directions of the act.

In cases of self-murder, or *felo-de-se*, when that fact was found by the coroner's inquest, though there could be no judgment pronounced

4 Geo. 4. c. 52. nounced against a dead man, yet as he was found a felon, in addition to the forfeiture incurred, the coroner issued his warrant for burying the body in a public highway, with a stake to be driven through it, and without the rites of sepulture; but this being revolting to the feelings of this more civilized age, by st. 4 Geo. 4. c. 52. it is enacted, "That from and after the passing of this act it shall not be lawful for any coroner, or other officer having authority to hold inquests, to issue any warrant or other process directing the interment of the remains of persons, against whom a finding of *felo-de-se* shall be had, in any public highway; but that such coroner or other officer shall give directions for the private interment of the remains of such person *felo-de-se*, without any stake being driven through the body of such person, in the churchyard or other burial-ground of the parish or place in which the remains of such person might, by the laws or custom of England, be interred. if the verdict of *felo-de-se* had not been found against such person; such interment to be made within twenty-four hours from the finding the inquisition, and to take place between the hours of nine and twelve at night."

Sect. 13. For the judgment of *peine forte et dure* upon all offenders standing mute, I shall refer to chap. 30. sect. 16.

(z) Co. Lit. 129. *Sect. 14.* THIRDLY, Judgment in *præmunire* at the suit of the king against the defendant being in prison, (a) is, that he shall be out of the king's protection, and that his lands and tenements, goods and chattels shall be forfeited to the king, and that his body shall remain in prison at the king's pleasure; but if the defendant be condemned upon his (b) default in not appearing, whether at the suit of the king or (c) party, the same judgment shall be given as to the being out of the king's protection, and the forfeiture; but instead of the clause, that the body shall remain in prison, there shall be an award of a *capiatur*.
(z) It is agreed 30 E. 3. 11. Ab. F. Judgm. 145. and in 8 H. 4. 6, 7. Ab. F. Forfeit. 13. B. Forfeit. 12. Pream. 6. 20. that such judgment shall not be given at the suit of the party, on 27 Edw. 3.; but in the two last citations it is holden, that the same judgment shall be given at the suit of the party, on 16 Rich. 2. (a) 3 Inst. 218. Supra, B. 1. c. 4. s. 14. 45. Co. Litt. 129, 130. (b) Vide B. 1. c. 4. s. 14. Rastal, 466, 467. 3 Inst. 125, 218. Dalton, c. 90. (c) 8 H. 4. 6. Ab. F. Forfeit. 13. B. Forfeit 12. Pream. 6. 20. 30 E. 11. Ab. F. Judg. 145. 44 E. 3. 7. Ab. Resp. 35. 39 E. 3. 37. Ab. F. Retu. de Vic. 61. Attorney, 36. 8 H. 6. 3. Ab. B. Pream. 8. 20.

Sect. 15. FOURTHLY, The judgment against a man for misprision of high treason (d) is, that he shall be imprisoned during his life, and forfeit all his goods, and the profits of his lands during his life.
(d) 1 Hale, 374. 2 Hale, 400. 3 Inst. 36. 218. B. Treas. 19. 25.

Sect. 16. The judgment against a man for drawing a sword on a judge, or striking any person in the (e) presence of the king's higher courts, is, that he shall be imprisoned during life, and forfeit his goods, and the profits of (f) his lands during life, and that his (g) right hand shall be cut off at a certain place.
(e) B. 1. p. 61. (f) Sum. 131. 41 Assize, 25. Ab. B. Fines, 11. Forfeit. 41.

Restit. 32. *Scire Facias*, 160. 2 R. Ab. 76. judgment was given, that the lands should be seized into the king's hands, and the king answered of the profits; after which the king granted over the lands as forfeited, and then pardoned the offence; and the heir was restored upon a *scire facias*; by which it appears that the inheritance of the lands was not forfeited. (Vide sup. c. 37. s. 54.) But in 1 Keble, 751. the judgment is, that the lands shall be forfeited during life; and Dalison, 23. *quære* is made by what law the lands shall be forfeited any farther than during life; yet 3 Inst. 140. 218. and 39 Assize, 1. Ab. B. Contempt, 9. F. Assize, 333. Dyer, 188. F. Judgment, 174. F. Cor. 280. S. P. C. 38. Owen, 120. C. Eliz. 405. Dalison, 23. say in general, that the land shall be forfeited, without adding for life; and 22 Ed. 3. 12. Ab. F. Forfeit, 21. that the offender shall be disinherited. (g) In this part of the judgment the books above cited generally agree.

Sect. 17. For the judgments for (h) striking in the king's palace, (h) V. 1. p. 61. s. 1. 3.
for (i) rescuing a prisoner from the superior courts for perjury, or forgery on the statute, and for the villainous judgment in conspiracy at the suit of the king, I shall refer to the first book under these respective titles. (i) V. 1. p. 62.

Sect. 18. The entry of the judgment for a defendant upon an acquittal by verdict, or upon the plea of a pardon, is, *Ideo consid' est quod præd' A. B. de (k) præmissis eat inde sine die*, or *eat sine die* omitting (l) *de præmissis*; or *de proditionibus prædictis eat inde (m) quietus*; or (n) thus, *quod sit inde quietus, &c. et quod ipse eat inde sine die*; and upon the plea of a release to an appeal, and in other cases of the like nature, it is, *Ideo consid' est quod (o) præd' A. quoad sectam præd' B. in præmissis eat inde sine die*. And (p) Staundforde says, that upon the acquittal of one arraigned of treason or felony, the judgment is no other, but that the court discharges the defendant paying his fees. (k) Co. Ent. 356. Rastal, 47, 48. (l) Coke's Ent. 358, 359. Rast. 51. 56, 57. (m) Co. Ent. 360. Rastal, 51. (n) Rast. 49. 57. (o) Rast. 43. 50. (p) S. P. C. 182.

SECONDLY, As to judgments by express sentence, which are discretionary and variable according to different circumstances,

Sect. 19. I shall observe in general, that for crimes of an infamous nature, such as petit (q) larceny, (r) perjury, or (s) forgery at common law, gross (t) cheats, conspiracy not requiring a villainous judgment, keeping a bawdy-house, bribing (u) witnesses to stifle their evidence, and offences of the like nature against the first principles of natural justice and common honesty, it seems to be in great measure (1) left to the prudence of the court to inflict such corporal punishment, and also such fine and lien to the good behaviour for a (x) certain time (y), &c. as shall seem most proper and adequate to the offence, from the consideration of the baseness, (q) 3 Inst. 218. (r) 3 St. Tr. 487, 488. Hobart, 62. (s) Raym. 81. 1 Sid. 142. 278. 3 Leonard, 170. (t) C. Jac. 498. 2 R. Ab. 78. II. 1. 1 Keble, 849. Noy, 99. 103. (u) 2 St. Tr. 272. Raym. 376. (2) 1 Sid. 214.

(y) See C. Car. 55. a decree of the Star-chamber against a Judge for bribery, that he should be incapable of any office of judicature.

(1) There were certain corporal punishments now abolished—the whipping of females is abolished by 1 Geo. 4. c. 57. It was before partially abolished by 57 Geo. 3. c. 75. which forbade “public whipping,” but the latter statute has abolished it altogether. The punishment of the pillory, which also used to be very common, is also abolished, except in certain cases; for by the stat. 56 Geo. 3. c. 138. intituled, “An act to abolish the punishment of the pillory, except in certain cases,” which recites that, “The punishment of the pillory has in many cases been found inexpedient, and not fully to answer the purpose for which it was intended;” and it is enacted as follows, “That from and after the passing of this act, judgment shall not be given and awarded against any person or persons convicted of any offence, that such person or persons do stand in or upon the pillory, except for the offences hereinafter mentioned; any law, statute, or usage to the contrary notwithstanding: provided that all laws now in force whereby any person is subject to punishment for the taking any false oath, or for committing any manner of wilful and corrupt perjury, or for the procuring or suborning any other person so to do, or for wilfully, falsely, and corruptly affirming or declaring, or procuring or suborning any other person so to affirm and declare, in any matter or thing, which, if the same had been deposed in the usual form, would have amounted to wilful and corrupt perjury, shall continue to be in full force and effect; and that all persons guilty of any of the said several offences shall incur and suffer the same punishments, penalties, and forfeitures as such persons were subject to by the laws and statutes of this realm, or any of them, before the passing of this act, and as if this act had not been made. S. 1. In all cases where the punishment of the pillory has hitherto formed the whole or a part of the judgment to be pronounced, it shall and may be lawful for the court before whom such offence is tried, to pass such sentence of fine or imprisonment, or of both, in lieu of the sentence of pillory, as to the said court shall seem most proper: provided that nothing herein contained shall extend, or be construed to extend, in any manner to change, alter, or affect any punishment whatsoever which may now be by law inflicted in respect of any offence, except only the punishment of pillory, in manner as hereinabove is enacted.”

baseness, enormity, and dangerous tendency of it; the malice, deliberation, and wilfulness, or the inconsideration, suddenness, and surprise with which it was committed; the age, quality, and degree of the offender; and all other circumstances which may any way aggravate or extenuate the guilt.

Sect. 20. And at this day by force of 5 Ann. c. 6. and 4 Geo. 1. c. 11. and 6 Geo. 1. c. 23. and other statutes, set forth more at large, title "Transportation," the judges, upon a conviction for larceny, may in their discretion award the offender to the house of correction; and for that and other felonies within the benefit of clergy, instead of giving the usual sentence, &c. may direct that the offender be transported.

Hard labour in larcenies.

Also by the 53 Geo. 3. c. 162. it is enacted, "That it shall be lawful for any court to pass upon any person who shall be lawfully convicted before such court of felony with benefit of clergy, or of any grand larceny, or of any petit larceny, the sentence of imprisonment to hard labour either simply and alone or in addition to any other sentence, which such court may or shall be authorized to pass upon any person, lawfully convicted of any of the offences aforesaid, as to such court shall seem fit. And such person shall thereupon suffer such other sentence, and moreover be imprisoned and kept to hard labour, or be simply imprisoned and kept to hard labour in such place and for such time as such court shall think fit to direct, not exceeding the time for which such court may now imprison for such offences."

3 Geo. 4. c. 94.
Hard labour in certain misdemeanors.

And the 3 Geo. 4. c. 94. reciting the above statute, and that it is expedient the provisions of the above act should be extended to certain aggravated misdemeanors and offences below the degree of felony, enacts, "That, from and after the passing of this act, whenever any person shall be convicted of any of the offences hereafter specified, that is, any assault with intent to commit felony; any attempt to commit felony; any riot; any misdemeanor, in having received stolen goods knowing them to have been stolen; any assault upon a peace-officer, or upon an officer of the customs or excise, or upon any other officer of the revenue, in the due discharge of his or their respective duty or duties, or upon any person or persons acting in aid of any such officer or officers in the due discharge and execution of his or their respective duty or duties; any assault committed in pursuance of any conspiracy to raise the rate of wages; being an utterer of counterfeit money knowing the same to be counterfeit; knowingly and designedly obtaining money, goods, wares, or merchandises, bills, bonds, or other securities for monies by false pretences, with intent to cheat any person of the same; keeping a common gaming house, a common bawdy house, or a common ill-governed and disorderly house; wilful and corrupt perjury or subornation of perjury: having entered any open or inclosed ground, with intent therein illegally to destroy, take or kill game or rabbits, or with intent to aid, abet and assist any person or persons illegally to destroy, take or kill game or rabbits, and having been there found at night armed with any offensive weapon; in each

“ each and every of the above cases, and whenever any person
 “ shall be convicted of any or either of the aforesaid offences, it
 “ shall and may be lawful for the court before which any such
 “ offender shall be convicted, or which by law is authorized to
 “ pass sentence upon any such offender, to award and order (if
 “ such court shall think fit) sentence of imprisonment with hard
 “ labour, for any term not exceeding the term for which such
 “ court may now imprison for such offences, either in addition to
 “ or in lieu of any other punishment which may be inflicted on
 “ any such offenders by any law in force before the passing of this
 “ act; and every such offender shall thereupon suffer such
 “ sentence, in such place, and for such time as aforesaid, as such
 “ court shall think fit to direct.

It may be proper here to note the alterations lately made in the judgments of several felonies without clergy originally enacted by statute. By st. 1 Geo. 4. c. 115. the judgment of death is repealed in the following cases, viz. “The forcibly taking away women,” which was originally created a felony by stat. 3 Hen. 7. c. 2. and deprived of clergy by 39 Eliz. c. 9. (see vol. 1. p. 123, 124.) “The taking a reward to restore stolen goods,” which was felony without clergy by 4 Geo. 1. c. 11. (see vol. 1. p. 247.) “Destroying locks, &c. erected by authority of parliament,” which was a capital offence by 8 Geo. 2. c. 20. (vol. 1. p. 339.) Instead of judgment of death, the court is to sentence the offender “To be transported for life, or any term not *less* than seven years; or to be imprisoned with or without hard labour, at the discretion of the court, for any term not *more* than seven years.” By the 1 Geo. 4. c. 117. so much of the act of the 10 and 11 Will. 3. which makes it a capital felony privately to steal in any shop or warehouse, to the value of five shillings, (vol. 1. p. 201.) is repealed, and the stealing above the value of five shillings and under fifteen pounds is subjected to the like punishment of transportation for life, or not *less* than seven years; or to be imprisoned with or without hard labour, at the discretion of the court, for not *more* than seven years; and by 4 Geo. 4. c. 53. those convicted of stealing in a shop or warehouse, *above* the value of fifteen pounds, are subjected to the like judgment. By the 4 Geo. 4. c. 46. the judgment of death for the offences of “Cutting down sea or river banks,” (vol. 1. p. 339.) “Cutting hop binds,” (vol. 1. p. 333.) “Destroying any lock, sluice, flood-gate, or other work, erected by authority of parliament,” (vol. 1. p. 339.) “Personating Greenwich pensioners,” (vol. 1. p. 316.) is repealed, and the judgment of transportation for life, or not *less* than seven years, or imprisonment with or without hard labour, at the discretion of the court, substituted in lieu thereof. By the 4 Geo. 4. c. 53. the judgment of death is repealed in the following larcenies:—“Stealing cloth from the rack or tenter in the night-time,” (vol. 1. p. 205.) “Stealing naval stores,” (vol. 1. p. 199.) “Stealing upon navigable rivers, &c.” (vol. i. p. 204.) and the like judgment of transportation for life, or not less than seven years, or imprisonment with or without hard labour, not exceeding seven years, substituted in lieu thereof.

By the 4 Geo. 4. c. 54. the capital punishment is also repealed

pealed in the following felonies:—"Killing or hunting, &c. deer in any inclosed park, &c. with blacked faces," (vol. i. p. 179, 180. 190.) "Being armed, and with blacked faces, hunting in any inclosed grounds where conies are kept," (vol. i. p. 177.) "Stealing fish out of any pond, and maliciously breaking down the mound of the fish pond, whereby the fish escape," (vol. i. p. 191. 334.) and in lieu thereof, the judgment is, "That any person convicted thereof, or of procuring, counselling, aiding, or abetting the commission thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned only, or to be imprisoned and kept to hard labour, in the common gaol or house of correction for any term not exceeding three years."

Manslaughter and polygamy are subjected to the judgment of transportation, as before noticed, p. 513.

By statute 3 Geo. 4. c. 38. s. 2. servants, clerks, and apprentices, stealing their masters' goods, &c. may be "transported beyond the seas for any term not exceeding fourteen years, or be imprisoned only, or imprisoned and kept to hard labour in the common gaol, house of correction, or penitentiary house, for any term not exceeding three years."—(See vol. i. p. 159)

And in order to reach those who instigated others to commit thefts and kept themselves out of the way,

By stat. 3 Geo. 4. ch. 58. § 3. after reciting, that "Whereas children, servants, and others, are often induced to commit thefts by the persuasion, instigation, or commands of wicked and evil-disposed persons, who, not being present, aiding, and assisting in the commission of such thefts, frequently escape the punishment which so mischievous an offence demands;" it is enacted, "That if any person or persons shall counsel, hire, procure, or command any other person or persons to commit any larceny whatsoever of the degree of grand larceny, then and in every such case, if the person or persons, so counselling, hiring, procuring, or commanding as aforesaid, shall be convicted of felony, and shall be entitled to the benefit of clergy; and by the laws now in force shall be liable to be fined and imprisoned for any term not exceeding one year only, he, she, or they, instead of being so fined and imprisoned as aforesaid, may, at the discretion of the court by or before which any such offender shall be convicted, be ordered and adjudged to be transported beyond the seas for the term of seven years, or to be imprisoned only, or to be imprisoned and kept to hard labour, in the common gaol, house of correction, or penitentiary house, for any term not exceeding three years." (1)

Sect. 21. But it (a) seems, that the court cannot be authorised by any letters-patent, but only by act of parliament, to inflict a punishment unknown to our laws, as of (b) banishment, &c.

Sect. 22. NOTE, That the court may assess a fine, but cannot award any corporal punishment against a defendant, unless he be actually present in the court (c).

Sect.

(1) The offender may be tried before the principal is convicted, vide ante, 452.

(a) Dalis. 20.
(b) 2 Inst 47.
201.
Co. Litt. 135.

(c) Salk. 56.
400.
Skinner, 684.

Sect. 23. NOTE also, That where there are several defendants, a joint award of one fine against them all is (d) erroneous, for it ought to be several against each defendant; for otherwise one who hath paid his proportionable part might be continued in prison till all the others have also paid theirs, which would be in effect to punish him for the offence of another.

(d) 11 Co. 43.
1 Roll. 74.
Ch. 9. s. 16.
1 Lev. 126.

Sect. 24. It hath been adjudged, (e) that where a man is to make fine and ransom, the ransom must be treble the fine at least. But Sir Edward Coke strongly (f) argues, that fine and ransom are in legal understanding the same thing under different names, called a fine, because it makes an end of the business, and a ransom, because it redeems from imprisonment; for if they were different things, it would follow, that where the books say that a man shall make a fine and ransom, they must be taken to intend that he ought to pay two different sums, of which there is no precedent.

(e) Dyer, 232.

(f) Co. Litt.
127.

Sect. 25. A fine is under the power of the court, during the term in which it is set, and (g) may be mitigated as shall be thought proper; but after the term, it admits of no alteration.

(g) 1 Inst. 260.
Adj. Raym. 376.
& Cro. Car. 251.

Of judgments without an express sentence to the punishment proper to the crime, there are two kinds :

1. Outlawry.

2. Abjuration.

Sect. 26. Judgment of outlawry is (h) given by the (i) coroner at the fifth county court upon the party's not appearing to the *exigent* : which is a (k) writ commanding the sheriff to cause the defendant to be demanded from county-court to county-court until he be outlawed, &c.; and such judgment is (l) entered thus : "*Ideo, &c. per judicium coronatoris domini regis comitatus predicti utlagatus est.*"

(h) Finch, 356.
Dyer, 223.
B. Corone, 166.
3 Inst. 212.
(i) C. Jac. 531.
1 Burn. 639.
If the judgment appear not, by the return of the

exigent, to have been given by the coroner, it is erroneous, except in London, where the mayor by custom is coroner, and the judgment is given by the recorder. Coke Litt. 288. B. Utlagary, 31. Dyer, 317. 8 Co. 126. 21 H. 7. 33. Cro. Eliz. 648. (k) Reg. Judg. 2. (l) 3 Inst. 212. But see the cases of Dr. Cameron, Foster, 109. and Lord Griffin, Foster, 113.

Sect. 27. It seems (m) agreed, that when a judgment of outlawry for treason or felony appears of record by the sheriff's return of the *exigent*, and it hath been (n) holden, that if it appear not by such return, but only by the coroner's return of a (o) *certiorari* to them directed to certify whether the party were outlawed or not, the party is as much (p) attainted, and shall forfeit and lose as much as if sentence had been given against him upon verdict or confession.

(m) Co. Lit. 128.
288.
28 Assize, 49.
Ab. B. Nonab.
25.
3 Inst. 212.
Thelou. b. 1. c.
15. s. 20.
(n) Co. Lit. 288.
But the contrary seems to be

holden, Dyer, 223. and it is made a *quære*, 38 Ed. 3. 14. (o) Vide Rastal, 332. 2 Hale, 399. (p) Finch, 467. 3 Inst. 52. 212. 3 St. Tr. 324. B. Coro. 166.

Sect. 28. If such (q) outlawry appear to the court to be erroneous, whereof any one as *amicus curiæ* may inform them, the party shall have counsel assigned (1) him to take advantage of the error; but if

(q) 3 Inst. 212.
1 Burrow, 639.
2 Hale, 408.

(1) The court cannot assign counsel upon an outlawry for the diminishing the coin till the defendant has pleaded, and then he may have counsel upon the collateral matter, whether he was out of

the realm, &c. 1 Burr. 638. both as to law and fact, though not on the indictment itself, because treason in diminishing the coin is excepted out of the 7 Will. 3. Stra. 844.

if he will neither bring a writ of error, nor plead in convenient time, and the outlawry be voidable and not void, the proper execution shall be (r) awarded against him, but no sentence pronounced because the outlawry is a judgment, and no man shall have (s) two judgments for one offence.

(r) 3 St. Tr. 323. 334.
 (s) Finch, 389. S. P. C. 34. F. Corone, 313.
 11 H. 7. 4. Ab. B. Cor. 226. 27 Assize, 54. Ab. B. Cor. 110. 9 Ed. 4. 28. Ab. B. Corone, 55. 12 Co. 100. F. Esch. 14. Ch. 23. s. 53. Ch. 36. s. 1. Yet sentence was given upon one outlawed of felony, 3 H. 7. 7. Ab. B. Cor. 134.

(t) Finch, 389. Sect. 29. For the nature of abjuration (which was also an (t) attainder of itself), being wholly obsolete at this day, I shall refer to the citations (u) in the margin.

467.
 S. P. C. 34. 117. 122.
 F. Cor. 313. 335. 3 Inst. 216, 217. (u) Sup. c. 9. s. 44. and 32. 6. 3 Inst. 216, 217.

(a) B. Cor. 166. Sect. 30. It seems to be generally (x) agreed, that a man can and the other books under-cited. no other way be attainted of treason or felony at this day, but only by judgment by express sentence, or by outlawry or abjuration; and therefore where an appellee was slain in the field upon a wager of battle, (y) judgment was given, *quod suspendatur per collum*, in order to intitle the lord to his escheat. But I know of no other case wherein it is clear at this day, that a man may be attainted after his death. It is said indeed in a note in Fitzherbert's Abridgment of a case in the time of Edward the Third, (z) that in eyre it hath been seen that a man hath been attainted by presentment after his death. Also it was holden by (a) Markham in the time of Henry the Fourth, that if he who levies war against the king be slain in battle, his lands may be seized by the king. And it is said in the (b) Fourth Report, that if one aiding the king's enemies be slain in open rebellion, and the chief justice of the king's bench, who is the sovereign coroner of England, make a record of it upon a view of the body, and return it into the king's bench, he shall forfeit his lands (2). And this seems agreeable to 34 Hen. 3. c. 12. whereby the king expressly reserves his prerogative as to forfeiture of wars, but grants that he will in no other case seize lands for treason whereof the party is not attainted in his life. Yet the contrary opinion seems to be holden in the First and Third (c) Institutes, and also by (d) Hale; and to this (e) Staundforde seems also to incline.

(x) 7 H. 4. 46. but denied by Gascoign; and it is said by Brown, in Plow. 263. that the ancient law was so. See also Plow. 262. and Dalt. c. 89. (b) 4 Co. 57. (c) 3 Inst. 27. Coke Lit. 13. (d) Summ. 17. 1 Hale, 342, 343. (e) S. P. C. 188, 189.

(2) This may be true as to goods, but not as to lands, because none can be attainted after his death but by act of parliament. 2 Hale, 53. Also see this point largely treated of, 1 Hale, 342 to 349.

CHAP. XLIX.

OF FORFEITURE.

AND now I am to shew the consequences of an attainder, or conviction of treason and felony.

I shall consider under the following particulars,

1. What shall be forfeited by the offender.
2. Where his wife loses her dower.
3. How far his blood is corrupted.

As to the **FIRST POINT**, I shall endeavour to shew,

1. What is forfeited by the common law.
2. What by statute.
3. To what time the forfeiture shall relate.
4. What shall be done with the goods of an offender before they are actually forfeited.

As to the first particular, viz. What is forfeited by the offender, by the common law,

I shall endeavour to shew,

1. Where his lands are forfeited by the common law; and,
2. Where his goods.

And **FIRST**, As to the forfeiture of lands.

Sect. 1. It seems agreed, that, by the common law, all lands of inheritance whereof the offender was (*a*) seised in his own right, and also all rights of (*b*) entry to lands in the hands of a wrong doer, are forfeited to the (*c*) king by an attainder of high treason, (1) and to the lord of whom they are immediately holden, by an attainder of petit treason or felony. (2) And that the lands whereof a person attainted of high treason dies (*d*) seised, of an estate in fee, are actually vested in the king without any office, because they cannot descend, the blood being corrupted, and the freehold shall not be in abeyance.

(*a*) 3 Inst. 19.
3 Co. 2, 3.
1 Hale, 240,
241, &c.
(*b*) 3 Inst. 19.
3 Co. 2, 3.
(*c*) See 25 Ed.
3. c. 2.
(*d*) Co. Litt.
2. 392.
4 Co. 58.
1 Leonard, 21.
Infra, s. 23.
1 Hale, 242.
4 Comm. 375.
(*e*) 3 Coke, 10.
Co. Litt. 2.
S. P. C. 191.
B. Cor. 208, 210.
1 Leonard, 21. Infra, sect. 3.

Sect. 2. But it seems (*e*) agreed, that, by the common law, such lands were not vested in the actual possession of the king during the life of the offender without an office.

Sect. 3. Also it (*f*) seems clear, that the lord cannot enter into the lands holden of him upon an escheat for petit treason or felony, without a special grant, till it appear by due process that the king has had his prerogative of the year, day, and waste.

Sect. 4. It is (*g*) said, that the inheritance of things not lying in tenure, as of rents-charge, rents-seck, commons, &c. shall be forfeited

(1) By 7 Anne, c. 2. and 17 Geo. 2. c. 39. "No attainder for treason, after the decease of the late Pretender's sons, should extend to the disinherison of any heir, nor to the prejudice of any person,

other than the traitor himself. As the Cardinal of York, the last of the sons, is now dead, forfeiture in cases of treason has ceased.—P. 649.

(2) Vide p. 639.

forfeited to the king by an attainder of high treason, and that the profits of them shall be also forfeited to the king by an attainder of felony during the life of an offender, and that the inheritance shall be extinguished by his death; for it cannot escheat because there is no tenure, nor descend because the blood is corrupted.

(h) 3 Coke, 2, 3. *Sect. 5.* But it is (h) said, that no right of action whatsoever to lands of an estate of inheritance are forfeited, either by the common law or by the statute; and it seems agreed that no (i) right of entry into such lands whereof there is a tenant by feoffment, or other title, nor (k) use (except only lands conveyed (l) fraudulently with an intent to avoid a forfeiture) nor (m) condition, were liable to be forfeited before the statute of 33 Hen. 8. and that (n) land in tail could not be forfeited after the statute of Westminster the second, but only for the life of the tenant in tail, till the statute of 26 Hen. 8. c. 13.
(h) 3 Coke, 2, 3. 7 Coke, 13. 1 Hale, 242, 243. Vide infra, s. 23, 24, 25. (i) F. Ent. Cong. 28. 3 Coke, 2, 3. 3 Inst. 19. (k) 3 Inst. 19. 1 Hale, 247. (l) 2 R. Abr. 34.
(m) 3 Inst. 19. 1 Hale, 244. (n) 3 Inst. 19. S. P. C. 187. Plowden, 554, 555. Dyer, 289. Co. Litt. 130. 372. 391. 1 Bunb. 92. Vide the case of John Gordon in the House of Lords, Foster, 95.

(o) 3 Inst. 19. *Sect. 6.* It (o) seems, that the profits of such lands, whereof a person attainted of felony is seised of an estate of inheritance in the right of his wife, or of an estate for life only in his own right, are forfeited to the king, and that nothing thereof is forfeited to the lord.
F. Assize, 166. Forfeited, 23. 4 Assize, 4.

(p) 2 Jones, 151. *Sect. 7.* It seems (p) agreed, that by force of a special custom a copyhold of inheritance may be forfeited by an attainder or conviction of treason or felony: also it hath been (q) holden, that by custom it may be forfeited for treason or felony, even without a conviction: also it (r) seems the stronger opinion, that it shall be forfeited by an attainder of treason or felony of common right, without any special custom, but (s) not by a conviction only (1.)
1 Levinz, 263. 1 Leonard, 1. (q) 1 Bulst. 13. 2 Brown. 217 to 220. See Godbolt, 267. 2 Ventris, 38. (r) 2 Jones, 189. 2 Ventris, 38, 39. 5 Coke, 117. 2 Keble, 451. Co. Copyholder, s. 58. (s) 1 Lev. 265. 2 Keble, 251.

(t) 4 Coke, 124. *Sect. 8.* It seems (t) agreed, that by the common law, upon an attainder of felony, the king had a right utterly to waste the lands holden of any but himself, where the person attainted was seised of an estate of inheritance, either in his own or in his (u) wife's right. (x) And it is said by some, that the king hath both this right, and also a right to hold such lands for a year and a day: but it is holden by others, that the right to hold over the lands for a year and a day was given to the king in lieu of the waste; and this seems (y) implied in Magna Charta, chap. 22. which saying, "that the king shall not hold over the lands of those convicted of felony but for one year and a day," and making no mention of the waste, seems plainly to intimate, that at the time of the making of that statute the king was thought to have no other right but only to the year and day. Yet the statute of *Prærogativa Regis*, 17 Edw. 2. having declared the king's right to the year and day, and also to the waste; it seems to have been the more
S. P. C. 190. 191. Staund. Prer. 48, 49, 50. (u) F. Cor. 327. 332. (x) 2 Inst. 36. 37. S. P. C. 190. 191. Staundf. Prer. 48, 49, 50. (y) See the books above cited; yet it seems admitted 8 Edw. 3. F. Trav. 489. Prescription, 50. that the king was intitled to the waste as to the year and day since this statute.

(1) But if the attainder happens before the tenant is admitted, the copyhold is not forfeited, but shall go to the heir at law. 2 Wilson, 13.

more general (z) opinion since that time, that he hath a right to both. Indeed if this statute had been against the express purview of Magna Charta, it would have been clearly repealed by those many subsequent statutes which repeal all statutes contrary to Magna Charta; but being not contrary to the express words of it, but only to what is argumentatively drawn from it, it may be well argued that it is still in force.

(z) B. Corone, 206. 208, 209, 210.
F. Corone, 290.
308. 310. 312.
327. 358.
Register, 165.
F. Traverser, 19.
S. P. C. 190,
191. Staundf.

Prerog. 48, 49, 50. 49 E. 3. 11. 4 Coke, 124. But 49 Assize, 21. the contrary seems to be holden. 2 Inst. 36, 37. F. Ulag. 2. See also F. Corone, 285. 290. 332. 344. And it seems agreed, that the king's prerogative of the waste is not grantable over, except only as to such interests which by virtue of it are actually vested in him. F. Cor. 310. S. P. C. 191. Staundforde's Prerogative, 50. 2 Inst. 37. 4 Comm. 378.

But the law of forfeiture in cases of felony is now altered by the stat. 54 Geo. 3. c. 145, "To take away corruption of blood in certain cases," which enacts, "That no attainder for felony which shall take place from and after the passing of this act, save and except in cases of the crime of high treason, or of the crimes of petit treason or murder, or of abetting, procuring, or counselling the same, shall extend to the disinheriting of any heir, nor to the prejudice of the right or title of any person or persons, other than the right or title of the offender or offenders during his, her, or their natural lives only; and that it shall be lawful to every person or persons, to whom the right or interest of any lands, tenements, or hereditaments, after the death of any such offender or offenders, should or might have appertained if no such attainder had been, to enter into the same."

As to the SECOND POINT, viz. Where the goods of the offender shall be forfeited for treason or felony.

I shall endeavour to shew,

1. What goods are liable to such forfeiture.
2. In what cases.

As to the first of these particulars,

Sect. 9. It seems (a) agreed, that all things whatsoever which are comprehended under the notion of a personal estate, whether they be in action or possession, which the party hath, or is intitled to in his own right, and not as executor or administrator to another, are liable to such forfeiture.

(a) Staundf.
Prerog. 45, 46.
S. P. C. 187.
C. Car. 566.
12 Coke, 121.
It is holden
Staundforde's

Prerogative, 45. and S. P. C. 188. c. 28. that a felon shall forfeit the goods of others stolen by him; but the authorities cited to this point, viz. 44 Ed. 3. 44. F. Corone, 317, 318, 319. 323. 334. 376. 380. do not seem fully to come up to it, except where such goods are waived, or of such a nature as not to be distinguishable from others of the like kind, as corn out of a bag, &c. Vide 2 Leonard, 5, 6. 1 Anderson, 19. Moor, 100. Dyer, 309, 310. that a term limited to executors and not vested in the party himself, is not forfeitable. Sed vide Foster, 223.

Sect. 10. Also it (b) seems to be settled, that a bond taken in another's name, or a lease made to another in trust for a person who is afterwards convicted of treason or felony, are as much liable to be forfeited, as a bond made to him in his own name, or a lease in possession.

(b) C. Jac. 312.
313.
Hobart, 214.
and the books
cited to the following section.

Sect.

(c) 2 Keble, 564. 608. 644. 763. 772.
 1 Levinz, 279.
 Lane, 54. 113.
 1 Modern, 16. 38.
 Hardres, 466.
 1 Ander, 294.
 Raym. 120.
 2 R. Abr. 34.
 1 R. Abr. 343.
 March, 45. 88.
 1 Sid. 260. 403.
 1 Keble, 909.

Sect. 11. Also it (c) seems to be in a great measure settled, that the trust of a term granted by a man for the use of himself, his wife and children, &c. is liable in like manner to be forfeited, if fraudulently made with an intent to avoid a subsequent forfeiture; but that it shall be forfeited so far only as it is reserved to the benefit of the party himself, if made *bona fide*, whether before or after marriage, for good consideration without fraud, which is to be left to a jury on the whole circumstances of the case, and shall never be presumed by the court where it is not expressly found.

(d) 2 Keb. 564. 644. 763. 772.
 1 Lev. 279.
 1 Mod. 16. 38.
 Vide inf. s. 26.

Sect. 12. It hath been (d) adjudged, that a power of revocation of the trust of a settlement reserved to the grantor is not liable to be forfeited, if it depend on something personal to be done by the grantor himself, as the making the deed of revocation under his own hand and seal.

Sect. 13. PERSONAL THINGS liable to forfeiture, shall be forfeited in the following cases :

(e) 5 Coke, 109. **FIRST,** Upon a conviction of treason or felony (e).

Sup. c. 33.
 s. 129, and the books cited to the three foregoing sections.

(f) S. P. C. 183, 184. 191, 192.

Staundf. Prerog. 46.
 Keilway, 69.
 Dyer, 239.
 5 Coke, 110.

(g) Secus if he be found accessory after, for the indictment is so far void.

S. P. C. 184.
 Sup. c. 9. s. 26.

(h) S. P. C. 184. 191.

Summary, 271.
 Keilway, 68.
 5 Coke, 110.
 F. Forfeiture, 35.

(i) S. P. C. 184.
 F. Corone, 206.

(k) Sum. 271.
 36 H. 6. 26.

Sup. c. 9. s. 51,
 52. F. Corone, 22.

(l) Summary, 271. S. P. C. 184. 47 Edw. 3. 26. Ab. F. Traverse, 18. B. Corone, 17. But the jury very seldom find the flight. Vide 4 Comm. 380.

Sect. 14. **SECONDLY,** Upon a *fugam fecit*, found before a coroner, upon an inquisition of death taken upon view of a dead body; as to which it is (f) agreed, that wherever a person found guilty by such inquest, either as a principal, or as an accessory (g) before the fact, is found also to have fled for the same, he forfeits his goods absolutely, and the issues of his lands till he be acquitted or pardoned. Also it is (h) agreed, that where one indicted of any capital felony, either as principal or accessory before or after, before justices of *oyer*, &c. is acquitted at his trial, but found to have fled, he shall incur the like forfeiture of his goods, but not of the issues of his lands, because by the acquittal the land is discharged, and consequently the issues. And it hath been (i) holden, that the law is the same as to the finding of a *fugam fecit* upon an acquittal of an indictment of petit larceny. But it is (k) certain, that the party may in all cases, except that of the coroner's inquest, traverse the finding of a *fugam fecit*. Also it seems (l) agreed, that whenever the indictment against a man is insufficient, the finding a *fugam fecit* will not hurt him; and that in all cases the particulars of the goods found to be forfeited may be traversed.

(m) F. Corone, 181.

Forfeiture, 28.
 S. P. C. 183, 184.

Staundf. Prerog. 47.

B. Corone, 8.
 Finch, 352.

1 R. Abr. 793.
 21 Assize, 13.

Sect. 15. **THIRDLY,** Upon a default till the award of an *exigent*, as to which it is (m) agreed, that if one make such a default either upon an appeal or indictment of a capital felony, he forfeits his goods, unless he was pardoned before the *exigent* was awarded; and it hath been (n) holden, that the law is the same as to such a default upon an indictment of petit larceny: however it is clear, that

22 Assize, 81, C. Eliz. 4. 721. 5 Coke, 110, 111. (n) Summ. 271.

that wherever goods are so forfeited, they are not saved by an acquittal at the trial. But it seems (o) agreed, that they are saved by a reversal of the award of the *exigent*, for an error either in fact or in law; as for the imprisonment of the defendant at the time when the *exigent* was awarded, or for a defect in the indictment, appeal, or process.

Staundforde's Prerogative, 47.

(o) 5 Coke, 110
111.
43 Edw. 3, 17,
18.
1 R. Abr. 743.
S. P. C. 184.
Co. Litt. 259.
Cro. Jac. 464.

Sect. 16. FOURTHLY, Upon a (p) presentment by the oaths of twelve men, that a person arrested for treason or felony fled from, or resisted those who had him in custody, and was killed by them in the pursuit or scuffle.

3 Inst. 56. 227. Plowden, 260. But Staundforde makes a *quære* whether the law in this point be not altered by 34 Edw. 3. 12. taken notice of above, c. 48. s. 25. Staundforde's Prerogative, 46.

Sect. 17. FIFTHLY, By being (q) waived or left by a felon in his flight, from those who either actually do pursue him, or are apprehended by him so to do, whereby he forfeits the goods so waived, whether they be his own (r) proper goods, or the goods of others stolen by him, which shall not be restored to the right owners but upon a proper prosecution, as hath been more fully shewn, chap. 23. from sect. 49 to 58.

3 Inst. 227. and 5 Coke, 109. it is said, that the felon's proper goods are not forfeited as goods of a fugitive.

(p) 5 Coke,
109.
F. Corone, 289,
290, 291. 312.
S. P. C. 184.
189. 191, 192.
(q) S. P. C. 186.
5 Coke, 109.
C. Eliz. 611.
(r) S. P. C. 186.
and 29 Ed. 3.
29.
Ab. F. Avo.
253. seems ex-
press to this
purpose. But
waifs, but as the

As to the second particular, *viz.* What is forfeited by statute.

Sect. 18. By 16 Hen. 8. c. 13. " Every offender and offenders " being hereafter lawfully convicted of any manner of high trea- " sons by presentment, confession, verdict, or process of outlawry, " according to the due course and custom of the common laws " of this realm, shall lose and forfeit to the king, his heirs and " successors, all such lands, tenements, and hereditaments, which " any such offender or offenders shall have of any estate of in- " heritance, in use or possession, by any right, title or means, " within the realm of England, or elsewhere within any of the " king's dominions, at the time of any such treason committed, " or any time after. Saving to every person and persons, their " heirs and successors, other than the offenders in any treasons, " their heirs and successors, and such person and persons as " claim to any their uses, all such rights, titles, interests, posses- " sions, leases, rents, offices, and other profits, which they shall " have at the day of committing such treasons, or at any time " before, in as large and ample manner as if this act had never " been had nor made."—And the same is enacted in near the same words by 5 and 6 Edw. 6. c. 11.

Sect. 19. By 33 Hen. 8. c. 20. sect. 2. " If any person shall " be attainted of high treason by the common laws or statutes of " this realm, every such attainder by the common law shall be of " as good strength, value, force and effect, as if it had been done " by authority of parliament; and that the king, his heirs and suc- " cessors, shall have as much benefit and advantage by such at- " tainder, as well of uses, rights, entries, conditions, as posses- " sions, reversions, remainders, and all other things, as if it had " been done and declared by authority of parliament, and shall

Attainders for high treason by the common law shall be as effectual as attainders by parliament.

" be deemed and adjudged in actual and real possession of the
 " lands, tenements, hereditaments, uses, goods, chattels, and all
 " other things of the offenders so attainted, which his highness
 " ought lawfully to have, and which they being so attainted ought
 " or might lawfully lose or forfeit, if the attainder had been done
 " by authority of parliament, without any office or inquisition to be
 " found of the same; any law, statute, or use of the realm to the
 " contrary thereof in any wise notwithstanding."

Sect. 20. By 33 Hen. 8. c. 20. s. 3. there is a " saving to all
 " and every person and persons, and bodies politic, and their
 " heirs and assigns, and successors, every of them (other than
 " such person and persons which hereafter shall be attainted of
 " high treason, and their heirs and assigns, and every of them,
 " and all and every other person and persons, claiming by them
 " or any of them, or to their uses, or to the uses of any of them,
 " after the said treasons committed), all such right, title, use,
 " possession, entry, reversions, remainders, interests, conditions,
 " fees, offices, rents, annuities, commons, leases, and all other
 " commodities, profits and hereditaments whatsoever they or any
 " of them should, might or ought to have had, if this act had
 " never been had or made."

In the construction of these statutes the following points seem most considerable.

(a) S. P. C.
 187.
 3 Inst. 19.
 Dyer, 28.
 1 Hale, 241.
 356.

Sect. 21. FIRST, It is (a) settled, that they are not repealed by 1 Mary, sess. 1. c. 1. which enacts, " That no pains of death, " penalty or forfeiture in any wise ensue or be to any offender or " offenders, for the doing or committing any treason, petit treason " or misprision of treason, other than such as be in the statute " 25 Edw. 3. ordained and provided;" for the words, " other " than such as be within the statute of 25 Edw. 3. &c." shall not be taken to refer to the pains, penalties and forfeitures which are mentioned in the beginning of the sentence, but to treasons, petit treasons and misprision of treason, which are last mentioned.

(b) S. P. C. 187.
 Co. Litt. 372.
 391. and the
 books cited to
 the following
 sections.
 (c) Dyer, 322.

Sect. 22. SECONDLY, It is (b) agreed, that estates in tail are forfeited by force of those words in 26 Hen. 8. " of any estate of " inheritance," which must be void, if they do not include estates in tail; for estates in fee simple were forfeited before. Also it hath been (c) adjudged, that where lands are given to a man and his wife, and the heirs of their two bodies, the intail is forfeited by his attainder, and the heir is as much disabled as if the gift had been made to the heirs of his body in general.

(d) 3 Co. 2, 3.
 1 Leon. 270.
 Moor, 125.
 Hobart, 340.
 C. Eliz. 389.
 cited and
 agreed, C. Car.
 428.
 7 Co. 13.
 Moor, 323.
 Lit. Rep. 100.
 1 Hale, 242.
 (e) 3 Co. 2.
 Hob. 340, 341.
 7 Coke, 13. 4 Coke, 58. (f) 3 Co. 2, 3. 1 Hale, 242. (g) 3 Co. 11. 4 Coke, 58. 1 Leon. 21.
 9 Coke, 93. Supra, a. 1, 2.

Sect. 23. THIRDLY, It was (d) settled in the Marquis of Winchester's case, that the right to a writ of error to reverse an erroneous common recovery is not forfeited by these statutes. Also it is (e) agreed, that a mere right of action to lands in the hands of a stranger, as of a discontinuee, or of the heir of a disseisor, is not forfeited: (f) but, that a right of entry into lands to which a person attainted of high treason is intitled, is as much forfeited as lands in possession. But yet the king shall (g) not be adjudged in possession of such lands without an office, and *scire facias*

facias, or seizure on such office; for the words, "that the king shall be deemed in possession without office," shall have this construction, that he shall be in possession without office in the same manner as he should have been upon an office found at common law: but at the common law, if a disseisee had been attainted of high treason, and the *seisin* found by office, the king should not have been in possession without a *scire facias*, or a seizure at least.

Sect. 24. FOURTHLY, After two contradictory judgments upon the same point, it was at last (*h*) settled by a majority of the judges in *Stone and Newman's case*, that where a tenant in tail of the gift of the crown makes a feoffment in fee, the reversion being still in the crown, and afterwards is attainted of high treason, the right of the intail is forfeited to the crown; because the reversion continuing always in the crown, the intail could not be discontinued, but the heir might have entered after the death of the feoffor, without bringing any action; and though the intail by such a feoffment be put in abeyance as to any benefit which the feoffor himself may claim from it; yet since it is not turned to a right of action, and would have continued still in him for the benefit of the heir, if he had not been attainted (as appears from the form of a writ of *formedon*, which supposes that the right descended to the heir from the feoffor, and consequently that it was in him at his death), it shall likewise continue in him for the benefit of the king.

(*h*) C. Car. 427.
Vide Plowd.
552.
1 Hale, 243.

Sect. 25. FIFTHLY, It was solemnly adjudged in the exchequer chamber in (*i*) *Sheffield's Case*, and a judgment to the contrary in the exchequer reversed, that where one attainted of high treason is seised of a defeasible estate in tail, and hath at the same time a right to an ancient intail which is discontinued, he forfeits both the intail in possession, and the right to the old intail; for the first is within the express words of 26 Hen. 8. and the latter within those of 33 Hen. And it by no means follows, that because naked rights of action to lands in the hands of the heir of a disseisor, or of a discontinuee, or not within the meaning of the statute, as it is (*k*) settled that they are not; therefore also a right to lands in the hands of the person attainted himself is not within the meaning of it; for the forfeiture of such naked rights might not only be of dangerous consequence in unsettling possessions, but might also be highly prejudicial to strangers, whom the statute by an express saving plainly intends to favour; but the forfeiture of the offender's right to his own lands can be of no prejudice to any but himself and his heirs, to whom the statute is so far from intending any favour, that it expressly excludes them from all the benefit of the saving clause.

(*i*) Hobart, 334,
&c.
Palmer, 351,
&c.
2 Roll. 305, &c.

(*k*) Sup. s. 23.

Sect. 26. SIXTHLY, It seems (*l*) agreed, that a power of revoking the uses of a settlement may be forfeited by force of 33 Hen. 8. if the execution of it require nothing but what may be as well performed by any person as by the party himself by whom it was reserved; as the tender of a ring, &c.

(*l*) 7 Coke, 12,
13.
1 Hale, 245.
Popham, 18.
1 Ander. 293.
Moor, 303.
4 Leonard, 279.
Palmer, 433, &c. 1 Roll. 142.

(m) 7 Coke, 12.
and the other
books above
cited.
Cited and
agreed,
2 Keble, 566,
763, 773. 1 Levinz, 279. Lanc, 44. 1 Roll. 142.

Also it was adjudged in (m) Englefield's case, that the mention of such considerations and inducements for the reserving of such a power of revocation in the preamble of it, as are inseparable from the person, do not alter the case, if nothing of this kind be in the proviso itself by which it is reserved.

(n) 7 Coke, 13.
1 Hale, 245.
Cited and
agreed,
1 Levinz, 279.
2 Keble, 566,
367, 773.
3 Inst. 19.

But is agreed, that if the proviso by which such a power is reserved require something inseparably annexed to the person, it keeps it out of the statute; and therefore in the (n) Duke of Norfolk's case, where there was this proviso, "that if the Duke should be minded to alter and revoke the uses, and signify his mind in writing under his hand and seal, that then, &c." it was clearly adjudged, that the power of revocation was not forfeitable, because it depended on the duke's signifying his mind in writing under his proper hand and seal, which none but himself could do.

(o) Sup. s. 12.
1 Hale, 246.
(p) Palmer, 429.
Latch, 22, 26,
&c. 79, 102.
1 Jones, 135.
1 Ventris, 129.
1 Modern, 40.

Also it was adjudged in (o) Main's case, that the law is the same where such proviso doth not expressly require the party's signifying a change of mind, but only that the deed of revocation be under his proper hand and seal. (p) But if such proviso require only the tender of a ring by the feoffor, *ipso adhunc declarante* that the tender is to the intent to avoid the feoffment, it seems unsettled, whether it come within the same construction.

(q) Plowden,
381, 382.
(r) Plowden.
379, &c.
(s) Plowden,
379.

Sect. 27. SEVENTHLY, It (q) seems, that an annuity granted to a man *pro consilio impendendo*, is not forfeitable by these statutes: also it seems (r) doubtful whether an office granted to a man for life, and requiring skill and confidence, be forfeitable; but if it be (s) granted in fee, it seems clear that it may be forfeited even by the common law; because the grantor in giving such an estate, which shall descend to all the heirs of the grantee, however unqualified, seems plainly not to have been induced to make his grant from any consideration of the peculiar merit of persons who are to execute the office.

(t) 2 Lev. 169.
3 Keble, 459.
651, 712.
2 Modern, 130,
131.
2 Jones, 57.
1 Vent. 299.
(u) Co. Litt.
230. and the
books above
cited.

Sect. 28. It hath been (t) adjudged, but not without great difficulty, that an act of parliament that certain persons shall forfeit all their lands, possessions, rights, interests, and hereditaments, and other things of what nature soever, extends to estates in tail, by force of the words "all interests of what nature soever." Yet it is (u) agreed, that the statutes of *præmunire*, which give a general forfeiture of all the lands and tenements of the offender, extend not to land in tail.

(x) Summ 8.
1 Hale, 704.
3 Inst. 47, 90.
Salkeld, 85.

Sect. 29. It is (x) holden, that a saving against the corruption of blood in a statute concerning felony, doth by necessary consequence save the land to the heir; because the escheat to the lord for felony is only *pro defectu tenentis*, occasioned by the corruption of blood. Also it is holden, that a saving of the land to the heir prevents the corruption of blood, and also the loss of dower. But it hath been (y) adjudged, that a saving against the corruption of blood in a statute concerning treason, doth not save the land to the heir, because in treason the land goes to the king by way of immediate forfeiture, and not by escheat.

(y) Salk. 85.

As to the third particular, viz. To what time the forfeiture shall relate.

Sect. 30. It seems (x) agreed, that the forfeiture upon an attainder either of treason or felony, shall have relation to the time of the offence, for the avoiding of all subsequent alienations of the lands; but to the time of the (a) conviction, or *fugam fecit* found, &c. only, as to chattels; unless the party were (b) killed in flying from or resisting those who had arrested him; in which case it is said, that the forfeiture shall relate to the time of the offence.

(a) F. Forf. 30. Staundforde's Prerog. 48. S. P. C. 192. B. Relation, 31. Exposition, 26. Forfeiture, 119. F. Corone, 296. 1 Hale, 362. (b) Vide sup. s. 16. S. P. C. 192. F. Corone, 290. 1 Hale, 362.

Sect. 31. But it seems (c) unsettled, whether in *præmunire* it shall relate to the time of the offence, or only to that of the judgment.

Sect. 32. It seems the better (d) opinion, that no attainder whatsoever shall have any relation as to the mesne profits of the lands of the person attainted, but only from the time of the attainder.

191. and the contrary seems holden. F. Corone, 290. 344. See also F. Forfeiture, 16. F. Cor. 374. Finch, 326, 327.

As to the fourth particular, viz. What shall be done with the goods of an offender both before and after they are actually forfeited.

Sect. 33. It seems to have been always (e) agreed, that one indicted or appealed of treason or felony may *bonâ fide* sell any of his chattels real or personal for the sustenance of himself and family until they be actually forfeited.

8 Coke, 171. 7 II. 4. in the last date. S. P. C. 193. 1 St. Tr. 994, 995. 4 St. Tr. 65, 66, 454. 1 Hale, 362, 367. But if they are conveyed over for the purpose of avoiding the forfeiture, it is fraudulent and void, Skinner, 357, 358.

Sect. 34. Also it seems (f) agreed, that the goods of such person can in no case be lawfully removed out of his house until they be forfeited.

Sect. 35. Yet according to the general tenor of the old (g) books, the goods of one (h) arrested for treason or felony, may by the purview of an ancient statute, which (i) seems to continue

18. s. 2. Britton, f. 4. S. P. C. 52, 192. Staundf. Prerog. 47, 48. 1 Hale, 263, 364. It is said, 26 Assize, 32. Ab. B. Corone, 102. that justices of oyer, &c. shall put the chattels of felons in estreat presently, &c. and deliver them to the towns, &c. to answer to the king in eyre. But this seems intended of the chattels of one convict of felony. And in 44 Assize, 13. and 43 E. 3. 21. Ab. B. Corone, 9. Forfeiture, 7. Reseiser, 3. Office and Officer, 3. F. Trespass, 7. Bar. 196. the 2d. it is said, that no minister of the king ought to take the chattels of an appellee of felony away with him, but to seize them, and cause the party to find surety that they shall not be elaigned, &c. And if the party cannot find surety, he ought to deliver them to the neighbours, &c. And in the last case of 7 II. 4. Ab. F. Corone, 83. and B. Forfeit, 10. it is said, that where one is indicted of felony, until he be attainted, his goods shall not be removed out of his house, but shall be kept by his neighbour, until, &c. and in the mean time the felon ought to live upon his goods. Vide 41 Assize, 13. Ab. F. Process, 183. B. Forfeit, 40. 13 II. 3. 13. in which books it is said, that goods shall not be seized till they be forfeited. (h) The old writ recited Bracton, b. 3. c. 18. sect. 2. and Fleta, b. 1. ch. 26. sect. 2. is express to this purpose: yet in 3 Inst. 228. it is said, that the goods of any delinquent cannot be inventoried and the town charged therewith before the owner is indicted of record; and a note in Summ. 269. seems to be to the same effect, and 1 Hale, 367. (i) 1 St. Tr. 994, 995. 4 St. Tr. 65, 66. S. P. C. 139.

(x) F. Forf. 3. 30. 30 H. 6. 5. S. P. C. 192. F. Counterp. de Voucher, 30. Co. Litt. 2. 8 Coke, 170. 38 Edw. 3. 32. Plowden, 488. 1 Hale, 360, 631. (c) C. Car. 172. 1 Jones, 217.

(d) 8 Coke, 170. Plowden, 488. 38 Edw. 3. 32. But this is made a *quare* S. P. C. F. Cor. 374.

(e) Bracton, b. 3. c. 18. s. 5. and c. 18. s. 1, 2. Fleta, b. 1. c. 26. s. 1, 2. (f) See the citations to the foregoing and following section.

(g) Fleta, b. 1. c. 26. s. 2. Bracton, b. 3. c.

still in force, be immediately inventoried and appraised; after which, and on surety found that they shall be forthcoming, they shall be kept by the bailiffs of the party arrested, and, for want of such surety, by his neighbours, till he be convicted, or found to have fled, &c. whereby they are actually forfeited.

Sect. 36. Also it was enacted by the statute *De Officio Coronatoris* (set forth more at large ch. 9. sect. 19, 20.), that where one is found guilty of murder by a coroner's inquest upon the view of a dead body, the coroner shall inquire what goods he hath, and cause them to be valued and delivered to the township, &c. But so much of this statute as enables the coroner to seize the goods, (k) seems to be repealed by 1 Rich. 3. (set forth more at large, sect. 38.), unless the party indicted be found also to have fled.

(k) S. P. C. 52.

Sect. 37. Also by 25 Edw. 3. c. 14. set forth more at large ch. 27. sect. 116. it is enacted, "That in the second *capias* given by that statute on the return of a *non inventus*, it shall be commanded, that the sheriff shall cause the party's chattels to be seized, and safely kept till the day of the writ or precept returned, &c." and this is still in (l) force, notwithstanding the statute of 1 Rich. 3. c. 3. for this prohibits only the seizing of the goods of those who are arrested.

(l) S. P. C. 193.
1 Hale, 366.
Staundforde,
Prerog. 48.

Vide 1 Hale, 366, 367, for a variety of observations upon this act.

(m) For precedents of such actions, see 1 Lutw. 132. C. Litz. 749.

Sect. 38. And so far as it relates to this purpose, it is enacted by the said statute 1 Rich. 3. c. 3. as followeth: "And that no sheriff, under-sheriff, nor escheator, bailiff of franchise, or any other person, take or seize the goods of any person arrested or imprisoned for suspicion of felony, before that the same person so arrested and imprisoned be convicted or attainted of such felony according to the law, or else the same goods otherwise lawfully forfeited, upon pain to forfeit the double value of the goods so taken, to him that is so hurt in that behalf, by (m) action of debt, &c."

(n) Vide Sup. s. 33, 34, 35.
S. P. C. 193.
(o) 1 Ray. 414.

Sect. 39. This statute is said to be in (n) affirmance of the common law, and hath been (o) adjudged to extend as well to the seizure of money as of any other chattel.

(p) Co. Litt. 391.

(q) F. Corone, 300, 347, 306.
13 H. 4. 13. 6.

Ab. F. Forl. 32. 22 Assize, 81. Ab. F. Corone, 181. B. Charge, 45. Forfeiture, 32. S. P. C. 193, 194. Staundforde's Prerogative, 47. 47 E. 3. 26. (r) 23 Assize, 81. Ab. F. Corone, 181. B. Charge, 45. Forfeiture, 32. Staundforde's Prerogative, 47.

(s) F. Corone, 300, 347.
S. P. C. 194.

Sect. 41. And at the common law it was no (s) plea for such township, that the goods were delivered to the custody of J. S. who embezzled them, &c. But it is enacted by 31 Edw. 3. c. 3. "That if any man or town be charged in the exchequer by es-treats of the justices of the chattels of fugitives and felons, and will allege in discharge of him another which is chargeable, he be heard, and right done to the other."

As

(1) Whether the king takes the forfeited goods, subject to the debts of the party, vide Douglas, 542.

As to the SECOND POINT, *viz.* Where the wife loses her dower.

Sect. 42. It is agreed, that before the statute of 1 Edw. 6. ch. 12. the wife not only lost her dower at common law (*t*) but also her dower (*u*) *ad ostium ecclesie*, or *ex assensu patris*, or by special (*x*) custom (except that of (*y*) gavel-kind), by an attainder of any treason or (*z*) capital felony, whether (*a*) committed before or after the marriage, and whether the lands were in the hands of a (*b*) feoffee, or forfeited to the king, or escheated to the lord of the fee, and though the (*c*) attainder were pardoned, &c. (*t*) S. P. C. 194. Co. Litt. 31. 37. 41. 392. Litt. s. 747. 3 Inst. 47. 211. 1 Hale, 359. (*u*) Co. Lit. 37. 41. S. P. C. 195. Bracton, 311. (*x*) Co. Litt. 41. Bracton, 311. Winch, 27. (*y*) Bracton, 311. (*z*) Co. Litt. 41. 1 Hale, 359. (*a*) Co. Litt. 31. (*b*) 3 Inst. 216. Sav. 54, 55. Co. Litt. 41. Benlowe, 55, 56, 57. Dyer, 140. Moor, 639. Con. by Vavasor. Litt. s. 55. (*c*) 1 Leonard, 3.

Sect. 43. But it (*d*) seems, that the wife never forfeited lands given jointly to her husband and her, whether by way of frank-marriage or otherwise, but only for the year and day and waste (*e*). (*d*) Co. Litt. 37. 3 Inst. 216. Bracton, 129, 130. (*e*) Bracton, 129. Supra, s. 8. Con. Bract. 130.

Sect. 44. Also it hath been (*f*) adjudged, that if a husband having levied a fine with proclamations, is afterwards erroneously attainted of high treason, and the five years pass after his death, and then the outlawry is reversed, the wife may pursue her title of dower within five years after such reversal; because being barred of her dower by the attainder while it stood in force, which attainder she could no way reverse, she had no remedy to pursue her title of dower within the five years, and therefore shall not be barred by her non claim. (*f*) 3 Inst. 216. Moor, 639. 879.

Sect. 45. By 1 Edw. 6. c. 12. s. 17. "Albeit any person shall be attainted of any treason or felony whatsoever, yet that notwithstanding every woman who shall fortune to be the wife of the person so attainted, shall be endowable and enabled to demand, have, and enjoy her dower in like manner and form as though her husband had not been attainted, &c." See Harg. Co. Lit. 41. *notis.*

Sect. 46. But this is repealed as to treason by 5 and 6 Edw. 6. c. 11. par. 9. by which it is enacted, "That the wife whose husband shall be attainted of any treason whatsoever, shall in no wise be received to ask, challenge, demand, or have dowry of any the lands, tenements, or hereditaments of the person so attainted during the said attainder in force." And this hath been construed (*g*) to extend as well to an attainder of petit treason, as of high treason. (*g*) S. P. C. 195. Dyer, 140. Co. Litt. 37. 392. 1 Hale, 359.

As to the THIRD POINT, *viz.* How far the blood is corrupted by an attainder of treason or felony, the following particulars seem most remarkable.

Sect. 47. FIRST, It is (*h*) agreed, that by (*i*) such an attainder the blood is so far stained or corrupted, that the party loses all the nobility and gentility he might have had before, and becomes ignoble. (*h*) 3 Inst. 211. S. P. C. 195. (*i*) But an attainder of piracy. (B. 1. 41. Noy, 170. tit. "Piracy," s. 6. 8. Co. Litt. 391.) or petit larceny corrupts not the blood. 3 Inst. 112. Co. Litt. 41. Noy, 170.

Sect. 48. SECONDLY, It is also (*k*) agreed, that he can neither inherit as heir to an ancestor, nor have an heir. (*k*) Co. Litt. 8. 391, 392. S. P. C. 195.

B. Nonabil. 21. Corone, 60.

Sect.

(l) C. Car. 543.
Litt. Rep. 28.
2 Ven. 413.
417.
Noy, 159. 166.
&c.

Levinz, 60.
1 Sid. 200, 201.
(m) 3 Coke, 10.
Litt. sec. 746,
747.
1 Hale, 356.
8 Coke, 166.
(n) 1 Ventris,
416. 418.
Dalison, 14.
1 Hale, 356.
Co. Litt. 392.

Sect. 49. THIRDLY, It is also further (l) agreed, that wherever it is necessary for any one who would make a title to another to derive the descent through him, the attainder is a bar to such title, (m) unless the land were intailed. And therefore if there be grandfather, father and son, and the father be attainted, it is clear, that the son (n) cannot claim as heir to the grandfather of the lands in fee-simple, because he must of necessity derive the descent through the father, which by reason of the attainder he cannot do. And for the same reason, if there be two brothers, and one of them having issue a son, be attainted, and either the son or uncle purchase land and die without issue, the other (o) cannot be his heir, because the blood of the father, through whom the descent must be conveyed, is corrupted.

(o) C. Car. 543. Dyer, 274. 1 Ventris, 413. 416. 425. 1 Hale, 357.

(p) C. Car. 543.
1 Ventris, 413,
417, &c.
Litt. Rep. 28.
Noy, 159, 166,
&c.
1 Levinz, 60.
1 Sid. 200, 201.
Vide Bracton,
b. 3. c. 14.
s. 17.
(q) 1 Ventr. 416.
(r) Co. Litt. 8.
1 Hale, 357.
4 Leonard, 5.
C. Jac. 539.
1 R. Ab. 625.
C. Car. 543. 1 Ventris, 425. Palmer, 19. 1 Levinz, 59. 2 Roll. 93. 2 Siderfin, 25, 27. This is left doubtful, Moor, 569. Noy, 158, &c. Con. Litt. Rep. 28.

But it seems a (p) general rule, that the attainder of a person who needs not be mentioned in the conveyance of the descent, does no hurt, let the ancestor be never so remote; and *à fortiori*, therefore it seems clearly to follow, that where one may claim as immediate heir to another, without deriving the descent through any other, he shall not be barred by the attainder of any other. And therefore it seems (q) agreed, that if the son of one attainted purchase land, and have a son and die, such son shall inherit him, because he derives his descent immediately from him. And for the like reason it hath been (r) settled, that if a man hath two sons, and then be attainted, and one of the sons purchase lands and die without issue, the other shall be his heir, because he may make his title without mentioning the father.

(s) Co. Litt. 8.
1 R. Ab. 625.

But Sir Edward Coke (s) says, that the reason of this case is, "because the attainder of the father corrupts only the lineal blood, and not the collateral blood between the brethren, which was vested in them before the attainder;" but he saith, "That some have holden, that if a man after he be attainted have issue two sons, the one cannot be heir to the other, because they could not be heir to their father, for that they never had any inheritable blood in them." But the ground of this opinion seems to be overthrown by the resolution in the case of *Collingwood v. Pace*, wherein it was adjudged (t) in the exchequer-chamber by seven judges against three, that the sons of an alien might be heirs to one another if born in England, or naturalized; and yet it is certain that they could not be heirs to their father. Also it seems to (u) be the better opinion, that where a person attainted hath issue by a woman seised of lands of inheritance, such issue may inherit the mother, though he never had any inheritable blood from the father.

(t) 1 Sid. 193.
Hardres, 224.
1 Ventris, 413.
1 Levinz, 59.
(u) 1 Sid. 201.
1 Ventris, 422.
426.
Noy, 159. 167.
168, 169.
2 Siderfin, 248.
This also appears from
13 H. 7. 17.
cited S. P. C.
196.
Abridged Bro.
Tenant, by
Curtesy, 15.

and wherein it is holden, That if the husband of an inheritrix have issue, and be attainted of felony and pardoned, he shall not be tenant by courtesy by reason of the issue born before the pardon, but by reason of issue born after he shall; from whence it necessarily follows, that such issue must be inheritable to the wife. Also it is admitted, Co. Litt. 84. h. That the issue of an inheritrix by an alien, or a person attainted may be in ward, which could not be unless he could inherit the mother. Vide C. Jac. 539. Litt. Rep. 28. 1 Levinz, 59, 60. But the contrary was anciently holden. 3 Coke. 41. Bracton, b. 3. c. 13. s. 19, 20.

Sect.

Sect. 50. FOURTHLY, It seems clear, that notwithstanding a person attainted be to many purposes looked upon as dead in law, yet he hath a capacity to (x) purchase land, which the king shall have upon office found. Also if the father of a person attainted die seised of an estate of inheritance during his life, no (y) younger brother can be heir, but the land shall rather escheat; for the elder brother, though attainted, is still a brother, and no other can be heir to the father while he is alive; but it seems (z) agreed at this day, that if he die before the father, the younger brother shall be heir.

1 Ventris, 413. 417. 1 Levins, 60. 29 Assize, 11. Noy, 166. 170. 1 Siderfin, 195. 26 Assize, 2. (x) See the books next above cited, and Bro. Descent, 64. Con. Bracton, b. 3. c. 14. s. 17.

Sect. 51. FIFTHLY, It is clear, that the corruption of blood from an attainder is so high, that it cannot be absolutely salved but by the act of parliament; for it seems (a) agreed, that the king's pardon cannot restore the blood so as to make the person attainted capable either of inheriting others, or of being inherited himself by any one born before the pardon. (b) Yet if such person have a son born after the pardon, and purchase lands and die, such son may be his heir, unless he have an elder brother alive born before the pardon; for a pardon doth as it were make a man a new creature, and give him a new capacity, in respect whereof his issue born after the pardon may be his heir, as to lands purchased after the pardon, in the same manner as if he had never been attainted.

† **Sect. 52.** By 7 Ann. c. 21. s. 10. it is enacted, (1) "That after
"decease of the Pretender no attainder for treason shall extend
"to the disinheriting of any heir, nor to the prejudice of the right
"or title of any person or persons, other than the right or title of
"the offender or offenders during his, her, or their natural lives
"only; and that it shall and may be lawful to every person or
"persons to whom the right or interest of any lands, tenements,
"or hereditaments, after the death of any such offender or of-
"fenders, should or might have appertained, if no such attainder
"had been, to enter into the same."

† **Sect. 53.** But by 17 Geo. 2. c. 39. s. 3. "The said provision
"so made by the said last recited clause of the 7 Ann. c. 21. shall
"not take place, nor have any operation, force, or effect whatso-
"ever, until after the deceases, not only of the said Pretender,
"but also of his eldest, and all and every his son and sons."

(1) For the history of this act, which is rather curious, see 4 Black. Comm. c. 27. And as the Squart family is now extinct, corruption of blood

for treason is virtually abolished. The same is also now abolished in felony by 54 Geo. 3. c. 145. Vide ante, p. 639.

CHAP. L.

OF AVOIDING JUDGMENT.

4 Comm. 38.

FOR the better understanding the learning concerning the avoiding of judgment in criminal cases, I shall endeavour to shew,

1. How such judgment may be avoided.
2. The effect of such avoidance.

Such judgment may be avoided either,

1. Without writ of error.
2. By writ of error.

They may be avoided without writ of error two ways:

1. For faults apparent in the record.
2. For other matter *dehors* the record.

And **FIRST**, I shall endeavour to shew where such judgment may be avoided by plea without any writ of error for faults apparent in the record.

Sect. 1. As to which it is observable, that notwithstanding it be the allowed practice of the court of common pleas to suffer a defendant coming in by (a) *capias utlagatum* the same (b) term in which an *exigent* is returnable, to avoid the outlawry without writ of error, by shewing that he purchased a (c) *supersedeas* out of the (d) same court, and (e) delivered it to the sheriff before the *quinto exactus*, &c. or by shewing any (f) other matter apparent on record which makes the outlawry erroneous, as the want of an (g) original,

(a) Co. Litt. 259.

1 Ander. 36.

Vide inf. s. 9.

Scrus if he comes in gratis.

Dyer, 112.

Con. 39 H. 6. 27. Ab. F. Resp. 52. B. Utlag. 35. Vide 14 H. 4. 27. F. Ind. Nominis, 3. B. Utlag. 28. 30 H. 6. 3. (b) 8 H. 6. 37. Ab. F. Error, 19. 19 H. 6. 2. a. Ab. F. Error, 26. But some have holden, that an outlawry cannot be avoided for this or any other cause in another Term. Co. Litt. 259. 37 H. 6. 17. Ab. F. Utlag. 28. B. Error, 97. 8 H. 6. 37. Con. ad. 1 And. 36. (c) 19 H. 6. 44. Ab. F. Utlag. 20. B. Utlag. 21. 33 H. 6. 1. Ab. F. Utlag. 27. Bro. 2. 30 H. 6. 3. Ab. F. Protect. 11. B. Utlag. 74. 12 H. 4. 18. Ab. B. Utlag. 14. 7 H. 4. 1. Ab. B. Utlag. 5. 8 H. 6. 7. F. Error, 42. 11 H. 4. 34. 33 H. 6. 1. 45. Ab. F. Utlag. 27. 1 Anderson, 36. But 1 R. Abr. 743. the contrary is said to have been holden. 39 Eliz. (d) 30 H. 6. 3. Ab. F. Protect. 11. Scrus, if the supersedeas were from the Chancery, 7 H. 4. 5. Ab. F. Supers. 10. B. Utlag. 65. Supersedeas, 8. Vide 18 H. 6. 18. Ab. F. Error, 24. 7 Edw. 4. 9. Ab. F. Exigent, 1. B. Supersedeas, 31. F. N. B. 236. (e) 14 H. 4. 27. B. Utlag. 15. L. Quin. Edw. 4. 5. Ab. B. Error, 155. Dyer, 222, 223. and it is said not to be material whether it were delivered to the sheriff or not. Co. Litt. 128. B. Utlag. 8. 4 E. 4. 42. Con. F. Error, 77. Vide F. Error, 42. (f) Coke on Litt. 259. 33 H. 6. 1. 5. Ab. B. Utlag. 27. (g) 11 H. 7. 4. Ab. B. Utlag. 78. 16 E. 4. 9. Ab. B. Error, 172. F. Utlag. 41. Vide 19 Edw. 4. 8. But it is agreed that an outlawry without any original is not void, but voidable only, F. Color. 45. Utlag. 18. 7 H. 7. 5. Ab. F. Error, 52. Keilway, 19. B. Utlag. 45. L. Quin. Edw. 4. 116.

original, or the (h) omission of process, or want (i) of form in a writ of proclamation, &c. or a (k) return by a person appearing not to be sheriff, or a (l) variance between the original and the exigent, or other process, or the want of such additions as (m) are required by 1 Hen. 5.

19 H. 6. 2. Ab. F. Error, 26. L. Quin. Ed. 4. 116. B. Utlag. 43. (i) Dyer, 206. 11 H. 4. 34. (k) Dyer, 41. (l) F. Utlag. 41. 38 H. 6. 31. Ab. Utlag. 31. 21 Edw. 3. 56. Ab. F. Dis. 3. 16 Edw. 4. 9. B. Error, 172. F. Dis. 17. 20 H. 6. 18. Ab. F. Dis. 22. 2 Rich. 3. 13. B. Mis. 80. Variance, 90. (m) 8 H. 6. 37. Ab. B. Er. 19. 1 Anderson, 36. 1 R. Abr. 743. 2 Inst. 670. Con. B. Utlag. 34. 39 H. 6. 1.

Yet it is said in many (n) books, to be the constant course of the court of king's bench, never to reverse an outlawry on the crown-side, either in the same or a different term, for (o) these or other errors of the like nature, as (p) the want of a *capias* to the sheriff of the county whereof the party is named, or a (q) fault in the indictment, without a writ of error.

Ab. F. Err. 26. Vide Palmer, 43. Con. 11 H. 7. 4. Ab. B. Utlag. 78. (o) Not for the want of an addition, 19 H. 6. 2. Ab. F. Error, 26. 11 H. 6. 15. b. 54. (p) Sup. c. 27. s. 127. 9 H. 6. 15. B. Utlag. 20, 34. 39 H. 6. 1. (q) 1 Bulstrode, 109. 1 Siderfin, 144.

Yet since Sir Edward (r) Coke seems to be of another opinion, and since also it is clearly holden, that one may plead even a matter of fact in the king's bench in avoidance of an outlawry of felony, which cannot be pleaded in avoidance of any other outlawry, as shall be more fully shewn, section the sixth; I shall leave this point to be farther considered.

However it is (s) agreed, that a conviction of felony whereon the party hath had his clergy may be discharged by exception to the indictment, because no writ of error lies on such a conviction, not being a judgment.

As to the second particular, viz. Where a judgment may be avoided, without writ of error, for matters *dehors* the record.

Sect. 2. It is holden, that he who purchases land of a person who afterwards is (t) outlawed of felony, or condemned upon his own (u) confession, may falsify the record, not only as to the time wherein the felony is supposed to have been committed, but also as to the point of the offence. But it is (x) agreed, that where a man is found guilty by verdict, a purchaser cannot falsify as to the point of the offence, but that he may falsify for the time, where the party is found guilty generally of the offence in the appeal or indictment; because the time is not material upon the evidence.

B. Traverse de Office, 35. 7 Edw. 4. 1, 2. F. Estoppel, 91. (x) See the books above cited.

Sect. 3. Also it seems (y) agreed, that any judgment whatsoever given by persons who had no good commission to proceed against the person condemned, may be falsified by shewing the special matter without writ of error, because it is void; as where a commission authorises to proceed on an indictment taken before

A.

A. B. C. and twelve others, and by colour thereof the commissioners proceed on an indictment taken before eight persons only.

(a) 3 Inst. 232. *Sect. 4.* Also it seems (a) agreed, that if the treason or felony of which a man is attainted, be afterwards pardoned by parliament, the attainder may be falsified by himself or his heir without plea.

8 Coke, 79. Sup. c. 37. s. 53. C. Eliz. 4. 72. It is said that a writ of error lies on such a pardon; but this contrary to 3 Inst. 231. and 6 Co. 14. For the avoiding of an outlawry by the king's pardon, vide c. 49. s. 15. F. Charter, 27. B. Error, 56. 18 Ed. 3. 38. B. App. 7. 92. 9 H. 5. 14, 15.

(b) 29 Ed. 3. 25. *Sect. 5.* But it hath been (b) adjudged, that the king's letters patent reversing an attainder are void, unless they be afterwards made good by act of parliament.

(c) Co. Lit. 269. *Sect. 6.* It seems generally agreed, that by the common law, in (c) *favorem vitæ*, an outlawry of treason or felony might be avoided by plea, that the defendant was in (d) prison, or in the king's service beyond the (e) sea, &c. at the time of the outlawry (f) pronounced against him.

10 H. 4. 7. F. Respon. 101. (d) F. Utl. 2. 11. 18. 27. 33 H. 6. 1. 7 H. 6. 25. B. Utl. 18. 40. 38 Ass. 17. 27 Ass. 47. F. Cor. 123. 8 H. 4. 13. 3 Inst. 32. Con. 21 Ed. 4. 73. B. Utl. 57. 1 H. 7. 13. B. Utl. 68. B. Corone, 128. that he who pleads this plea must shew in whose custody he was, and in what county, and must also aver his plea; and by 5 Ed. 3. 13. an averment is given against the testimony of a sheriff or others, having no record testifying such imprisonment. (e) F. Utl. 11. 2 E. 4. 1. F. Respond. 54. 9 H. 4. 3. F. Sci. Fac. 64. 11 H. 7. 5. B. Utl. 79. 4 Ed. 4. 10. Con. F. Corone, 123. Vide 10 H. 4. 7. a. Ab. F. Respon. 201. 9 Coke, 31. Co. Lit. 74. (f) Skin. 16. F. Utl. 2. 48. F. For. 19. F. Res. 54. 101. 7 H. 6. 25. Ab. B. Utl. 18. 16 Ed. 4. 6. See Davis's Case, 1 Burr. 640.

(g) Co. Litt. 259. But I take it to be generally (g) agreed, that no outlawry for any other crime (against a party (h) rightly described) can be avoided by the plea of any matter (i) of fact whatsoever.

(h) Infra, s. 9. (i) Not by the plea of imprisonment. F. Utlag. 27, 47. 33 H. 6. 1. 45. Nor by the plea of being beyond sea, F. Utlag. 27. 33 H. 6. 1. 45.

Sect. 7. By 26 Hen. 8. c. 13. it is enacted, "That all process of outlawry to be had or made within this realm, against any offenders in treason, being resiant, or inhabiting out of the limits of this realm, or in any of the parts beyond the seas at the time of the outlawry pronounced against them, shall be as good and effectual in law to all intents and purposes, as if such offenders had been resident and dwelling within this realm at the time of such process awarded, and outlawry pronounced."

(j) See Sir T. Armstrong's Case, 3 St. Tr. 335. 3 Mod. 47. Skin. 195. But the law of this case is contradicted: see Stra. 824. and Post. C. L. 40.

Sect. 8. But by 5 and 6 Edw. 6. c. 4. it is provided, "That if the party so to be outlawed, shall, within one year next after the said outlawry pronounced, (j) yield himself to the said chief justice of England for the time being, and offer to traverse the indictment or appeal whereon the said outlawry shall be pronounced as is aforesaid, that then he shall be received to the same traverse, and being thereupon found not guilty by verdict of twelve men, he shall be clearly acquitted and discharged of the said outlawry, &c."

Sect. 9. And it hath been (k) resolved, that these statutes extend as well to treasons, by subsequent statutes as to those within 25 Edw. 3.

(k) 3 Inst. 37. 216. See Dyer, 287. and 2 Jon. 180. *Sect.* Error assigned for the reversal of an outlawry of high treason, that the defendant was beyond sea at the time. See also Davis' Case, 1 Burr. 639. and Rex v. R. Johnston, Foster, 46. where an outlawry for high treason in diminishing the current coin was reversed for the same reason.

Sect. 10. It seems generally agreed, that any outlawry whatsoever may be avoided by a defendant's coming in upon the (*l*) *capias utlagatum*, and pleading a (*m*) misnomer either of the name or addition in the writ, &c. as by shewing, that whereas he is called by such a name of (*n*) baptism, or (*o*) surname, he hath been always known by a different one, and not by that in the writ, &c. or whereas he is named of such estate, degree, or mystery, that he hath some (*p*) addition, and not that in the writ, &c.

(*l*) 33 H. 6. 1.
38. 45.
F. Utlag. 23,
23, 26, 27, 29,
32, 35, 37, 44.
Nonsuit, 6.
Estoppel, 47.
54, 67.
Dyer, 199.

B. Utlag. 1. 22, 23, 24, 25, 26. Misnomer, 52. 1 Edw. 4. 2. 21 H. 6. 50. 5 H. 7. 16. 7 Edw. 4. 1. 27 H. 8. 11, 12. 22 H. 6. 23. 19 H. 6. 80. 5 H. 5. 7. 28 H. 6. 2. Vide F. Variance, 74. 19 H. 6. 58. 22 Edw. 4. 37, 38. (*m*) 33 H. 6. 1. 45. But in the abridgment of this case, Bro. Utlag. 2. the contrary seems to be holden. Fitz. Utlag. 27. (*n*) Fitz. Utlag. 44. Bro. Utlag. 1. 27 H. 8. 11, 12. (*o*) 14 Edw. 4. 6. Bro. Utlag. 53. 19 Edw. 4. 24, 25. Bro. Sci. Fac. 132. Misnomer, 1. 27 H. 8. 11, 12. 12 H. 6. 7. So if one be called in the writ the son of J. S. he may plead that he is the son of W. S. 10 Edw. 4. 12. Bro. Idemp. Nominis, 9. (*p*) Fitz. Nonsuit, 6. Estoppel, 47. 67. 1 Edw. 4. 2. 21 H. 6. 50. 28 H. 6. 2. b. F. Utlag. 32. 35. 37. Bro. Utlag. 15. 24. 78. Misnomer, 52. 5 H. 6. 16. a. 7 Edw. 4. 1. 5 H. 5. 7. Abridged, Bro. Utlag. 15. Fitz. Utlag. 37. But it is there said, that some were of opinion, that the party should be put to his writ of error, because he is the same person. See 38 H. 6. 1. B. Utlag. 32. 51. 13 Edw. 4. 16. Bro. Scire Facias, 132. 9 Edw. 4. 24, 25.

Also it is said in many (*q*) books, that he may plead that there is no such town as that whereof he is named. (*q*) Fitz. Utl. 23. 26.

22 H. 6. 23. 33 H. 6. 51. Bro. Utlag. 26. Raat. Ent. 300, 301. But the contrary is holden, 33 H. 6. 1. because such plea would avoid the outlawry against all persons. Bro. Utlag. 29. there is an opinion to the contrary, but it seems not warranted by the Year Book.

And it seems clearly agreed, that he may plead, that at the time of the writ purchased, and ever since, he hath made his abode at some (*r*) other town, and not at that in the writ, &c.; and it is (*s*) said, that by such plea, the outlawry shall only be avoided as to the person who pleads it (who shall (*t*) not be intended to be the person meant), and shall stand in force against the person of the name and addition in the record.

22 Edw. 4. 37.
22 H. 6. 23. 33 H. 6. 51. Bro. Utlag. 26. Raat. Ent. 300, 301. But the contrary is holden, 33 H. 6. 1. because such plea would avoid the outlawry against all persons. Bro. Utlag. 29. there is an opinion to the contrary, but it seems not warranted by the Year Book.
(*r*) Fitz. Utl.
22. 23. 25. 29,
30. 33.
Estoppel, 54.
Error, 23.
38 H. 6. 1.
28 H. 6. 2.
33 H. 6. 38.

22 H. 6. 7. 16. 23. 19 H. 6. 80. Dyer, 192. 2 E. 4. 1. B. Utlag. 22. 25. 32. 33. 58. 21 Edw. 4. 79. Keilway. 101. Such matter is pleaded without any traverse of the place in the indictment. Vide 22 E. 4. 37, 38. 20 H. 6. 19. It is adjudged, 28 H. 6. Ab. F. Utl. 25. that it is no plea for one named of the parish of C that there are three villis in the same parish, viz. D. E. F. and that he was commorant at D. and therefore ought to have been named of it. (*u*) 39 H. 6. 1. B. Utl. 34. 73. 10 H. 6. 4. 30 H. 6. 2. F. Error, 23. 21 H. 7. 13. But it is said, 21 H. 6. 21. Ab. F. Scire Facias, 55. B. Utl. 23. that a *capias ad satisfaciendum* the judgment is affirmed or disaffirmed by the affirmation or avoidance of the outlawry. Vide 22 H. 6. 16. B. Utlag. 25. 19 H. 6. 58. F. Utl. 21. (*t*) And for this cause this is a good plea in avoidance of the plea of outlawry in disability. F. Nonability, 14. 21 H. 7. 13. 7 E. 4. 1. B. Nona. 50.

But it is said, that a person of the same name and addition as mentioned in a record of outlawry, (*u*) cannot avoid it by averring that there are two persons of such name and addition, and that the person intended is the elder, and he himself is the younger, but shall be put to his writ of *idemtitate nominis*, which is said by some to be the (*x*) only remedy in such case after an outlawry returned.

(*u*) 21 H. 7.
13.
14 H. 4. 27. a.
F. Idemp. No-
minis, 9. 3.
Vide B. Utl.
29. 55. 56.
21 Edw. 4.
15. 54.

13 H. 6. 7. F. Utl. 1. 24. 43. Variance, 74. (*x*) F. Utl. 6. 16 Resp. 21. Nona. 1. 7.

And it seems, that notwithstanding in civil causes (*y*) before an outlawry is returned, one of the same name may come into court, and shew, (*z*) that he is not the person intended; whereupon if the

(*y*) 21 E. 4. 15.
13 H. 7. 12.
Bro. Idemp.
Nom. 3. 5. 7. 8.
F. Idemp.
Nom. 3. 6. 7.

Con. F. N. B. 268. (*z*) F. N. B. 268. Bro. Idemp. Nom. 3. 4. 11. 14 H. 4. 27. F. Idemp. Nom. 5. 21 Edw. 3. 36. Con. F. Idemp. Nom. 4. B. Idemp. Nom. 6. L. Quin. Edw. 4. 51.

(a) *F. Idemp.*
Nom. 3.
F. N. B. 268.
B. Idemp.
Nom. 2. 11.
9 *H.* 4. 3.

the plaintiff confess it, the diversity of the names shall be entered on the roll, and a new *exigent* shall issue with a fuller description of the person intended, yet this (a) cannot be done upon an indictment, without a writ of *idemtitate nominis*, because it would make the process variant from the indictment, which cannot be altered without the consent of the jurors.

And now I am to shew how judgments in criminal cases may be avoided by writs of error.

As to which having shewn already, ch. 29. sect. 40. that the reversal of the attainder of the principal *ipso facto* reverses that of the accessory, I shall in this place only observe the following particulars :

(b) *Cro. Eliz.*
225. 273. 558.
5 *Coke*, 111.
Owen, 147, 148.
1 *Leonard*, 325.
Salkeld, 295.
Shower, 13.

Sect. 11. FIRST, That it seems to be in a great measure settled, that a writ of error to reverse an attainder of treason or felony may be brought as well by the executor as by the heir of the party, but (c) by no other person whatsoever.

(c) *Vide Salkeld*, 60, 61, and *Harg. Co Litt.* 13. note (1).

(d) 1 *Hen.* 7.
13. b.
B. Error. 351.

Sect. 12. SECONDLY, That a person attainted of treason or felony, before he can have a writ of error to reverse his attainder, must (d) assign his errors, and thereupon have leave from the court to prosecute his writ of error.

(e) 1 *Sid.* 69.
1 *Bulst.* 71.
3 *Mod.* 42.
1 *Roll.* 175.
See Crawle v. Cook, 1 *Vern.* 170. the *Rioters case*, 1 *Vern.* 175. *Rex v. Wilkes*, 4 *Burr.* and *Rex v. Davis*, 1 *Burr.* 641.

Sect. 13. THIRDLY, That no writ of error for the reversal of an attainder of treason or felony is to be (e) allowed without an express warrant from the king, or the consent of the attorney-general.

(f) *Dyer*, 34.
1 *Keble*, 141.
1 *Sid.* 316.
22 *E.* 4. 37.
4 *F.* 4. 10.
F. Error, 52.
7 *H.* 7. 5.
4 *Edw.* 4. 10.
(g) *Queen v. Stafford*,
12 *Ann.* upon examination of all the precedents.

Sect. 14. FOURTHLY, That an attainder of felony of a person who had any lands, shall never be reversed by writ of error (f) without a *scire facias* against all the terre-tenants and lords mediate and immediate; but it is (g) settled, that such *scire facias* is not necessary in the case of high treason. Also it is (h) said, that it is not necessary in the case of felony when it is suggested on the roll that the party had no lands, and the attorney-general confesses it.

(h) 2 *Salkeld*, 495. 3 *Keble*, 29.

(i) 3 *Inst.* 2. 4.
315.
1 *Hale*, 353.

Sect. 15. FIFTHLY, That it hath been (i) settled, that the statute of 33 *Hen.* 8. c. 29, which enacts, "That if any person shall be attainted of high treason by the course of the common laws or statutes of this realm, that in every such case, every such attainder by the common law shall be of as good strength, value, force, and effect, as if it had been done by authority of parliament," is to be intended of lawful attainders by due course of the common law, and not of erroneous and void attainders, which therefore may be avoided in the same manner as before.

(k) Which is called the 29th in the printed Statutes by a mistake.
3 *Levinz.* 333.

Sect. 16. SIXTHLY, That it is also clear, that the statute of 28 *Eliz.* c. 2. which enacts, "That no record of attainder that then was of high treason, where the party is or hath been executed,

"executed, shall be reversed, avoided, or impeached by any plea, (l) 3 Inst. 31.
 "or writ of error," extends not to (l) attainders since that time. 213.
 1 Hale, 53.

Sect. 17. SEVENTHLY, (m) That it hath been holden, that a writ of error lies in the king's bench on an attainder before the lord high steward. (m) 1 Sid. 208.

And now I am in the second place to shew the effect of the avoidance of a judgment.

As to which I shall take notice only of the following particulars :

Sect. 18. FIRST, That it is (n) agreed, that after an outlawry of treason or felony is reversed, the party shall be put to (o) plead to the indictment, for that still remains good. (n) B. Cor. 27-144. 465.
 7 H. 7. 5.
 18 Edw. 4. 9.
 3 Mod. 42. C. Jac. 464. F. Er. 52. C. Car. 365. (o) That the law is the same in civil causes, F. Er. 41. 37 H. 6. 17. B. Utlag. 28. 20 H. 6. 3. Ab. F. Protection, 11. B. Utlag. 74. Con. 21 H. 6. 50. Ab. F. Nonsuit, 6. B. Utlag. 24. 35.

Sect. 19. SECONDLY, It is said by Sir Edward Coke, that if the judgment be erroneous, both that and the execution thereupon, and all former proceedings shall be reversed by writ of error; but if the execution be erroneous, that only shall be (p) reversed. (p) 3 Inst. 2. 10.

Sect. 20. THIRDLY, That it hath been (q) adjudged, that if the king grant over the lands of a person outlawed for treason or felony, and afterwards the outlawry be reversed, the party may enter on the patentec, and need neither to sue a petition to the king, nor a *scire facias* against the patentec. (q) 1 Ander. 188.

CHAP. LI.

OF EXECUTION AND REPRIEVE.

AND now nothing remains but to shew in what manner a person condemned is to be executed or reprieved.

As to which, having shewn already (d), that a person attainted, standing mute to a demand why execution shall not go against him, shall not be awarded to his penance, but to the ordinary execution proper for the crime, I shall farther observe only the following particulars :

Sect. 1. FIRST, That the court of king's bench hath not only power to award execution against persons attainted there, but also against persons attainted in (b) parliament, or any other (c) court, the record of their attainder, or a transcript thereof, being (b) 1 Sid. 72.
 1 Levinz, 61.
 1 Keble, 244.
 Sup. c. 44.
 s. 18.
 (c) 2 Hale, 4.
 Popham, 131.
 Car. 176. C. Jac. 495.

(d) C. Car. 176. first (d) removed into the court of king's bench, and themselves C. Jac. 495. brought thither by (e) *habeas corpus*. (1)
 1 Siderfin, 72.
 1 Levinz, 61. 1 Koble, 244. (e) C. Car. 176. C. Jac. 495. 1 Siderfin, 72, 73. Foster, 44. 140.

(f) C. Car. 176. Sect. 2. SECONDLY, That execution ought (f) not to be awarded into a different county from that wherein the party was tried and convicted, except only where a record of attainder is removed into the court of king's bench, which (g) may award the execution in the same county wherein it sits. (2)
 3 Mod. 124.
 125.
 1 Show. 511.
 (g) C. Car. 176.
 C. Jac. 495.
 Hutt. 21. 1 Levinz, 61. 1 Siderfin, 72.

(h) Popham, 131. Sect. 3. THIRDLY, That where a person attainted hath been at large after his attainder, and afterwards is brought into court and demanded why execution should not be awarded against him, (h) if he deny that he is the same person, it shall be (i) immediately tried by a jury returned for that purpose.
 C. Car. 176.
 C. Jac. 495.
 Crompt. 183.
 2 Hale, 407.
 (i) 1 Siderfin, 72. 1 Levinz, 61. Whether the party may have peremptory challenges on such a trial, vide c. 43. s. 6. Also Ratcliffe's case, Foster, 40, 41.

(k) Finch, 478. Sect. 4. FOURTHLY, That the court (k) may command execution to be done without any writ.
 3 Mod. 42.
 2 Hale, 409.
 But sometimes execution is commanded by writ, as in Sir Walter Raleigh's case, Cro. Jac. 496. and in Lord Stafford's case, St. Tr. vol. 3. p. 101. being both in the custody of the Lieutenant of the Tower, and beheaded only.

Sect. 5. FIFTHLY, That it is (l) holden by Coke and Hale, that no execution can be warranted unless it be pursuant to the judgment; and therefore that it cannot be altered by the king, as from hanging to beheading. Yet since there is a great number of precedents, where (m) men condemned to be hanged for felony, and women condemned to be burnt (n) for treason, have been beheaded by force of a special warrant from the king to that purpose; and since (o) Bracton and (p) Staundforde and the (q) Year Book of 35 Hen. 6. speaking of this matter, are not so express as Coke and Hale, but say only in general, that the sheriff cannot lawfully behead a man who is only condemned to be hanged, by which they may perhaps intend no more than that he cannot lawfully do it of his own authority, I shall leave this matter to be farther considered (3). However, it is agreed, that where beheading is part of the judgment, as in case of high treason, son,
 (l) 3 Inst. 52.
 111. 212, 247.
 12 Coke, 130.
 4 Comm. 179.
 397.
 1 Hale, 501.
 496.
 2 Hale, 411.
 15 Raym. 295.
 19 Raym. 284.
 Regis. 165.
 F. N. B. 339.
 Staundf. 198.
 And accordingly Lord
 Dacres, Lord
 Stourton, and
 Sanchar, a
 Scotch lord,
 were hanged for murder. 3 Inst. 211, 212. 9 Coke, 121. (n) Lord Hungerford, in 32 H. 8. Duke of Somerset, in 5 Edw. 6. 3 Inst. 211. Lord Audley, in 6 Car. 1. State Trials, 271. (n) Queen Catherine Howard, Lady Jane Grey, Countess of Salisbury, Lady Alice Lisle, 4 State Trials, 129.
 (o) Bracton, 104. (p) S. P. C. 13. (q) 35 H. 6. 5.

(1) In the case of the Earl of Ferrers it was resolved, by all the judges, that if a peer be convicted of murder, before the lords in parliament, and the day appointed by them for execution pursuant to 25 Geo. 2. should lapse before such execution done, a new time may be appointed for the execution either by the high court of parliament before which such peer shall have been attainted, or by the court of king's bench, the parliament not then sitting, the record of the attainder being properly removed into the court. Foster, 140.

(2) N. B. Where the prisoner is in the custody of the marshal of the king's bench, the usual place

of execution is at St. Thomas a Waterings, i county of Surry. 4 Burr. 2086. Strange, 4

(3) The king cannot vary the execution or aggravate the punishment. But it doth not follow thence, that he who can wholly pardon an offender cannot mitigate his punishment, with regard to the pain or infamy of it, Foster, 269. 1 Burr. 650. and this prerogative is part of the common law, Foster, 270. 4 Comm. 398. therefore it is not criminal in the officer who obeys a warrant from the crown for beheading a person under sentence of death for a felony, or woman for treason of any kind, Foster 268.

son, the king may (r) pardon all the rest, and consequently in such case the judgment will be well executed by beheading only.

12 Coke, 130. Supra, c. 37. s. 12. 3 Inst. 31. it is said that such a pardon must be sealed; but it seems admitted that it may be by a writ, 2 St. Trials, 704, 705.

Sect. 6. SIXTHLY, That it seems (s) agreed at this day, that an execution cannot be lawfully executed by any but the proper officer. (1)

Sect. 7. SEVENTHLY, That it is (t) clear, that if a man condemned to be hanged, come to life after he be hanged, he ought to be hanged again; for the judgment is not executed till he be dead.

Sect. 8. EIGHTHLY, It seems agreed, that every court which has power to award an execution, has also of common right a discretionary power of granting a reprieve; as (u) where a person pleads a pardon defective in point of form, but sufficiently shewing the king's intention of mercy; or where it is (x) doubtful whether the offence be not included in a general statute-pardon; or (y) whether, as it is laid in the indictment, it amounts to so high a crime as that with which the prisoner was charged. And it seems (z) agreed at this day, that judges continue to have this power after their commission is determined.

Vide 8 Geo. 3. c. 15. for a power given to judges of assize to reprieve a prisoner for the purpose of obtaining a conditional pardon.—Ante, tit. "Transportation."

Sect. 9. NINTHLY, That it is clear, that if a woman quick with child be condemned either for (a) treason or (b) felony, she may allege her being with child in order to get the execution respited, and thereupon the sheriff (c) or marshal shall be commanded to take her into a private room, and to impanel a jury of (d) matrons to try and examine whether she be quick with child or not; and if they find her quick with child, the execution shall be respited (e) till her delivery.

180. B. Corone, 88. (d) 3 Inst. 13. Finch, 478. S. P. C. 198. (e) 4 State Trials, 612. S. P. C. 198. 3 Inst. 17. 4 State Trials, 612. F. Corone, 253. 410. 23 Assize, 2. Ab. Corone, 97. Fitz. Corone, 188. 25 Edw. 3. 42. Abridged Fitz. Corone, 130. 12 Assize, 11. Abridged Fitz. Corone, 168. Bro. Corone, 72. Bro. Pain, 11.

Sect. 10. But it is agreed, that a woman (f) cannot demand such respite of execution by reason of her being quick with child.

3 Inst. 17. 23 Assize, 2. Ab. B. Corone, 97. F. Corone, 188. 25 Edw. 3. 42. Abridged Fitz. Corone, 30. 12 Assize, 11. Bro. Corone, 72. Pain, 11.

(1) Cases, as well capital as otherwise, execution may be performed by the sheriff or his deputy, whose warrant for so doing was anciently by precept under the hand and seal of the judge, as it is still practised in the court of the lord high steward upon the execution of a peer, 2 Hale, 409. though in the court of the peers in parliament it is done by writ from the king, Append. 4 B. C. sect. 5. Afterwards it was established, Finch, 478. that in case of life the judge may command execution to be done without any writ. And now the usage is for the judge to sign the calendar, a

list of all the prisoners' names, with the separate judgments in the margin, which is left with the sheriff. S. P. C. 182. 5 Modern, 12. The sheriff, upon receipt of this warrant, is to do execution within a convenient time, which in the country is left at large. In London, the Recorder, after reporting to the king in person the case of the several prisoners, and receiving his royal pleasure that the law must take its course, issues his warrant to the sheriffs, directing them to do execution at the day and place assigned. 4 State Trials, 332. Foster, 43.

(g) Finch, 478. more than once ; and that she can neither save herself by this means from (g) pleading upon her arraignment, nor from having (h) judgment pronounced against her upon her conviction. Also it is said both by (i) Staundforde and Coke, that a woman can have no advantage from being found with child, unless she be also found quick with child.

3 Inst. 17. 22 Assize, 71. Ab. F. Corone, 180. B. Corone, 88. (h) 4 State Tr. 611. S. P. C. 198. 3 Inst. 17. 2 Hale, 413. (i) 3 Inst. 17. S. P. C. 198. and in 22 Assize, 71. Ab. Fitz. Corone, 180. Bro. Corone, 88. it is expressly said, that the inquiry was whether the woman were enseint with a live child or not. See also Summary, 272. and Finch, 478. Yet F. Corone, 127. 168. 388. 240. 410. 22 Assize, 2. 25 Edw. 3. 42. 12 Assize, 11. B. Corone, 72. B. Pain, 11. it is said only, that the woman was found enseint or pregnant.

END OF BOOK II.

A

TABLE

OF

PRINCIPAL MATTERS

CONTAINED IN THE

SECOND VOLUME.

Such of the Contents as have the Letter (N) added at the End refer to the Notes:

ABATEMENT.

See INDICTMENT.

For what faults a writ of appeal may be abated.

Page 257. s. 96

The appellee ought, for this purpose, to demand *oyer* of the writ in open court. *ib.*

But the court of chancery alone can abate it, before it is returned into the king's bench.

258. (N) 2

How it may be abated *ex officio*.

258

The court may abate an appeal of burglary which has the word *burgaliter* instead of *burglariter*, or *burglariter*;—or of rape wanting the word *rapuit*;—or any appeal wanting the word *felonic*. *ib.* s. 97

So also the Court may abate the writ, where the declaration varies from the writ. *ib.* s. 98

Or where it doth not conclude *statuti*.

Or where the sense is defective of a material word in the writ. *ib.* s. 100

Or where the writ is brought by the husband and wife, and the conclusion is in the name of one of them only. 259. s. 101

Or where the name of baptism or surname is omitted. *ib.*

But a name of dignity supplies the want of a surname. *ib.*

So also the writ may be abated at the instance of the party, before plea, for the want of fifteen days between the *teste* and the return. *ib.* s. 102

But if the original be right, appearance will cure all defects in mesne process. *ib.*

So also the writ may be abated upon the excep-

tion or plea of the party for *misnomer* or wrong addition. 259. s. 102

So also for a defective addition to either of the parties. 260. s. 104

But by 1 Edw. 6. c. 7. no manner of action pending shall be abated by a change of title occasioned by creation. *ib.*

A baronet is not within the meaning of this act. *ib.*

By 1 Hen. 5. c. 5. in all process on which outlawry lies, proper additions; &c. shall be made to the names of the defendants. 260

Where a father hath the same name with a defendant son, the writ is abateable unless it add *puise* after the other additions. 261. s. 106

For the cause of abatement for the want of proper additions to the names of the parties, *vide Addition*. 262 to 265

If a new writ of appeal be commenced after a former appeal is removed, this multiplicity of action may be pleaded in abatement. 265 s. 126

But a second *bill* of appeal is not a good plea in abatement; because till it is removed by writ, it is merely a *plaint*. *ib.*

The plea cannot be pleaded till the plaintiff hath appeared in the king's bench where the cause is removed. *ib.*

It is no good plea in abatement that the plaintiff hath purchased another writ returnable, &c. even if such writ be delivered of record to the sheriff. *ib.*

A misnomer, false addition, or death of defendant to a writ of appeal, may be pleaded in abatement. 266. s. 127

It

- It is good against all the defendants. 266. s. 127
 But such plea must not contain a negative pregnant. *ib.*
 And appearance will cure these defects. *ib.*
 A defendant may take advantage of several pleas in abatement at the same time, unless they be repugnant to one another. 266
 Even though some of them are triable by record and others by the country. *ib.*
 But if they are all triable by the country, he must at the same time plead all his matters in bar, and also if his pleas do not admit the fact over to the felony. 267
 If the abatement be triable by record only, and it is found against him, he may yet plead over to the felony. *ib.*
 How the law differs in this respect from civil actions. *ib.*
 To any suit on a penal statute actually depending, a subsequent suit may be pleaded in abatement if it be expressly averred to be for the same offence. 383. s. 63
 A difference of the day on which the prosecutions are laid, is no exception to the plea. *ib.*
 Two informations exhibited on the same day may mutually abate each other. 384
 The suit is depending from the time of the information being filed, and before any process issues. *ib.*
 Where an appeal abates for an insufficiency of the writ, the defendant shall not be arraigned upon it. 293. s. 11.
 On an indictment a mistaken surname cannot be pleaded in abatement. 317
 But in an appeal it may be so pleaded. *ib.*
 But a misnomer of the defendant's Christian name may be pleaded in abatement, as well on indictment as appeal. *ib.* s. 69
 So it is a good plea in abatement where one is styled knight, that he is a baronet. 318
 So also if an indictment against Garter king at arms, if he is not so named thereon. *ib.*
 And *quere* if the omission of the defendant's name of baptism is not fatal in abatement. *ib.*
 The want of such addition as is required by 1 Hen. 5. c. 5. may be pleaded in abatement of an indictment. *ib.* s. 70
 In criminal cases, not capital, on demurrer in abatement adjudged against the party, the Court will give final judgment, and not *respondere ouster*. 468
 That there is another indictment for the same offence cannot be pleaded in abatement. *ib.*
 Where an indictment is abated for a misnomer, the Court will detain the prisoner, and cause him to be indicted *de novo*. *ib.* s. 2.
 Abatement may be pleaded in an information by attorney, and in an indictment by a defendant appearing *gratis*. *ib.* s. 3.

ABETTERS.

- In an appeal abettors may be charged generally as principals, or the special manner of the abatement may be set forth at the election of the plaintiff. 249. s. 76
 In what cases an appellant shall recover damages against an abettor in appeal. 274

- Abettors are only liable to costs when the principal is insufficient. 279
 Those who only abet a fact shall be esteemed as much principals in it as those who actually do it. 438. s. 7. 496
 Anciently, abettors present were esteemed accessories, or at most principals in the second degree. 438
 But at this day they are principals in the highest degree. 439
 In murder, if there be malice in the abettor, and not in the person who strikes, it will be murder in the abettor, and only manslaughter in the other. *ib.*
 To make an abettor a principal, it is not necessary that the person suffering the felony should be under any terror from the abetment. *ib.* s. 8
 It is sufficient that the person who does the fact is encouraged by the abetment. *ib.*
 An abettor who stands by while another breaks and enters a house, and afterwards divides the money with him, if he does not actually enter the house, is not a principal within 39 Eliz. c. 15. 496
 The propriety of this decision doubted. *ib.*
 Aiders and abettors in *shoplifting* ousted of clergy by 3 and 4 Will. & Mary, c. 9. *ib.*
 Cases in which an abettor will be entitled to clergy, notwithstanding this act. *ib.*
 A person may abet, though absent when the fact is committed. 439
 To abet another in trespass will not make the abettor a principal if a felony be committed. 439. s. 9
 And those who are barely present when a felony is committed, and no way encourage it, shall not be esteemed abettors. 440. s. 10

ABJURATION.

- The coroner might formerly take abjuration for felony. 86. s. 44.
 But by 21 Jac. 1. c. 28. no sanctuary or privilege shall be allowed in any case. *ib.*
 The manner in which an abjuration was taken at common law. *ib.*
 Judgment of abjuration was an attainder of itself. ch. 46. s. 24
 No man can be attainted but by sentence, or by outlawry, or by abjuration. 636. s. 25

ABBOT.—*Vide* APPEAL.

ABBREVIATIONS.

- All law proceedings shall be in the English language, in words at length, and not abbreviated, except in expressing numbers by figures, or in such abbreviations as are most commonly used. 331

ACCESSARY AND PRINCIPAL.

- By stat. Westm. 1. c. 15. those who are accused of the receipt of thieves or felons, or of commandment, or of force, or aid of felony done, shall be replevisable. 155. s. 53.

- And accessories by any other means than those mentioned in the statute are within the equity of it. 155. s. 53
- All accessories are bailable till the principal be convicted or attainted, if they be of good fame and reputation. *ib.*
- And afterwards upon their pleading to the indictment. *ib.*
- But accessories *notoriously guilty* of crimes excluded from clergy shall not be bailed. 156
- By 31 Car. 2. c. 2. no persons charged, *on suspicion*, as accessories to petit treason or felony, shall be removed or bailed in any other manner than before. *ib.*
- An accessory charged *on an appeal* with his principal shall have damages from the appellant, if the principal be acquitted. 276. s. 142
- The same man may be charged as principal and accessory in the same indictment or appeal. 436. c. 29
- A man may be accessory after the fact, by receiving the principal, or one who was an accessory before. *ib.* s. 1
- A man may be accessory *before* by procuring another to be accessory *before* to the principal. *ib.*
- There can be no accessories in high treason or trespass. 437. s. 1
- Whatever will make an *accessary before in felony* will make him a principal in treason or trespass. *ib.*
- If one, by command of another, commit trespass, the person commanding is as guilty as if he had actually done it. *ib.*
- And being a principal may be tried and found guilty before the actual perpetrator. *ib.*
- But in *his progress to conviction* he ought to be considered in the light of an accessory only. 437. (N) 2
- The same receipt which will make a man *accessary after the fact* in felony will make him a principal in high treason. 437. s. 3
- Whoever agrees to a trespass *on goods, done to his own use* is a principal offender—but not in a trespass *on the person*. *ib.* s. 4
- Nor shall a receipt of a man who has committed an *inferior* trespass make such receiver a principal. 438. s. 4
- And as he cannot be punished as principal, he cannot be punished as accessory; *for he must be punished as principal, or not at all*. *ib.*
- But *perhaps* he may be punished for contempt of law, in screening such an offender from legal process. *ib.*
- In petit treason, and in all felonies of death, there may be accessories both before and after, who must be proceeded against as such, and not as principals. *ib.* s. 5
- There may be accessories before, but not after, the fact in *mayhem*. *ib.*
- Quare*, If there can be any accessories in *præmunire*. *ib.* s. 6
- All persons who assemble with intent to commit felony or trespass, and abet one another till the execution of that or any other felony; and all who are *actually present* and abetting at the execution thereof are (contrary to ancient opinions) principals in the highest degree. 438
- And in homicide, if there were malice in the abettor, and none in the person who actually did the fact, the abettor would be guilty of murder, and the actual perpetrator of manslaughter only. 439
- It is not essential to the making an abettor a principal, that the person on whom the felony is committed should be under any terror from, or know of, the abetment. *ib.* s. 8
- It is sufficient that the person who does the fact is encouraged in it by *the hope* of assistance from the abettor, whether he be within view of the fact or not. 439
- Therefore in a combination in breach of the peace, with a resolution to resist all opposers, if a murder ensue, all are equally principals, though at the time of the fact, some of them be out of view. *ib.*
- So if a man escapes from one party of such a combination, and is robbed by another party of it, they are all principals. *ib.*
- So in burglary, those are equally principals who watch at a convenient distance from the house while the fact is committing. *ib.* s. 8
- But in doing a *lawful act*, if murder ensues, the companions of the perpetrator shall neither be esteemed principals nor accessories. *ib.* s. 9
- So also where a bare trespass is committed, and one of the company be guilty of larceny, the rest shall not be included in his guilt. *ib.*
- Nor shall a person who is barely present when a felony is committed *without taking any part, or shewing assent therein*, be considered as either principal or accessory. 440. s. 10
- But they may be punished for the misdemeanour. 440
- Wherever a man procures a felony to be committed, and is absent at the time, *and no other person but himself can be adjudged a principal in it*, he shall be esteemed as much a principal as if he were present. *ib.* s. 11
- No one can be punished as a *felon* but either as principal or as accessory; and where the procurer of a felony cannot be punished as an accessory, *because there is no other to whom he can be an accessory*, he must be punished as a principal, or not at all. *ib.*
- If a man persuade another to drink poison, and he drink it in his absence, or if he deliver it to a third person who administers it innocently in his absence; or if he incite a madman to kill another, and he does it in his absence; yet the persuader, deliverer, or inciter, is a principal as much as if he had been present when it was done. 440
- And so also are those who were *present* when the poison was infused, consenting to the design. *ib.*
- But abettors *absent* at the infusion are accessories only. *ib.*
- And if the person administering know it to be poison he is a principal, and the person who knowingly gave it to him to be administered is an accessory. *ib.*
- By 3 Hen. 7. c. 2. all who are concerned in the felony

- felony of forcibly taking away a woman shall be deemed principals. 440 s. 12
- Where a statute ordains, that those guilty of the offence shall be traitors or felons, it makes, by necessary implication, all the procurers and abettors of it principals or accessaries before, upon the same circumstances which will make them such at common law. 441
- Therefore those who procure the clipping of the coin, so as to make them principals at common law, shall also be adjudged principals under the statute. *ib.*
- So also those who abet petit treason, rape, buggery, or any felony by statute, shall be adjudged principals if present, and accessaries if absent, in the same manner as in felonies at common law, unless the statute otherwise expressly provide. *ib.*
- Where a statute makes any offence treason or felony, it involves the receiver of the offender in the same guilt with himself, in the same manner as in treason and felony at common law, unless there is some express provision to the contrary. *ib.* s. 14
- The knowing receiver of an offender may properly be said to be a partaker in his guilt. *ib.*
- And the crime is determined by the rules of law in other cases of like nature. 442
- A statute by expressing accessaries before does not necessarily exclude accessaries after. *ib.*
- It is an uncontroverted rule of law, that the offence of the accessory can never rise higher than that of the principal. *ib.* s. 15
- Therefore if a wife or servant cause a stranger to murder the husband or master, and are absent, they are not accessaries to the petit treason, but to the murder only: because the offence of the principal is but murder. *ib.*
- But if present, they will be guilty of the treason, and the stranger of murder. *ib.*
- AN ACCESSARY BEFORE THE FACT is he who commands, or perhaps assents to, if such assent abet, the felonious design of another, but is so far absent when he actually commits it, that the perpetrator could not hope for any assistance from him in committing the intended felony, or in any other which shall happen in consequence of it. *ib.* s. 16
- But if such abettor expressly retract and countermand his counsel or assent, before the felony is actually committed, he shall not be considered an accessory to it. *ib.*
- And in the indictment he need not be especially charged, but only *quod felonice, &c. abettavit, incitavit, et procuravit, &c.* 443. s. 17
- And the same general allegation is sufficient in setting forth the aid given to a felon by those who are principals by being present at a felony, and also as to accessaries after. *ib.*
- If a man advise a woman to destroy a child enscint, and after its birth she does it in pursuance of such advice, he is an accessory. *ib.* s. 18
- If one command another to beat a man, and he beat him accordingly in such a manner that he dies thereof, the commander is accessory before to the death. *ib.*
- If one command another to rob or burn the house of a man, and in so doing he kill him, or burn the house of another, the commander is as much an accessory to the subsequent felony, as to that which he directly commanded. 443
- So if I command a man to rob another, and he kill him in the attempt, without robbing him, I am an accessory. *ib.*
- But if I direct A. to poison B. but B. gives part of the poison to C. I am not an accessory to the death of C. *ib.*
- And *quere*, if upon any unlawful act commanded by another, and executed pursuant to such command, and a felony ensues, whether the commander is not accessory thereto. *ib.* s. 19
- If the felony committed be substantially the same with the felony commanded, variance only in circumstance, as of time, place, &c. the commander is certainly accessory. *ib.* s. 20
- But if the command be to commit one kind of felony, and the person commanded commit a felony of quite a different nature, the commander is not an accessory, because the act done substantially varies from that commanded. 444. s. 21
- Yet if the person meaning to execute the felony commanded, and under a mistake commit a different felony, in this case the commander is accessory. *ib.* s. 22
- Whoever conceals a felony intended is guilty of misprision, but is not an accessory. *ib.* s. 23
- No one can be punished as accessory to homicide *per infortunium* or *se defendendo*, because they are not felonies. *ib.* s. 24
- Therefore, on an indictment for murder, if the principal be found guilty only *per infortunium*, &c. the accessaries must be discharged of course. *ib.*
- So also accessaries before, where the principal is found guilty of manslaughter. 444
- Before 11 and 12 Will. 3. c. 7. accessaries to piracy were not within 28 Hen. 8. 445. s. 25
- Any assistance given to a known felon, so as to intercept the ends of justice, will make the offender an accessory after the fact. *ib.* s. 26
- Instances given of this effect. *ib.*
- Whether rescuing, suffering the escape, or preventing the apprehension of a felon, will make an accessory after. *ib.* s. 27
- Whether the bare receiving of a felon is sufficient for this purpose. 446
- It is said, relieving by money or victuals, without receiving, will constitute an accessory after, especially if it prevents his being taken. 446. s. 28
- Receiving a felon under bail will not make an accessory; for the trial is not hindered by it. *ib.* s. 29
- Soliciting the release of a felon, teaching him to read, labouring the king's witnesses, suffering his escape without arresting him, or barely concealing his felony, are not acts which will make an accessory after. 447
- Nor at common law receiving the stolen goods, nor retaking stolen goods not to prosecute, nor

- nor taking any other reward, unless the offender received the thief. 447
- But by 3 and 4. Will. and Mary, c. 9. and 5 Anne, c. 31. receivers of stolen goods shall be deemed accessaries after *ib.*
- By 1 Anne, c. 9. such offenders may be prosecuted for a misdemeanour before the principal is convicted. *ib.*
- Whether the receipt of a felon pardoned, but liable to an appeal, will make an accessary. 447. s. 31
- The receiver must have notice, either express or implied, of the felony. *ib.* s. 32
- How far this notice shall be implied. *ib.* s. 33
- A wife cannot be an accessary by any receipt of her husband. 448. s. 34
- If a wife procure her husband to commit felony, it makes her an accessary before. 448
- No other relation but man and wife will exempt the receiver from being an accessary. *ib.*
- The reception of one who becomes a felon *ex post facto* will not make an accessary, although the cause of the felony be committed before. *ib.* s. 35
- If the principal be acquitted, the accessary shall not be arraigned. 449. s. 36
- The exigent shall not be awarded against the accessary until the principal be attained. *ib.* s. 38
- The attainder of the principal at the king's suit will not help the trial of an accessary in an appeal. *ib.* s. 39
- The attainder of the principal in one felony will not affect an accessary to another. *ib.*
- But the reversal of the attainder of the principal *ipso facto* reverses the attainder of the accessary. *ib.*
- Where the attainder of the principal is prevented by his death, &c. &c. the accessary shall not be arraigned. 450. s. 41
- But after the principal is attainted, neither his death, nor any other subsequent event, will avail the accessary. *ib.* s. 42
- By 1 Anne, c. 9. where any principal shall be convicted, or stand mute, or challenge above twenty, the accessary before and after may be proceeded against, though the principal be afterwards admitted to clergy, pardoned, or otherwise delivered before attainder. *ib.* s. 43
- Receivers of stolen goods may be prosecuted for a misdemeanour, though the principal be not convicted. 450
- But this shall exempt the offender from punishment as accessary, if the principal shall be afterwards convicted. 451
- By 5 Ann. c. 31. if any such principal cannot be taken, such receiver may be prosecuted. *ib.*
- It is in the election of the prosecutor to indict for the misdemeanour immediately, or wait for the trial, &c. of the principal, and then proceed for the felony. 451. (N)
- By 22 Geo. 3. c. 58. where the principal has not been convicted of grand larceny, or some greater offence, receivers of any goods, except lead, iron, copper, brass, bell metal, and solder, may be prosecuted for a misdemeanour, although the principal may be not convicted, and whether he be amenable to justice or not. 451
- By 3 Geo. 4. c. 24. s. 3. the receivers of bank notes, &c. shall be tried before principal convicted; and where receipt of goods and chattels is felony, the receiver may be tried for felony before principal convicted. 452
- By sect. 4. those who procure and counsel the commission of any robbery, burglary, or grand larceny, may be tried for misdemeanour. *ib.*
- Quere*, If by the common law the accessary may not be arraigned, though he cannot be tried before the principal be convicted, unless he desires it himself. 451 s. 45
- Whether a person charged as accessary to more than one principal may be tried before all of them have appeared. 453. s. 46
- If there be several principals, and a person be charged as accessary to one of them only, he may be tried, though the other principals do not appear. *ib.*
- If the principal and accessary appear, and plead, they may be both tried by the same inquest. *ib.* s. 47
- The guilt of the principal must be first established. *ib.* s. 47
- If the principal plead in abatement, the accessary need not answer till it is determined. 454
- The accessary may enter into the full defence of his principal, where they are tried together. *ib.* (N) 1
- If the accessary be tried alone, and it shall manifestly appear that the principal was not guilty, he shall be discharged. *ib.*
- Whether the bare production of the record of the conviction of the principal is sufficient proof to put the accessary upon his defence. *ib.*
- In what manner the accessary shall be tried, where the offence arises in a different county from that of the principal. *ib.*
- By 2 & 3 Edw. 6. c. 24. an appeal for murder may be brought against both principals and accessaries in the county where the party shall die. 455. s. 49
- An indictment for murder or felony may be brought against accessaries in the county where they commit the offence. *ib.*
- And as a ground for proceeding, the Court shall write to the county where the principal was tried, for a certificate of the fate of such principal. *ib.*
- On the trial of an accessary on this statute, the indictment must expressly recite that the principal did the felony in the other county. 456. s. 51
- The court of king's bench, and the court of the lord high steward, are within the provision of the statute of Edw. 6. although not named therein: the reason of it. *ib.*
- In what form the justices shall write for the certificate of the principal's attainder. *ib.* s. 53
- In what manner, and under what circumstances, it is advisable for the king's bench to send for the record itself, relating to the principal by special writ. *ib.* s. 54
- The

The probable consequences of removing it by *certiorari*. 457

By 2 Geo. 2. c. 21. where a person shall be stricken or poisoned at sea, or abroad, and die in England, and, *et converso*, principals and accessaries, may be tried in the county where either the stroke, poisoning, or death shall happen. *ib.*

A statute excluding principals from clergy doth not thereby exclude the accessaries before or after. 477. s. 26

Nor doth a statute excluding accessaries thereby exclude principals. 477

Where a statute excludes those who shall be found guilty, &c. accessaries are not included. *ib.*

For the cases in which accessaries both before and after are excluded from the benefit of clergy, *vide* the Index to the First Book, "Felonies without Clergy," and

ACCOMPLICES.

How justices of gaol-delivery may receive an appeal against accomplices out of prison. 34. s. 5

In analogy to the law of approvement, an accomplice may entitle himself to a recommendation to mercy, by making a confession, and being admitted an evidence for the crown. 532. (N) 3

But an accomplice giving evidence is not entitled to a pardon of right. *ib.*

An accomplice may be admitted as an evidence notwithstanding he has confessed himself guilty of the same crime, if he have not been indicted for it. 603. s. 90

Accomplices indicted are good witnesses for the king until they are convicted. *ib.* s. 91

The unsupported evidence of accomplices is sufficient to convict a prisoner. *ib.* s. 92

Whether the evidence of an accomplice should be received till some *unpolluted* evidence has been given to affect the prisoner. *ib.*

ACCORD AND SATISFACTION.

An appeal of *mayhem* may be barred either by arbitrament, or an accord with satisfaction executed. 229

ACCUSATION.

When a person is brought before a justice of peace upon an accusation of treason or felony, he must be either bailed or committed, unless no crime appear, or the suspicion be groundless. 138

An indictment is an accusation at the suit of the king. 267

The number of *accusers* necessary to high treason. 350

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An appeal is a personal action, and dies with the person. 236

ACTION POPULAR.

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ACQUITTAL.

See AUTREPOIS ACQUIT.

What is such an acquittal as will entitle the *appellee* to his damages. 273

By 3 Hen. 7. c. 1. if either principal or accessary be acquitted on any indictment of murder, the court may remit him to prison, or bail him, at their discretion, till the year and day is passed. 148. s. 35

How far an acquittal on a *qui tam* action or information may be pleaded in bar to another suit. 383

ADDITIONS.

By the common law no addition in an appeal was necessary except the christian and surname, unless the party was knighted or of higher degree. 260. s. 104

In which case the title was to be added to the names. *ib.*

But of the degree of nobility the title ought to supply the place of the surname. *ib.*

But by 1 Edw. 6. c. 7. if any plaintiff, pending any action, shall be made noble, or a bishop, knight, justice, or serjeant, the suit shall not abate for want of the proper addition. *ib.*

The dignity of a baronet is not within this statute. *ib.*

By 1 Hen. 5. c. 5. in every original writ of actions personal, appeals, and indictments, in which the *exigent* shall be awarded, additions shall be made to the names of the defendants, of their estate, or degree, or mystery, and of their terms, places, and counties, or otherwise all outlawry thereon shall be void, and the process abated. *ib.*

Where there are several defendants, it is safest to apply the additions to each of their names. 261. s. 106

Where a father has the same name and addition with a defendant son, the word *puisse* must be added to the other additions. *ib.*

But where a father is defendant, there is no need of the sur-addition *eigne*. *ib.*

Nor is *puisse* a necessary addition to a son in *custodia mureschalli*, unless the father be so likewise. *ib.*

In the addition of the estate or degree, that which the defendant hath at the time of the writ must be shewn. *ib.* s. 107

But in the addition of place, "late of such a place" is sufficient. *ib.*

If the antecedent to which the addition of degree, &c. refers is not the defendant, it is insufficient. *ib.* s. 108

An Irish bishop may be described by his Irish bishopric. *ib.* s. 109

But a description of temporal dignity in Ireland, or any other nation besides our own, is insufficient, because no such dignity can be higher here than the title esquire. 262

The degree of serjeant at law is a good addition. *ib.* s. 110

But *quere* if a degree in either university be so. *ib.*

A doctor in divinity may have the addition of clerk. *ib.*

The

The general rule is, that the most worthy addition shall be used. 262. s. 110

Yeoman and labourer are good additions for a man. *ib.* s. 111

So widow, single woman, wife, spinster, are good additions for women. *ib.*

But burgess, citizen, servant, are too general, and not good additions either to a man or woman. *ib.* s. 112

How the Mystery of the defendant shall be added to his name. *ib.* s. 113

Mystery includes all lawful arts, trades or occupations; and a defendant, under the degree of gentleman, having divers, may be named by any of them. *ib.*

Good additions of this kind enumerated. 262, 263

Maintainer, extortioner, vagabond, and such like, are insufficient. 263. s. 115

The additions of farmer, instead of husbandman, or chamberlain, butler, or groom, &c. seem insufficient. *ib.* s. 115, 116

But hostler is a good addition for one who keeps an inn, &c. though he may be sued, &c. by the addition of labourer. *ib.* s. 117

How the Place shall be added to the name. *ib.* s. 118

If a defendant be named of *A.* late of *B.* it is sufficient to prove either addition. *ib.* s. 119

It is sufficient to name a defendant of a city which is a county of itself, without more. *ib.* s. 120

But not by words which import residence in the town only. 264

And if the town be not a county of itself, the addition must shew in what county it lies. *ib.*

So if a man be named of a parish which contains more towns, the town must be shewn. *ib.*

But it shall be intended to contain only one town, unless the contrary be shewn. *ib.*

If there be two towns in a county of the same principal name, but differently distinguished, and the addition be only of the principal, the defendant may plead there are two towns of that name. *ib.* s. 121

If a defendant live in a hamlet of a different name to the town, the hamlet should be named. *ib.* s. 122

If a defendant live in a place known by a special name out of any town or hamlet, he may be well named of that place. *ib.* s. 123

The habitation of the wife is implied in the addition of the husband. *ib.* s. 124

How A DEFECTIVE ADDITION MAY BE CURED. 265. s. 125

If the defendant appear and plead; he cannot afterwards take advantage of the defect of the addition. *ib.*

And *quere*, if the bare appearance does not cure this defect. *ib.*

It seems, from the case of *Reve v. Trundel*, that it will not. *ib.*

The statute 1 Hen. 5. c. 5. concerning additions, extends as well to indictments as appeals. 318. s. 70

It is a fatal fault to apply such addition to the vol. II. x x

name which comes under the *alias dictus* only, and not to the first name. 318. s. 70

But it is not material whether any name be put to the *alias dictus*, or not. *ib.*

But to omit the addition to the first name of one defendant makes the indictment vicious as to all.

ADMIRAL.

See INDICTMENT. PIRACY.

ADTUNC ET IBIDEM.

In appeal of death, it must be alleged that he struck the deceased *adtunc et ibidem*. 253

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ADJOURNMENT.

Holding a session of *oyer* and *terminer* without adjournment is a determination of the commission, if its continuance be indefinite. 20.

s. 7.

As where *pro hac vice*; but where *quandiu nobis placuerit*, it does not necessarily require any adjournment. 20

An adjournment without the authority of the majority of the Commissioners is void. *ib.* s. 7

In what form such adjournment shall be made. 22. s. 15

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See AMERCEMENT.

The manner in which an *amercement* shall be *affeer'd*. 94. s. 19

AFFRAY.

How far the court leet may amerce an affrayer 94. s. 17

Of the constable's power over affrays, 129. s. 8

In what cases a constable may break doors to suppress an affray 136. s. 8

The steward of a court leet may bind any person in recognizance of the peace who shall make an affray in his presence 5. s. 15

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See CLERGY.

ALIAS CAPIAS.

See CAPIAS, PROCESS.

AMENDMENT.

The 8 Hen. 6. c. 12. is the principal statute of amendment 267. s. 129

Appeals are excepted out of this statute *ib.*

No writ or bill of appeal is amendable for false Latin, omission of a word or letter, or other defect or variance from the proper legal form, where the king is a party. *ib.*

But *quere* if such defects arise from the negligence of the curitor or other officer. *ib.*

A misprision of the count, either in appeal or other action, before it is entered on the record. *ib.*

A mistake in laying the fact in an improper *visne* has been amended. *ib.*

And after the count is entered, a variance in it from the writ, if a mere misprision, may be amended by it. *ib.*

No

No criminal prosecution whatsoever is within any of the statutes of amendment.	336	A bill of appeal may be commenced before justices in eyre.	224. s. 5
In what cases criminal proceedings may be amended by common law.	ib.	Or before justices specially assigned.	225. s. 6
AMERCEMENT.		Justices of gaol-delivery may receive a bill of appeal against a prisoner in the gaol they are commissioned to deliver, or whom they have <i>bailed</i> , not <i>mainprized</i> .	ib. s. 7
The gaoler or township shall be amerced for suffering a dead body in prison to be interred or to putrefy before the coroner has sat upon it.	80	So if part of the accomplices only be in the gaol, they may try them on the bill, and afterwards remove it into the king's bench to proceed against the others.	ib.
In what cases the sheriff in his torn ought to award an amercement.	94. s. 17	And justices of assize may receive bills in the same manner as justices of gaol-delivery.	ib.
In what manner such amercement is to be awarded and altered.	94	But it <i>seems</i> justices of peace have no such power.	ib. s. 9
How such amercements are to be recovered.	95 to 97	But an appeal by bill may be commenced before the sheriff or coroner, and removed by <i>certiorari</i> into the king's bench.	ib. s. 10
How jurors shall be amerced for non-appearance.	212	But then the appellee shall be arraigned <i>de novo</i> , not declared against in <i>custodiâ mureschalli</i> , and he may sue out a <i>scire facias</i> for the appellant to appear, if he does not appear <i>gratis</i> , and on default nonsuit him.	ib. (N) 2
If a judge amerces a clergyman according to his spiritual benefice, or if the tenants of a manor assess an amercement without any assentment, they are punishable by attachment.	218	By 1 Hen. 4. c. 14. appeals of things done out of the realm may be tried before the constable and marshal.	226. s. 11
An infant can in no case be amerced.	281	Therefore the wife or heir may appeal before them for death in a foreign realm by the king's subjects.	ib. s. 12
In what cases persons shall be amerced for a false appeal.	ib.	But as they proceed by the civil law, their sentence cannot corrupt the blood.	ib.
If death happen in consequence of a bridge being out of repair, the township shall be amerced.	81. s. 23	If a man die in England of a wound received abroad, he may, by force of 1 Hen. 4. be appealed before the constable and marshal.	226. s. 13
AMICUS CURIE.		And now by 2 Geo. 2. c. 21. it may be tried by the common law.	ib.
An <i>amicus curie</i> may inform the court of any defect apparent on the face of the record.	467. s. 4	But by said 1 Hen. 4. no appeals shall be pursued in parliament.	226. s. 14
<i>Amicus curie</i> permitted to interpose on an indictment of death.	535. s. 7.	Appeals are either capital or non capital.	ib.
ANATOMIZING.		But appeals <i>de pace</i> , <i>de plagis</i> , <i>de imprisonmento</i> , and <i>mayhem</i> , are now become obsolete.	ib. s. 15
See EXECUTION.		An appeal of <i>mayhem</i> cannot be maintained unless the injury is done with an evil intention, but the offender is liable in damages.	227
ANGLICE.		The word <i>mayhemiarum</i> essential in every appeal of <i>mayhem</i> .	ib.
See INDICTMENT.		And the offence must be laid to be done <i>felonici</i> .	ib. s. 18
APPEAL.		The party hurt may proceed against abettors either as principals or as accessaries.	ib. s. 19
See INDICTMENT. CORONER.		But <i>mayhem</i> and battery cannot be joined in the same writ.	ib. s. 20
Appeal, the proceeding by, abolished by st. 59 Geo. 3. c. 46.	223. (N) 1	Nor can an appeal of <i>mayhem</i> be pleaded in bar to trespass for the battery.	228. s. 22
Appeals are either by an innocent person or by an approver.	224	But a recovery in trespass may be pleaded in bar to the appeal, unless the <i>maim</i> has been occasioned by reason of the wound subsequent to the action.	ib.
An appeal by an innocent person is the party's private action for the crown in respect of the public offence.	ib.	So an <i>assault demesne</i> a good bar to appeal of <i>mayhem</i> .	ib. s. 23
An appeal may be brought either by writ or by bill.	ib.	A <i>maim</i> laid in one place may be justified in another.	229
The writ is original out of chancery, and returnable in the king's bench only.	ib. s. 2	Defence of <i>possessions</i> is no justification in <i>maim</i> .	ib.
The bill must contain greater certainty than the writ, and is in lieu of both writ and declaration.	ib. s. 3	And	
An appeal may be sued by bill in the king's bench against any one in <i>in custodiâ mureschalli</i> .	ib. s. 4		
If the appellee be arraigned and tried the same term, the bill need not be filed.	ib.		
If he appear upon a void, or a voidable writ, he may be committed and proceeded against by bill.	ib.		

- And the *son assault* and justification must be specially pleaded. 229
- An appeal of *mayhem* may be barred by a plea of accord and satisfaction. *ib.* s. 24
- A *general release* may be pleaded in bar to *maim*. *ib.* s. 25
- A nonsuit in an appeal of *mayhem* may be pleaded in bar to another suit for the same offence. *ib.*
- But it cannot be pleaded in bar to an action for the battery which accompanied the *maim*. *ib.* s. 26
- And the defendant must have appeared, or the nonsuit will be no bar to the *maim* itself. 230
- An appeal of *maim* may be tried by *the view*. *ib.* s. 27
- And if doubtful they may impanel able physicians to inform them. *ib.*
- But the Court cannot proceed *upon view* except the defendant pray it. *ib.*
- And even then they may try it by jury, and order the jurors to take *the view*. *ib.*
- Therefore the plaintiff must *personally* appear: and if decided *on view*, it is peremptory. *ib.*
- The defendant may wage battle in appeal of *maim*. *ib.* s. 28
- Capital Appeals are either of *Treason* or *Felony*. *ib.*
- Appeals of treason are taken away from the common law courts of the realm; they may be brought before the constable and marshal. *ib.* s. 29
- Appeals of *Felony* are either of death, larceny, rape, or arson. 231
- Who may bring Appeal. 231. s. 30.
- Infancy, age, or imbecility, is no objection. *ib.*
- Therefore, in appeal, the parol of an infant for nonage shall not demur. 232
- But he must prosecute by guardian, and is bound by his *laches*. *ib.*
- But the guardian shall not persevere in an appeal against the inclination of his ward. *ib.*
- By *Magna Charta* a woman cannot appeal any one for death, except that of her husband.— But she may prosecute any other appeal. 232. s. 31
- An idiot, a person deaf and dumb, one attainted of felony, an outlaw, cannot bring any appeal. 232
- OF AN APPEAL OF DEATH. *ib.* s. 33
- It must be sued within a year and a day from the day on which the death happen, and not from the time the wound was given. *ib.* s. 33
- Against the receiver of an appellee, the time shall be computed from the receipt. 233
- And in both cases the day shall be taken from the beginning of it, and not from the precise minute or hour on which the death or receipt happened. *ib.* s. 34
- An appeal is a local action, and cannot be brought in a foreign county. *ib.* s. 35
- By 2 and 3 Edw. 6. c. 24. it may be tried by a jury of the county where the death shall happen, although the wound may have been given in a foreign county. *ib.*
- IN AN APPEAL BY A WIFE, she must exculpate herself from the death, and prove the fact of marriage. 234. s. 36
- Therefore *ne unques accouple*, &c. is a good plea, and may be tried by certificate. *ib.*
- The appeal may allege *inter brachia sua interfecti et non aliter*, and then a voidable sentence of divorce is a good plea in bar. *Sed quare*. *ib.*
- A wife may appeal, notwithstanding she has forfeited her dower by her husband's attainder for treason. *ib.* s. 37
- So also she may appeal his death, although she had eloped from him. *ib.*
- If the widow marries, pending her appeal, the appeal is gone. *ib.* s. 38
- If she marry after judgment, she cannot pray execution. *ib.*
- But in this case the appellee must obtain the king's pardon. *ib.*
- For although he cannot be indicted, being already attainted, yet the Court *ex officio* or at the king's demand, may award execution. *ib.*
- AN APPEAL BY THE HEIR cannot be brought if the deceased had a wife living, and innocent of the fact at the time of the death. 235. s. 39
- But if the wife partake of the guilt, the heir may bring an appeal against her, excepting that the petit treason be pardoned, which pardons the murder also. 235
- It must also be brought by the *legal heir general*; but if he also partake in the guilt, the next heir may bring it against him. *ib.* s. 40
- Therefore a father cannot appeal for the death of his son, for he cannot be his heir. *ib.*
- So none, except the wife, can appeal for the death of one attainted of felony. *ib.*
- A *special heir*, as by Borough English, &c. cannot appeal for the death of his ancestor: for it must be by the *general heir*. *ib.*
- Where the eldest of two sons is attainted of treason or felony, neither of them can appeal for the death of their father. *ib.*
- If there be an eldest son by one venter, and a middle and a younger son by another venter, and the middle son be killed, the younger son, and not the eldest by the former venter, can alone appeal his death. *ib.*
- Therefore a plea to an appeal by a brother, viz. that there is an elder brother, is not good, except it shews him to be an elder brother of the whole blood. *ib.*
- An appeal by an heir who dies pending the suit, cannot be continued by the next heir. 235. s. 41
- But if the first heir die within the year and day, it is said the appeal may be commenced by the next heir; but the later opinions are otherwise. 236
- And *quare*, whether a *presumptive heir* may not bring an appeal, if the right to do it has never before vested. *ib.*
- By *Magna Charta* none but the general heir male shall bring an appeal, except a wife in the case of her husband, 236 s. 42
- And if an appeal be brought by any other, the judges

- judges are bound, *ex officio*, to abate the writ. 236. s. 42
- By the common law an heir female might have have an appeal for the death of her ancestor, as well as an heir male. *ib.*
- And now the heir male *deriving through a female*, may bring an appeal. *ib.*
- In an appeal by an heir, it must appear by the writ, in what manner he is so. 237. s. 43
- OF AN APPEAL OF LARCENY. *ib.*
- The appellant, in larceny, need not prove an *absolute* property in the goods stolen; if he has a *special* property in them it is sufficient. *ib.* s. 44
- Therefore the appeal may be either *general* or *special*, at the option of the appellant. *ib.*
- But the *bare charge* of goods, without the *possession* of them, is not such a property on which *this* appeal can be maintained. *ib.*
- How far a *villain* may appeal against his lord. *ib.*
- The master and servant may separately appeal for the larceny of goods from the servant, they being the property of the master: but both cannot appeal for the same offence. *ib.* s. 45
- The survivor of joint property may bring an appeal of larceny. *ib.*
- So also this appeal may be brought against the thief who steals my goods, from the person who stole them from me. 238
- But not if the first taker is a mere trespasser, claiming title to the goods he takes. *ib.*
- Neither can an executor appeal for larceny committed on his testator. *ib.*
- An appeal of larceny may be brought as well against an infant, as an adult; and also against a *feme covert* without naming her husband. *ib.* s. 46
- An appeal of larceny must be brought in the county where the felony is committed. *ib.* s. 47
- If a robbery be in one county and the goods are taken into another, an appeal may be brought in either; in the first for *robbery*, in the second for *larceny*. *ib.*
- Therefore if one take me from the county of A. to B. and there rob me, the appeal must be in the county of B. *ib.*
- But if *by menace* goods are brought from one county to another, perhaps the appeal may be brought in either. *ib.*
- An appeal of larceny is not within the statute of Gloucester respecting being brought within a year and a day; but, *on fresh suit*, may be brought at any time. *ib.*
- OF RESTITUTION OF GOODS. 239. s. 49
- Stolen goods not seized by the crown or lord of a franchise, may be retaken, *upon fresh suit*, at any time, by the owner, without prosecuting his appeal; but not after such seizure. *ib.*
- Anciently *fresh suit* implied, that hue and cry should be made; but now, if the party be reasonably diligent to apprehend the offender, it is sufficient. *ib.*
- The jury who try the offence, are judges of the *fresh suit*, and upon their verdict the Court may award restitution. 240. s. 52
- And where the appellee is condemned by confession, &c. without trial, the Court may, by inquest of office, inquire of the *fresh suit*, and so award or withhold restitution. *ib.*
- But this inquest is rather for the satisfaction of the Court, than by necessity; for the judges may award a writ of restitution in their discretion. *ib.*
- Anciently every appellant must have *attainted* the appellee before he was *intituled* to restitution. *ib.* s. 53
- But now if *one* appellant *attaint*, an inquest shall inquire of the *fresh suit* made by other appellants, and restitution shall be awarded to them accordingly, without their being put to attain the appellee. *ib.*
- And the same may be done if the appellee die in prison. *ib.*
- And perhaps the same shall be done, if the appellee be outlawed, or have benefit of clergy before conviction, or stand mute, or challenge above twenty, or break prison, &c. 241
- On an appeal against two, if one is acquitted, yet the appellant shall have restitution. *ib.*
- If both were acquitted, the appellant forfeited his goods to the king for his false appeal. But *quare*, if the goods are not seized as waived, &c. *ib.*
- But the appellant's *title to restitution* shall not be barred by any seizure of the goods, as waifs, estrays, the goods of felons. *ib.* s. 54
- Nor even by a sale of them *bond fide* made in market overt. *ib.*
- Nor shall the *prosecutor of an indictment* be barred of his restitution by any such seizure or sale in market overt, &c. *ib.*
- By 1 Jac. 1. c. 21. the sale of stolen goods to any pawn-broker within two miles of London shall not change the property. *ib.* (N)
- By 21 Hen. 8. c. 11. the prosecutors of indictments for goods stolen, or obtained by any larceny, are *intituled* to *writs of restitution* from the Court, in the same manner as if the felon had been attained by appeal. *ib.*
- But awarding *writs of restitution* is now obsolete, and the judges will order redelivery of the property in court. 242. (N) 2
- By 31 Eliz. c. 12. stolen horses sold in market overt shall be restored, upon payment of the price sold for, *without prosecution*. *ib.* (N) 3
- In other cases, if it shall appear that the owner has neglected those endeavours to prosecute the felon which the ends of public justice require, the Court may refuse to grant restitution. *ib.*
- The appellant shall have only such goods restored as are mentioned in the appeal. 242. s. 57
- And if the owner has retaken his goods, and not included the whole of them in the appeal, it is questioned whether those left out are not confiscated, &c. *ib.*
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- Or

OF AN APPEAL OF RAPE.

How, and by whom this appeal might have been brought at common law, before the statute of Westminster 1. c. 13. reduced the crime to a trespass. 244

But the crime is made felony by stat. West. 2. c. 34. which impliedly restores the appeal; and therefore it must now conclude *contra formam statuti*. *ib.* s. 60

By 6 Rich. 2. c. 6. if the woman, after rape, consent, both parties are disabled from inheriting, taking dower, &c. and the next of blood shall have title; and the husband, father, or next of blood, may sue and convict the offenders, of life and member, &c. *ib.*

What was the offence meant by the word "rape." in this statute. 245. (N)

To an appeal by a husband on this act, for the rape of his wife, it may be pleaded that they were not lawfully married, &c. *ib.* s. 62

The consent of the woman need not be averred. *ib.* s. 63

If an orphan be ravished by her next of kin, the next of kin to the ravisher shall have the appeal. *ib.* s. 64

The next heir at the time of the rape shall have the appeal and the lands, &c. in exclusion to any *ex post facto* heir. *ib.* s. 65

The next remainder man, or reversioner, shall have the woman's land, provided he be of kin to her, albeit another be nearer of kin; but not the appeal in exclusion to the next of kin. *ib.* s. 66

It must be shewn in *what manner* the person suing for the land, is next of blood to the offender. 246. s. 67.

But cohabitation, or child-bearing, are not conclusive evidence of the woman's consent, if during the whole time she be under the power of the ravisher. *ib.* s. 68

And *quare*, whether the appeal must recite the statute. *ib.* s. 70

The appeal must be brought in the county where the rape is committed. *ib.* s. 71

And within proper time in the discretion of the Court. 247. s. 72

An appeal of arson is now obsolete. *ib.*

OF PROCEEDINGS IN APPEAL. *ib.*

In what cases the parties to an appeal must appear in person, or may appear by attorney or guardian. *ib.*

If the count in an appeal vary from the writ in a material point, it shall abate. 248

If several be present abetting a fact, but only one actually does it, the plaintiff may declare generally against all as principals, or specially setting out the manner of abetting, &c. 249

No circumlocution will express the *words of art* descriptive of the offence; as *murderavit* for murder; *rapuit* in rape; *cepit* in larceny; *mayhemavit* in maim; and *felonicè* in all felonies. *ib.* s. 77

An appeal of larceny must shew to whom the goods belonged; and of death who was killed; for *cujusdam ignoti* will not do in appeals. *ib.*

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In rape, *felonicè rapuit* is sufficient, without the words *carналitèr cognovit*, or any words to that amount. 249. s. 79

And the same general manner is sufficient in larceny, stating the value of the property. But in *mayhem* the particular manner of the fact must be stated. *ib.*

And in an *Appeal of Death*, all the special circumstances of the fact must be set forth, both by common law, and the statute of Gloucester. *ib.*

As the part of the body in which the wound was given; and therefore that it was *circa pectus*, or in the hand, leg, or arm, &c. &c. &c., is not sufficient either in an indictment or appeal. 250. s. 80

And where there is a sufficient certainty, the addition of an indefinite description shall be rejected as *surplus*. *ib.*

The length and breadth of the wound ought to be stated, that it may appear that it was mortal. *ib.* s. 81

But, describing the part, and that he gave him *mortale vulnus penetrans in et per corpus*, &c. is sufficient. *ib.*

The word *percussit* should be inserted where the fact will bear it, but *quare*, if it be absolutely necessary. *ib.* s. 82

So also in poisoning, the count must aver that the party received and drank the poison; and this defect shall not be supplied by any implication. 251. s. 82

The count ought expressly to shew that the party died of the hurt specially set forth. *ib.* s. 83

Therefore *qua suffocatione obiit*, instead of *de qua suffocatione*, &c. is erroneous. *ib.*

But it may allege that he died of the *several poisons* or wounds, they having been before particularized, without stating any wound or poison in particular. *ib.*

Or perhaps the several causes of the death may be alleged in the alternative. *ib.*

The particular weapon also with which the fact was committed must be set forth; but if the evidence vary in this respect it is not material. *ib.* s. 84

If the killing be by poison, drowning, suffocating, burning, or the like, the circumstances must be alleged as specially as possible. 252

And an appeal cannot be supported by an inverse evidence, as to the mode of killing. *ib.*

Vi et armis, are not necessary in an appeal. *ib.* s. 85

An appeal by stat. Gloucester, must declare the deed, the year, the day, the hour, the time of the king, the town, and the weapon. 252

An omission of any of these circumstances is not aided by the conviction. *ib.*

The *Hour* was not required by the common law; and it is sufficient to say, "about such an hour." *ib.* s. 87

If the hour and day are set forth against the principal, it is fatal to mention the day only against the accessory. 253

The mistake of the hour will not be material upon the evidence. *ib.*

The

- The Day on which the fact was done must be set forth.** 253. s. 88
- If the fact were in the night, the count should allege it *in nocte ejusdem diei.* *ib.*
- It is not sufficient to say, "about such a day," or, "between such a day and another day;" but the very day must be set forth. *ib.*
- So it is insufficient to allege the fact on a feast day, as *St. John's*, without shewing whether it is *the Baptist or the Evangelist.* *ib.*
- So it is erroneous to set forth the fact on an impossible day, as 31 June, or 30 February. 254
- And the day both of the wound and the death must be set forth. *ib.*
- It must also be alleged that "he struck him *ad tunc et ibidem.*" *ib.*
- How a repugnancy in setting forth the day will vitiate either an indictment or appeal. *ib.*
- A mistake of the day will not be material upon evidence. *ib.*
- If the allegation of the day be only *prima facie* uncertain, it may be helped by the apparent sense of the context. *ib.* s. 89
- How the day on which a principal in the second degree abetted shall be alleged. *ib.*
- In an appeal of death, the year in which the stroke was given, and that in which the death happened, must be set forth. *ib.* s. 90
- But the king's reign, in which these facts happened, is sufficient, without shewing the year of Our Lord. 255
- And alleging the facts in such a year of such a king, is sufficient, without saying that it was in such a year of his reign. *ib.*
- The place where the death happened, as well as that where the hurt was given, must be shewed with precise certainty, and free from repugnancy. *ib.*
- A mistake of the place is not material upon *not guilty*, provided the fact be proved at some place within the county. *ib.*
- In an appeal of death, some place both of the death and hurt, and in every other appeal some place where the fact was committed, must be alleged. *ib.* s. 92
- It is safest to lay it in a town; but if done out of a town, it may be laid in any other place from whence a *visne* may come. *ib.*
- A *visne* may come from any place where all the inhabitants, from the smallness of its environs, may be presumed to have some knowledge of the fact, &c. *ib.*
- Therefore a *visne* may come from a town, ward, parish, hamlet, burgh, manor, castle, or even from a forest, or other place known out of a town. *ib.*
- Where a place is generally alleged, the law will intend it to be a *vill*, unless the contrary appear. 256
- But if there be no such town, hamlet, or place, or the fact be done in some vill in a forest, and not mentioned, it may be pleaded in abatement. *ib.*
- So if a fact done in a vill within a parish containing divers vills, be alleged generally in the parish, or if a fact done in a city containing divers parishes be alleged generally in the city, it may be pleaded in abatement. *ib.*
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- An appellant must count against all, though only some of the appellees appear. 257. s. 94
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- en b
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- Of *Arrest of his* THE WRIT, (*vide* Abatement, *An market over*, "1. the "
- OF PLEAS IN BAR TO AN APPEAL. 268
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- So in appeal of robbery, that the plaintiff is a *villein* to the defendant. *ib.*
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- A nonsuit

- A nonsuit after appearance is a peremptory bar, without having declared. * 269. s. 131
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He is so called because he must prove his appeal in every point, to entitle himself to a pardon of course. *ib.*

He must be properly indicted of treason or felony, and in prison; he must confess the indictment, and be sworn to reveal all the treasons and felonies he knows, before the coroner enters his appeal against his accomplices in the crime he is charged with, being at the time of the appeal within the realm. 282

A peer of the realm cannot be an approver *ib.* s. 3

A person attainted or outlawed cannot approve. *ib.* s. 4

Nor an idiot, or deaf, and dumb person, or one non compos, nor an infant wanting discretion. *ib.* s. 5

A person in holy orders cannot be an approver. 283. s. 7

But it seems that a woman or an infant who possesses sufficient discretion, may approve. *ib.* s. 6

None shall be admitted to approve, without first confessing the crime in the indictment. *ib.*

Quere if one who has pleaded not guilty can be an approver. *ib.* s. 9

The court is not bound of right to admit any one to approve. *ib.*

No person indicted, unless for treason or felony, can be an approver. *ib.* s. 10

And he must be indicted, to enable the court to give judgment against him if his appeal be false. *ib.* s. 11

A person indicted and appealed for the same fe-

lony, shall not be admitted an approver.—Nor can a person appealed only, and not indicted, be an approver. 283. s. 12

The appellee of an approver cannot become an approver himself. 284. s. 13

No person can be approved, but of the very crime contained in the indictment. 284

But being bound to disclose all the treasons and felonies he knows, his accusation of other crimes is a ground to prosecute the persons he accuses; but not to put them on their trials. *ib.*

A man may approve any person within the realm, whether in the same or a foreign county, provided he be named of the county where he dwells. *ib.* s. 15

But if no such persons exist, or are within the realm, or perhaps in the very county named in the appeal, the approver shall be hanged. *ib.*

A man may be admitted an approver before any justices who have power to assign a coroner. 284 s. 16

As the king's bench, gaol-delivery, and justices in eyre; but quere as to justices of oyer and terminer. *ib.*

Neither a court baron, nor justice of peace, nor any other special justices, can receive the appeal of an approver unless their commission extend to it. 285

And quere if the lord high steward of England can receive such an appeal. *ib.*

On the confession of an indictment of treason or felony, the court may in their discretion either award execution, or respite the convict till he prove his appeal. *ib.* s. 17

If the court admits an approver, they shall assign him a coroner to take his appeal, and to swear him to discover all the treasons and felonies he knows. *ib.* s. 18

The court ought also to limit the proof of his appeal to a certain number of days; and quere if his wages of a penny a day shall be allowed in the interval. *ib.* s. 19

During the time limited he ought to be at liberty and out of prison; for he may disavow an appeal obtained by duress or extortion; but if such an allegation be found against him either by the coroner, or by an inquest, he shall be hanged. *ib.* s. 20

If he fail to make his appeal before the coroner, on any one of the days limited, or make the least variation in repeating it to the court, on such default being recorded, the approver shall be hanged. *ib.* s. 21

The coroner may award process to the sheriff against any appellee in the same county;—but quere if he can award the exigent. *ib.* s. 22

The king's bench, or justices in eyre, may award outlawry or any other process against appellees in any county. *ib.*

And justices of gaol-delivery may do the same to apprehend and try them; but perhaps they cannot award outlawry in a foreign county. 286. s. 10

The appellee may either put himself upon his country, or wage battle with the approver. *ib.* s. 23

If

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If there be never so many appellees, the approver must fight them all. 286. s. 24

But if there be several approvers, and one only be vanquished, they shall all be condemned. *ib.*

Quere if the appeal shall be good against the other appellees. *ib.*

The king's pardon to either party, pending the appeal destroys the approvement, and the appellee shall be discharged. *ib.* s. 25

Clergy is allowable, according to the nature of the offence, as well upon a conviction by appeal, as by indictment. *ib.* s. 26

If an approver convict all the appellees, the king *ex merito justitiæ* ought to pardon *as to his life*, and give him his wages (*vide ante.*) *ib.*

But *quere* if he ought not to be transported. 287

By 5 Hen. 4. c. 2. whoever solicits a charter of pardon for an approver, shall have his own name inserted therein, and if the approver become a felon again, the suitor for the pardon shall forfeit 100*l.* *ib.*

The practice of approvement now obsolete. *ib.* (N.)

APOTHECARY.

By 6 Will. 3. c. 4. apothecaries who have served a regular apprenticeship are exempted from serving the office of constable in the places where they live and carry on their art. 101. s. 45

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By 13 Rich. 2. c. 2. the constable shall have cognizance of contracts touching deeds of arms done out of the realm, &c. 12. s. 5

The constable and marshal shall be prohibited from proceeding to punish the painting of coats of arms, &c. 14. s. 8

ARRAIGNMENT.

See PRINCIPAL AND ACCESSARY.

Anciently the king sat with the justices upon the arraignment of great offenders. 1

How a prisoner shall be arraigned for breaking of prison. 202. s. 8

Anciently no man was arraigned upon an indictment for an offence for which an appeal could be brought until the year and day for bringing the appeal had passed. 294. s. 15

But the court was not peremptorily bound to suspend the arraignment upon the indictment, except for special reasons. 295

By 3 Hen. 7. c. 1. the justices are ordered to try
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an indictment of murder or manslaughter, though the time limited for the appeal is not expired. 433. (N. 1.)

Every prisoner, upon his arraignment, ought to be used with gentleness and humanity, and not be brought to the bar under any terror but that incidental to his condition. 434. s. 1

His hands should not be tied, nor his feet fettered, except for necessary security, nor should he suffer any mark of ignominy or reproach. *ib.*

And in this privilege the law makes no distinction between clerks and laymen. *ib.*

But a distinction has been made, respecting this freedom, between the time of arraignment and the time of trial. *ib.* (N. 2.)

The holding-up of the hand is a mere ceremony, intended only to identify the person, and may be dispensed with; for if the prisoner do not deny his identity, it is sufficient. *ib.* (N. 3.)

This ceremony is not required in the case of a Peer. *ib.*

By 37 Edw. 3. c. 15. every arraignment on an indictment must be in English. *ib.* s. 3

Appeals not considered as within this act. *ib.*

But by 4 Geo. 2. c. 26. all proceedings must be in English. *ib.*

An appeal in the king's bench ought to be arraigned on the plea side, unless it came in by *certiorari*, and then on the crown side. *ib.* s. 4

An appellee shall not be arraigned on the count, when the writ is abated. 435. s. 5

But if the writ be good, he may in many cases (*vide* ch. 23. s. 6 to 14.) be arraigned on the count at the suit of the king. *ib.*

An attainder of high treason has been reversed (*inter alia*) for the omission of an arraignment. *ib.* s. 6

And in all the precedents an arraignment appears upon the face of the record. *ib.*

And it is safest to express it in every record of attainder by condemnation, either by confession, verdict, or standing mute. *ib.*

In attainders upon an appeal, the arraignment does not constantly appear upon the records. 46.

An appeal of robbery at the suit of several; the appellee was severally arraigned and tried on each appeal, in order to entitle the different appellants to a restitution of their goods. *ib.* s. 7

And a person charged with several indictments of robbery, at the prosecution of several persons, may be severally arraigned and tried on each indictment; because by 21 Hen. 8. c. 11. each is intitled to restitution on conviction, &c. *ib.*

Every person attainted of robbery at the suit of one person may be arraigned and tried at the suit of another, if such suit were commenced before the attainder. *Sed quare.* *ib.*

Quere, if a prisoner before his attainder shall answer to *divers appeals* of death and rape, in the same manner as of robbery. 436. s. 8

Wherever an appellee is arraigned upon an appeal at the suit of the king, he may plead a pardon, as upon an arraignment on indictment. 294. s. 13

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No confession shall preclude any exception in arrest of judgment for faults apparent on the record. 466. s. 4
 The court is bound, *ex officio*, to take notice of such faults. 467
 By 7 Will. 3. c. 3. in high treason, or misprision thereof, no mis-writing, mis-spelling, false or improper Latin, shall, after conviction, be any cause to arrest the judgment. 355. s. 147
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 A judgment given without jurisdiction may be falsified without writ of error. *ib.*
 An attainder of treason or felony pardoned may be falsified either by the convict or his heir without plea. 652
 Letters patent to reverse an attainder are void, unless confirmed by parliament. *ib.*
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ARRESTS.

Sec HUE AND CRY. WATCHMEN. WARRANT.

OF ARRESTS FOR CRIMES BY PRIVATE PERSONS. 114. c. 12
 Every person present at a felony, or a dangerous wound, is bound to apprehend the offender, on pain of imprisonment. 115. s. 1
 On default, the town where it happens, or hundred if out of town, shall be amerced, both by common law and the stat. Winchester. *ib.*
 And all persons, though not present, are bound to attend the hue and cry, to apprehend the offenders (*vide Hue and Cry.*) *ib.* s. 4
Officers are bound by duty to apprehend offenders. *ib.*
 And every private person is bound to assist an officer demanding his help, to take a felon, to suppress an affray, or to apprehend the affrayers. *ib.* s. 7

OF ARRESTS FOR TREASON OR FELONY, BY PRIVATE PERSONS ON SUSPICION. 117
 Common fame; living an idle life; keeping bad company; such circumstances as induce a presumption of guilt; betraying a consciousness of guilt; suffering pursuit upon hue and cry; are sufficient grounds of suspicion to justify the arrest of an innocent person for felony. 118. s. 8 to 15
 But this suspicion must be original, and not

arise from the communication of any other man's suspicion. 118
 But constables are *justified* in arresting a man upon a given charge of felony, although eventually it appears no felony was committed. *ib.* (N. 2.)
 And by a private person the arrest of an innocent person is justifiable upon hue and cry. 119. s. 16
 So also one who only attempts to rob, or who only dangerously wounds, may be arrested upon hue and cry, though these are no felonies. *ib.*
 And *a fortiori* a private person may arrest an innocent man on a warrant from a justice. *ib.* s. 17
 To justify the arrest of an innocent person, the party must shew in pleading that the suspicion arose from himself, and set forth the cause of the suspicion, and that the crime for which he made the arrest was in fact committed. 120. s. 18
 But if he have several causes, he may allege them all under *son tort demesne*. *ib.*
 And when the person arrested actually did the fact, that fact alone may be alleged in justification. *ib.*
 But by 24 Geo. 2. c. 44. officers, &c. are allowed to plead the general issue, and to give the special justification in evidence. 118. (N)
 Any one may lawfully lay hold of another whom he shall see upon the point of committing a treason or felony, or doing any act which would manifestly endanger the life of another, and detain him till the danger subsides. 120. s. 19
 Thus any one may seize a person exposing an infant in the streets, &c. *ib.*
ARRESTS BY PRIVATE PERSONS FOR INFERIOR OFFENCES. 120. s. 20
 No private person can arrest another for the bare breach of the peace after it is over. *ib.*
 Yet it is said that any one may apprehend a night-walker, or notorious cheat, and take him before a justice. *ib.*
 So also private persons may justify an arrest for offences in like manner scandalous and prejudicial to the public. *ib.*
 And any person may justify executing the warrant of a justice, authorised by the law to require such execution. 121. s. 21
 In what cases the arrests of offenders by private persons are rewarded by law. *Vide Reward.* 121. to 127
ARRESTS BY PUBLIC OFFICERS. 127. c. 13
 Wherever such arrest may be justified by a private person, it may be justified by an officer. 128
 In what manner watchmen are appointed. *Vide Watchmen.* *ib.*
 By stat. Winchester, c. 4. if any stranger do pass by the watch he shall be arrested till morning. *ib.* s. 5
 If no suspicion be found, he shall go quit, or otherwise he shall be delivered to the sheriff, until acquitted by law. *ib.*
 If they disobey the arrest, HUE AND CRY may be

- be levied until they are taken; for which arrestment none shall be punished. 128
- A CONSTABLE in general has merely the same power to arrest another for felony, as a private person. 129. s. 7
- The chief difference is, that a constable has greater authority to demand assistance from others; and that he must deliver his prisoner to a justice, as a private person must his prisoner to the constable. 129
- A constable on view, has authority to arrest affrayers, and detain them till they find surety; but a private person can only stay the affray till the heat is over. *ib.* s. 8
- But of offences out of view, the power of a constable and of a private person seem to be the same; for it is clear that a constable cannot justify such an arrest, without a warrant from a justice.—*Quære.* *ib.*
- And an unlawful arrest by a constable without a warrant cannot be made good by taking out a warrant afterwards. *ib.* s. 9
- A man once arrested by a constable, on warrant, who is freed upon a promise to return, &c. cannot be retaken upon the same warrant. 130
- But if he surrender, the constable may take him before the justice in pursuance of the warrant. *ib.*
- A constable cannot justify any arrest by force of a warrant which expressly appears to be for an offence of which the justice had no jurisdiction. 130. s. 10
- Nor can he take the party to him at a place out of the county for which he is justice. *ib.*
- But he ought to execute a general warrant, for he must presume the justice to have jurisdiction. *ib.*
- THE CASE OF GENERAL WARRANTS. *ib.* (N. 2)
- Constables being bound to know the law, quære if they ought now to execute a general warrant—for they are not justified in so doing.* *ib.* (N. 2)
- And *quære* if a constable can justify the execution of a general warrant to search for stolen goods; for such warrant is illegal on the face of it. *ib.*
- A justice cannot legally grant a blank warrant for the arrest of a single person, leaving it to the party to fill up. *ib.*
- ut any constable, or even a private person, may execute the warrant of a justice to arrest a particular person for felony or other misdemeanour within his jurisdiction, whether the person be innocent or guilty, or whether he be indicted or not. *ib.* s. 11
- For the justice must be answerable for the consequence. *ib.*
- It has been the modern practice to make out warrants on the suspicion of felony, before any indictment found. 131
- This practice is countenanced by 1 & 2 Philip and Mary, c. 13. and 2 & 3 Philip and Mary, c. 10. *ib.*
- The ancient opinion, that a justice could not grant a warrant till an indictment was found, contradicted by constant experience. *ib.*
- And a warrant before indictment found, is a good justification to the officer; and the old cases to the contrary do not warrant the conclusion. 131
- The justice who granted it, if he did it maliciously of his own head, &c. is liable to an action by the person injured. *ib.*
- It is not politic that the officer should be liable for executing a warrant he is bound to obey, unless it appear that the justice had no jurisdiction. 132
- And a warrant *properly penned* (even though the magistrate who issues it should exceed his jurisdiction) will, by 24 Geo. 2. c. 44. at all events indemnify the officer. *ib.* (N. 3)
- Therefore a warrant to apprehend *all persons* guilty of a crime therein specified, will not justify the officer who acts under it. *ib.* (N. 4)
- How the officer shall avail himself of a plea in justification. *ib.*
- AS TO ARRESTS BY BAILIFFS of towns, it is enacted by statute of Winchester, c. 4. that they shall make inquiry among the inhabitants for suspicious persons, and do right therein. *ib.*
- And by this statute bailiffs may arrest and detain *suspected* persons until they give an account of themselves. *ib.*
- JUSTICES OF THE PEACE have the same power to arrest as private persons, and other inferior officers. *ib.* s. 13
- Justices may command an arrest either by parol or by warrant. *ib.*
- By parol, where any person is guilty by an actual breach of the peace in his presence, or shall be engaged in a riot in his absence. 133. s. 14
- A warrant may be granted by any justice for treason, felony, *premunire*, or any other offence against the peace. *ib.* s. 15
- So where a statute gives a justice jurisdiction, it impliedly empowers him to issue a warrant. 133
- And by modern practice one justice may issue a warrant where the jurisdiction is given to the sessions, or to two justices. *ib.*
- But a justice cannot justify sending a *general warrant* to search all suspected houses for stolen goods. *ib.* s. 17
- And a general warrant from a secretary of state to search for, and bring all papers, &c. in the case of a libel, is illegal and void. *ib.* (N. 6)
- The evidence on which warrants ought alone to be granted, *vide* Warrants.
- The form in which a warrant ought to be made. 134, 135. s. 21 to 28
- A bailiff or constable, known as officers within their precinct, need not shew their warrant to the party arrested, though he demand a sight of it. 135. s. 28
- But every person making an arrest ought to make the party acquainted with the substance of their warrant. *ib.*
- But all private persons, and officers not known, and out of their precincts, must shew their warrants if demanded. *ib.*
- By 27 Geo. 2. c. 20. the officers in executing the warrant of a justice, for the levying a penalty, shall shew the same to the person whose

- whose goods are to be distrained, and suffer a copy to be taken. 135
- If a warrant be directed to a sheriff, he may depute another to make the arrest; but all others must execute it personally, and may take assistance. *ib.*
- If a warrant be directed to *all constables*, none can execute it out of his precinct, and if it be directed particularly, the constable may execute it any where within the jurisdiction of the justice. *ib.* s. 30
- The execution of a warrant must be pursuant to the directions of it. *ib.* s. 31
- No one can justify breaking open doors, unless he first signify the cause of his coming, and require admittance. 136. ch. 14
- But no precise form of words is necessary in this notice, it is sufficient if the party be satisfied that the officer does not come as a mere trespasser. *ib.* (N. 1)
- To make an arrest, doors may be broken open upon a *capias* grounded on an indictment. *ib.* s. 3
- So also upon a *capias* from the king's bench or chancery. *ib.*
- So upon a warrant from a justice to compel appearance for good behaviour. *ib.*
- So upon a *capias utlagatum*, or *capias pro fine*, in any action whatsoever. *ib.* s. 4
- So upon the warrant of a justice for the levying a forfeiture in execution of a judgment *quidam*. *ib.*
- So doors may be broke open where a forcible entry or detainer is either found by inquisition before justices, or appears upon view. *ib.* s. 6
- Or where one is known to have committed a felony, and given a dangerous wound, and is pursued either by a constable or private person without warrant. *ib.* s. 7
- Where an affray is made in a house in the view or hearing of a constable. *ib.* s. 8
- Or where the affrayers fly and take shelter in a house. *ib.*
- And in every case of an escape after lawful arrest. 137
- Or, by 3 and 4 Jac. 1. s. 35. for arresting any Popish recusant excommunicated. *ib.* s. 9
- An officer cannot break open doors on a warrant from a justice, to require persons to come before him to take certain oaths ordained by statute. *ib.* s. 10
- But if the officer enter into any house to serve such a warrant, and the doors be locked upon him, his friends may break them open to set him at liberty. *ib.*
- In what cases justices of the peace may arrest persons of evil fame. 41. s. 4
- Of the offence of a stranger in forcibly freeing another from an arrest. 201. ch. 21
- Any judge of record may discharge a person arrested in the face of the court. 5. s. 18
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- Arson cannot be bailed by justices of peace. 164
- If a person command another to burn a particular house, and by burning it he also burn another house, the commander may be indicted as an accessory to arson for the subsequent felony. 443. s. 18
- In the statutes of Hen. 8. and Edw. 6., which oust felonies of clergy, the crime of arson is omitted. 479. s. 38
- But the offence of arson is now clearly excluded from clergy. *ib.* s. 107

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- An assault and battery is inquirable of in the sheriff's torn. 105
- By 11 Geo. 2. c. 26. to assault, beat, or wound any persons, contrary to the provisions of 9 Geo. 2. c. 23. is transportation for seven years. 205
- How justices shall conduct themselves on being assaulted. 56. s. 68

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ASSIZE AND NISI PRIUS.

- The power of justices of assize in criminal matters, depends wholly upon statute. 33. ch. 7
- By 27 Edw. 1. c. 3. justices of assize, after the assizes taken shall remain *both* together if they be lay; if one of them be a clerk, then the most discreet knights of the shire associated by the king's writ, with the lay justice, shall deliver the gaols, &c. in the manner they had been before delivered, and inquire if the sheriffs have improperly admitted any to bail. 33. s. 2
- By 2 Edw. 3. c. 2. no justices shall be made against the form of the above statute. *ib.* s. 3
- The above statutes have been construed to extend only to felony; but this is a forced construction, and justices of assize have power over both treason and felony with justices of gaol-delivery. *ib.*
- Justices of assize, being laymen, may deliver gaols without any special commission for that purpose. 34. s. 5
- By 3 Hen. 5. c. 7. they shall have power by commission to hear and determine offences against the coin. *ib.*
- As judges of assize, their jurisdiction over this offence is by virtue of the king's commission; but they have cognizance of it without, as justices of gaol-delivery. *ib.* s. 7
- By 28 Edw. 1. c. 10. justices of assize may award process into any foreign county against persons appealed by approvers, and proceed against them. 35. s. 8
- How justices of assize may be said to possess all the authority of justices of gaol-delivery. *ib.*
- By 28 Edw. 1. c. 10. judges of assize, upon plaint, may award inquests, and do right against

against conspirators, false informers, and evil procurers of dozens, assizes, juries, and inquests. 35. s. 10

By 4 Edw. 3. c. 11. whenever they hold *nisi prius* they shall inquire, hear, and determine, both at the suit of the king and the party, of maintainers, bearers, conspirators, &c. *ib.*

By 20 Edw. 3. c. 6. such justices shall have commission to inquire of maintainers and common embracers. *ib.*

By 5 Edw. 3. c. 10. they may inquire and determine the offences of any juror, &c. &c. 36. s. 11

But by 38 Edw. 3. c. 12. no justices shall inquire *ex officio* of the said offence, but only at the suit of the party. *ib.* s. 12

By 32 Hen. 8. c. 9. justices of assize of every circuit shall, in every county within their circuits, twice a year cause open proclamation against unlawful maintenance, champerty, embracery, &c. *ib.* s. 13

By 20 Edw. 3. c. 6. they shall have commission to inquire of sheriffs, escheaters, bailiffs of franchises, and their ministers, &c. *ib.*

By 23 Hen. 6. c. 10. they are authorised to determine *ex officio* without special commission, of and upon all sheriffs, under-sheriffs, clerks, bailiffs, gaolers, coroners, stewards, bailiffs of franchises, officers and other ministers, as to matters of arrest and taking bail. *ib.* s. 15

By 1 Hen. 8. c. 7. justices of assize have jurisdiction, as well by examination as presentment, over coroners for not taking inquest without *fee super visum corporis*. *ib.* s. 16

By 14 Hen. 6. c. 1. justices before whom inquests and juries shall be taken by *nisi prius*, shall have power, in all cases of treason and felony, to give judgment of acquittal or attainder, and to award execution. *ib.* s. 17

On nonsuit in appeal the justices cannot arraign the appellee at the suit of the king. 37. s. 18

But on the acquittal of the appellee, such justices have power to inquire of the abettors, &c. *ib.*

By 8 Rich. 2. c. 2. no man shall be justice of assize or of the common deliverance of gaols, in his own county. *ib.* s. 19

By 33 Hen. 8. c. 24. no man shall be justice of assize, in the county where he was born or doth inhabit, on pain of 100*l.*; but this shall not extend to the inferior officers. *ib.* s. 20

By 12 Geo. 2. c. 27. this penalty and restriction, as to the office of justice of *oyer and terminer* and gaol-delivery, are repealed. *ib.* s. 21

By 19 Geo. 3. c. 74. the lodgings of the justices upon the circuits shall be construed to be both within the city, town, &c. and within the county of such city, town, &c. *ib.* s. 22

ASSOCIATION.

By 1 Ann. c. 8. no commission of association, &c. &c. shall be determined by death of any king and queen, but shall continue in force for six months, unless sooner determined by the successors. 4

Commissions of association frequently called writs. 19

The manner in which justices may be associated,

and the nature of the commission for that purpose. 22

The king can grant but one patent of association to one commission. *ib.*

ATTACHMENT.

An attachment is a process from a court of record, awarded by the discretion of the justices upon a bare suggestion, or their own knowledge. 206. ch. 22.

It is properly grantable in cases of contempts, against which all courts of record, but more especially those of Westminster Hall, and above all the court of king's bench, may proceed in a summary manner. *ib.* s. 1.

The contempt being established by affidavit, the court will make a rule for him to shew cause why an attachment should not issue; or if the offence be exorbitant and apparent, the court will grant the writ in the first instance. *ib.*

Every one against whom an attachment is granted must appear personally in court. *ib.*

And on appearance, if the party be evidently guilty, the court will generally commit him immediately to answer interrogatories. *ib.*

Otherwise they will allow him to enter into recognizance for that purpose. 207

The practice of the court upon this occasion. *ib.*

All courts of record have a *kind* of discretionary power over all abuses by their own officers, and may grant attachment against them for any corrupt practice. 208. s. 2.

As against a sheriff for not serving a writ unless paid an unreasonable gratuity from the plaintiff. *ib.*

Or for receiving a bribe from the defendant. *ib.*

Or for giving him notice to remove his person or effects in order to avoid the effect of the writ. *ib.*

The court of king's bench has a general superintendency over all crimes whatsoever, but in contempts each court may punish by attachment, &c. *ib.*

But if the negligence, &c. do not appear wilful, the courts will leave the party to the ordinary remedy. *ib.*

The mode of obtaining that remedy. *ib.*

The court will grant an attachment against a sheriff or bailiff, &c. for oppressive practice in executing a writ. *ib.*

Instances in which the court will grant attachment upon this ground. 209

So also an attachment may be moved for against a sheriff or bailiff, &c. for not executing a writ effectually. *ib.* s. 4

As if he levy the money and keep it in his own hands and embezzle it. *ib.*

By what process the sheriff shall be forced to return the writ, and pay the money, &c. *ib.*

The court may grant attachment against a sheriff, &c. for making a false return to a writ. *ib.*

As where he returns *languidus* when the defendant is in health. 210

In what cases an attachment against the sheriff shall be directed to the coroner. 208. s. 2.

If the coroner make no return of such attachment,

ment, the court will grant an attachment in the first instance against the coroner, directed to alisors. 208

Attachment may be granted against attorneys for appearing to a suit without authority. 210. s. 6

But if they have a warrant and do not record it till judgment, the court will hardly grant attachment *ib.*

Penalties imposed by statute on attorneys for not recording the warrant, and for appearing without authority. *ib.*

Attachments may also be granted against attorneys after a rule *nisi* for injustice towards their clients, as for protracting suits by little shifts and devices, &c. 211. s. 10

Or for refusing to deliver up their clients writings (unless detained for his bill) or money received to their use. *ib.*

But the court will not interpose respecting any other writings or money but what he possesses in the way of his profession. *ib.*

Instances in which attachments have been granted against attorneys for contempts. 212

In what case an attachment shall issue against an attorney for *dishonest practices*. *ib.* s. 11.

All courts of record may proceed by attachment against any of its officers for refusing to execute its demand, &c. &c. *ib.* s. 12

In what cases an attachment may be granted against jurors (*vide Jurors*). 212 to 216

In what cases inferior judges are punishable by attachment for *proceeding without jurisdiction*. 217. s. 25

How they shall be so punished for acting *unjustly, oppressively, or irregularly*. *ib.* s. 26

They shall be punished by attachment for *refusing to do justice*. 218. s. 27

And for contempts of the superior courts. *ib.* s. 28

Quare, if counsellors are subject to an attachment for foul practice. 219. s. 30

In what cases gaolers are punishable by attachment. *ib.* s. 31

Peers, whether spiritual or temporal, are liable to attachment for contempt of court. 220. s. 33.

Instances in which attachments have been granted. *ib.*

The most material instances of contempts for which an attachment shall issue (*vide Contempts*). 220 to 223

The nature and consequences of an attachment. 207. (N. 1.)

ATTAINER.

Persons attainted of felony or other heinous crime shall not be bailed. 150. s. 40

But even attainted persons may be bailed by the king's bench in special cases, and upon very particular grounds. 151. s. 80

An attainer in treason or felony while it continues in force is a good objection against a plaintiff in bar to an appeal. 268. s. 130

The reception of an attainted person in the same county in which he was attainted, will make the receiver an accessory, without notice of the attainer. 447. s. 33

If an attainted person stand mute upon the de-

mand why execution should not be done, his obstinacy shall be disregarded. 461. s. 8

In what cases it shall be tried whether the person standing mute is the same person who was before attainted. *ib.*

Whether upon an attainer on one appeal, pending another for larceny, an inquest shall be to entitle the appellant to restitution. 525. s. 5

An attainted person is liable to answer a personal action, as if he had not been attainted. *ib.*

Whether a person attainted of one felony shall be forced to plead to a prosecution for another, in order to let in the trial of the accessories. 526

A reversal of the attainer of the principal *ipso facto* reverses the attainer of the accessory. 654

A writ of error to reverse an attainer of treason or felony may be brought by the executor and heir only. *ib.* s. 11

Before the allowance of the writ the errors must be assigned, and the leave of the court obtained. *ib.* s. 12

There must be an express warrant for it from the attorney-general. *ib.* s. 13

In what cases a *scire facias* is necessary. *ib.* s. 14

An attainer by the common law of as much validity as by statute. *ib.* s. 15

The 28 Eliz. c. 2. that no attainer of high treason shall be reversed by writ of error, does not extend to attainders since that time. *ib.* s. 16

A writ of error lies in the king's bench on an attainer before the lord high steward. 655. s. 17

The consequences of an attainer respecting the forfeiture of goods and chattels, and land, *see* Forfeiture.

ATTAINT.

See JURORS.

ATTORNEY.

By 5 Geo. 2. c. 18. no attorney shall be capable of being a justice of the peace. 46. s. 35

By 22 Geo. 2. c. 46. no person, unless he be regularly admitted an attorney, shall practise at the quarter sessions, on pain of 50*l.* 66. s. 19

And if any attorney shall suffer another to use his name he shall incur the like penalty. *ib.*

No clerk of the peace or his deputy, or any under-sheriff or his deputy, shall act as attorney at the quarter sessions, on like penalty. *ib.* s. 22

A sworn attorney may be discharged from the office of constable by writ of privilege. 100. s. 39

In appeal of *mayhem* the plaintiff cannot appear by attorney where a view is granted. 230

In what cases the parties in an appeal may appear by attorney. 247. s. 74

A defendant against whom an attachment is granted must appear in proper person, and not by attorney. 206

Whoever without being admitted and enrolled shall practise as an attorney, or being so admitted

mitted shall lend his name, shall forfeit 50l. &c. 66. s. 19

In what cases attornies may be proceeded against by attachment. §10 to §11. s. 6. to s. 12.

ATTORNEY-GENERAL.

The king's attorney excepted out of 2 Hen. 5. c. 4. concerning justices of the peace. 42. s. 7

AVERMENT.

No averment shall be allowed against a record. 4. s. 14

A material part of an indictment not found by the oaths of the indictors, cannot be supplied by any averment. 77

AVOWRY.

See SHERIFF'S TORN.

AUTHORITY.

See COURTS.

AUTREFOITS ATTAINT.

An attainder of felony, either by verdict, outlawry, or abjuration, may be pleaded in bar of any subsequent prosecution for the same, or any other felony. ch. 36

This plea is of no effect if the attainder be reversed for error, but until reversal it is good, for error only renders it voidable. 525. s. 2

A person attainted at the suit of the king, and pardoned, cannot plead it in bar to an appeal. *ib.*

Where a person is attainted of felony, and afterwards indicted for high treason, either before or after the attainder, the attainder cannot be pleaded in bar to the treason. *ib.* s. 4

A principal attainted cannot plead it against a prosecution on his conviction, on which the trial of accessories depend. 526

Judgment of *forte et dure* in one felony is no bar to a prosecution for another felony. *Sed quare* for the same felony. *ib.* s. 7

Autrefoits attaint no plea for one who breaks the prison of the ordinary. *ib.* s. 8

An attainder on an indictment for murder, is no bar to an appeal by treason 3 Hen. 7. c. 1. *ib.* s. 9

In all other cases *autrefoits attaint* is still of the same force as it was at common law. *ib.*

AUTREFOITS ACQUIT.

This plea is grounded on the maxim, "That a man's life shall not be in danger more than once for the same offence." 515

Therefore, where an indictment or appeal is free from error, well commenced, and brought before a competent jurisdiction, and the prisoner is found not guilty, he may in all cases plead such acquittal in bar to any subsequent prosecution for the same crime. *ib.* s. 1

This bar need not be pleaded with a *profert*, &c. of the record of acquittal; it ought to come before the Court by writ; and the prisoner shall have a day given him to bring it in. 516

A variance between the indictment and the re-

cord, provided the nature of the crime charged be substantially the same, may be helped by proper averments. 516. s. 3

If a man be named *yeoman* in the record, and *gentleman* in the indictment; or if the acquittal be for murder or robbery *cujusdam ignoti*, and the indictment insert the name; or if the indictment state a different surname than that on which the prisoner was acquitted; yet the variance may be cured by averring, that the person so differently named was one and the same person; that he was known as well by the one name as the other. 517. s. 3

So also a variance respecting the time and place may be helped by averring that they were one and the same felony. *ib.*

If the first indictment be in an *improper* county, the prisoner cannot plead an acquittal upon it, in bar to a subsequent prosecution in the proper county. *ib.*

And if the acquittal be in the *proper* county, his life is not endangered by the subsequent prosecution in an *improper* county, and so cannot be pleaded in bar. *ib.*

An acquittal for larceny in the county where the goods are found may be pleaded in bar to a prosecution for the same offence in the county where they were taken. 518. s. 4

And a jury of one-county may try, whether an offence laid in their own county be the same offence that was done in another. *ib.*

An acquittal in *trespass* cannot be pleaded against an appeal of *larceny* for the same goods, for they are distinct offences. *ib.* s. 5

And generally a bar in an action of an inferior nature will not bar another of a superior. *ib.*

An acquittal in murder is a good bar to an indictment for petit treason, for substantially they are the same offence. *ib.*

Burglary and stealing the goods of A. and B. and acquittal on an indictment for the burglary and stealing the goods of B. will not bar a subsequent prosecution for stealing the goods of A. but it may be well pleaded against a second indictment for the burglary. 519

See contra 519. (N. 1)

No discharge of an indictment will bar an appeal, and no discharge of an appeal will bar an indictment, except an acquittal by battle, or by verdict on the general issue. 520. s. 6

Quere, If an acquittal by battle in an appeal may not be pleaded in bar to an indictment. 521. s. 7

The acquittal upon indictment or appeal so erroneous as not to support the judgment, cannot be pleaded in bar to a subsequent indictment or appeal. *ib.* s. 8

But it is otherwise if the error be only in the process. *ib.*

An acquittal on an appeal brought by an *improper* appellant will not bar an appeal by the *right* appellant. *ib.* s. 9.

An acquittal in any court of competent jurisdiction is as good a bar as an acquittal in the highest court. 522. s. 10

An acquittal of murder at the grand session in Wales

Wales may be pleaded to an indictment for the same murder in *England*. 522

An acquittal of a man as accessory no bar of a subsequent prosecution against him as accessory after the fact. *ib.* s. 11

But it is doubtful, whether the acquittal of a man as principal is a good bar against an indictment as accessory before the fact. *ib.*

Whether a man can be found guilty as principal upon evidence which only proves him to have been an accessory before. *ib.*

If not, the acquittal of him as principal no way acquits him as an accessory before; which opinion is strongly holden by *Mr. Justice Foster*. 523. (N)

The acquittal of a man as accessory before or after is no bar to a prosecution against him as principal. *ib.* s. 12

An acquittal as accessory to one principal is no bar to an arraignment afterwards as accessory to another in the same fact. *ib.* s. 13

By 3 Hen. 7. c. 1. principals and accessories in murder may be tried before the expiration of the year and day within which time an appeal is allowed to be brought. *ib.*

But an acquittal on this trial within the time shall not bar the appeal. *ib.*

Nor shall this statute extend to any other acquittal but on an indictment. 524. s. 15

And an acquittal on any other indictment or appeal, except for death, may still be pleaded in bar to an appeal for the same crime. *ib.*

How the record shall be produced in pleading *autrefois acquit*. 516

A prisoner shall be allowed a copy of his indictment to enable him to plead *autrefois acquit*. 557

AUTREFOIS CONVICT.

This plea is allowed, because the party ought not to be brought twice into danger of his life for the same crime. 526. s. 10

A conviction of felony may be pleaded to an indictment or appeal for the same felony. *ib.*

A conviction of manslaughter on an appeal may be pleaded to an indictment or appeal of the same death. *ib.*

But a conviction of manslaughter on an indictment cannot be pleaded to an appeal, unless the convict be admitted to, or has prayed his clergy. *ib.*

A conviction of one felony cannot be pleaded in bar of another felony. 527

A person admitted to his clergy shall not thereby bar a subsequent prosecution for another felony not within the benefit of clergy. *ib.* s. 11

A person convicted of manslaughter on an indictment of murder, who hath prayed his clergy, though not actually admitted to it, may bar any subsequent appeal for the same death. *ib.* s. 12

But if a person be acquitted on such an indictment it is no bar to the subsequent appeal. 527

It is not material whether the appeal in bar, whereof such conviction and clergy are

pleaded, were depending at the time of such conviction, or not. 527. s. 13

It has been said, unless the Court call a man to judgment on a conviction of manslaughter, on an indictment of murder, he cannot demand clergy, and, therefore, cannot plead such conviction and clergy in bar to an appeal. 528. s. 14

But it is now settled that such a conviction, and the prayer of clergy, may be pleaded in bar to an appeal for the same death, whether the party were called to judgment or not. *ib.*

But if the record is erroneous either in respect of insufficiency in the indictment or appeal, or for a mis-trial, &c. so that his life was not in danger, the prisoner cannot plead such conviction and clergy thereon had, in bar of a second indictment or appeal. *ib.*

The form of the conclusion of a plea of *autrefois convict* of manslaughter. 529. s. 16

Quere, if *autrefois convict* of *se defendendo* on an indictment of murder may not be pleaded to an appeal of the same death. *ib.* s. 17

An appeal lies against a person convicted until he is attainted. *ib.*

BACKING.

See WARRANT.

BAIL.

Bail and mainprise alike save a man from gaol, by committing him to the custody of his sureties. 138. s. 2

Bail have a coercive power over the person of the principal, but *mainpernors* have not. 139

Not less than two bail should be taken for felony. *ib.* s. 4

On a *habeas corpus* for treason or felony, the king's bench always require four sureties, in a sum not less than £40, but higher in the discretion of the Court. *ib.*

They may be examined on oath respecting their sufficiency. *ib.*

If insufficient bail be taken, the principal may be forced into a new recognizance. 140

The number of bail must be mentioned in the notice. 139. (N. 1)

But excessive bail ought not to be required. *ib.* s. 5

If the ends of justice are defeated by the non-appearance of the principal, and the bail prove insufficient, the sheriff or justice of peace who admitted may be fined by judges of assize. 140 s. 6

To admit persons to bail not bailable by law, is punishable by the common law as an escape. *ib.* s. 7

By statute Westminster 1. officers shall lose their fee and office for ever, and be imprisoned three years, &c. *ib.* s. 8

By 27 Edw. 1. c. 3. and 4 Edw. 3. c. 7. judges of assize shall enforce the stat. West. *ib.* s. 9, 10

By 1 and 2 Phil. & Mary, c. 13. justices of peace shall not admit to bail persons forbidden to

- to be replevied by stat. West. on pain of being fined by the judges of assize. 141. s. 11
- Ignorance of the cause of commitment, or that the *mittimus* charged the offender on suspicion of felony only, is no excuse for improperly admitting him to bail. *ib.* s. 12
- But denying, delaying, or obstructing bail, where it ought to be taken, is indictable; and the offender is also liable to an action. *ib.* s. 13
- It is incumbent on the offender to be prepared with his bail. *ib.* s. 14
- By stat. West. if any withhold bail from persons *replevisable*, they shall be grievously amerced. *ib.* s. 15
- By the *Habeas Corpus Act*, 31 Car. 2. c. 2. wherever any writ of *habeas corpus* is served at any prison, the gaoler within three days after (unless the commitment be for treason or felony, plainly and specially expressed in the warrant) and upon tender of the charges, &c. shall make a return of such writs, and bring up the body of his prisoner to the court from whence the writ issues, and certify the true causes of his commitment or detainer. *ib.*
- If the prison be above 20 and not exceeding 100 miles distant from the court, the return, &c. shall be within ten days, and if above 100 miles, then within twenty days. 142
- All such writs shall be marked *per statutum tricesimo primo Caroli secundi regis*, and signed by the person awarding it. *ib.* s. 17
- Therefore if a writ be not signed, it need not be obeyed. 142. (N. 3)
- In vacation, any of the judges, on view of the commitment, or on oath or certificate that the warrant was refused, may grant a *habeas corpus* under the seal of the Court returnable *immediate* (other than to convicts or persons in execution), and on service thereof the gaoler shall make return, &c. as above. *ib.*
- Within two days after the return, &c. the judge awarding the writ, or in his absence any other of the judges, may discharge the prisoner on bail, &c. unless it appear that he is detained upon a legal process out of a court of criminal law, or that he is not bailable. 143
- If a prisoner is too infirm to be brought up, the Court will order him to be attended. *ib.* (N. 6)
- If a prisoner neglects for two whole terms to pray a *habeas corpus*, he shall lose the right to it in Vacation. *ib.*
- To refuse obedience to this writ, &c. incurs a penalty of £100 for the first offence, £200 for the second and loss of office. *ib.*
- No privilege will excuse a peer from obeying this writ. 143. (N)
- No person discharged by *habeas corpus*, shall be again imprisoned for the same offence, other than by legal process, &c. on pain of £500. 143
- Prisoners committed for treason or felony plainly and specially expressed, praying in open court the first week of the next Term, or first day of the sessions, to be tried, who shall not be indicted the term or sessions after commitment, may, upon motion the last day of the term or sessions, be discharged on bail, unless it appear on oath the king's witnesses could not be produced. If not indicted or tried the second term or sessions, they shall be discharged. 144. s. 21
- Prisoners may obtain *habeas corpus* out of any of the courts at Westminster. *ib.* s. 22
- If the Chancellor or any of the judges in Vacation time, upon view of the warrant, or oath of its refusal, &c. shall deny the writ of *habeas corpus*, they shall severally forfeit 500*l.* *ib.*
- And such writs do not expire on the commencement of the term. *ib.* (N. 7)
- After *assizes* proclaimed, no prisoner shall be discharged there upon *habeas corpus*, but shall be taken before the judge of assize. *ib.* s. 23
- Judges not liable to penalty for refusing *habeas corpus* in term time; because no judge is liable to an action for what he does as judge. *ib.* s. 24
- Quare*, if a sheriff or constable, as conservators of the peace, may take bail. 145. s. 25
- The statutes empowering justices to take bail, have taken away this power from the sheriff and constable. *ib.* s. 26
- The sheriff in his *torn*, might have taken bail; for whosoever is judge of the offence, may bail the offender. But this power is lost by reason of 1 Edw. 4. c. 2. *ib.* s. 27
- Bail is grantable by sheriffs by virtue of the writs *de odio et atia*, *mainprize*, and *homine replegiando*. *ib.* s. 28
- The writ *de odio et atia* is obsolete. *ib.* 146
- In what cases *mainprize* is yet in force. *ib.* s. 29
- In what cases *homine replegiando* and *cupias in withernam* are proper and effectual remedies. *ib.*
- By stat. West. 1. outlaws, abjurors, provers, house-burners, counterfeiters of the coin or seals, persons excommunicate, and traitors touching the king himself, shall be in no wise replevisable. 147. s. 32
- But persons indicted for larceny, or of light suspicion, or for petty larceny (unless accused as accessories), may be let out on surety by the sheriff. *ib.*
- Those who are taken for the death of a man, were not replevisable by sheriffs, &c. at the common law. Nor can justices bail for manslaughter or even excusable homicide, though they may for light suspicion thereof; and even the superior courts are cautious how they bail for homicide. 148. s. 33, 34
- By 3 Hen. 7. c. 1. principals and accessories acquitted of murder, may be recommitted or bailed at the discretion of the Court till the year and day be passed. *ib.*
- Persons imprisoned by the special command of the king or his privy council, were not replevisable by the sheriff, &c. *ib.* s. 36
- How far persons committed by command of the king's justices are replevisable by the sheriff under the stat. of West. 149
- Persons imprisoned for the forest, are excepted out of the writ *de homine replegiando*. *ib.* s. 38
- But

- But by several statutes, no man shall be imprisoned for the forest, without indictment, unless taken with the *mainour*, or trespassing. 150
- How such offenders may be bailed or mainprised. *ib.* s. 39
- Persons outlawed, or who have abjured the realm, those taken upon an *excommunicato capiendo*, approvers, and all persons convicted of felony, or other *heinous crime*, and also all those who, on examination, confess the guilt of felony, and are so charged in the warrant, are excluded from the benefit of *replevin* by the stat. of West. *ib.* s. 40
- Bail is only proper where it stands indifferent whether the party be guilty or innocent of the charge. But when that indifferency is removed it would be absurd to bail. 151. s. 40
- By several statutes, the bodies of prisoners convicted or in execution restrained from being bailed. 151 to 152
- The court of king's bench may bail a person upon an outlawry for felony. 153
- Justices of gaol-delivery may bail or convict of manslaughter, and it is said, for any other felony. 151
- A person imprisoned by *excommunicato capiendo*, in a cause of which the spiritual court has no consuance, may be bailed on *habeas corpus*, or he may supersede the writ. *ib.*
- Persons taken with the *mainour*, prison-breakers, persons appealed by provers, persons apprehended upon hue and cry, notorious thieves, dangerous and treasonable rioters, conspirators, rescuers, and persons guilty of misprision, *præmunire*, or maim, and such like notorious offences, seem not to be bailable by the stat. West. 151, 152. s. 41
- But in offences under the degree of felony, bail seems to be left, in a great measure, to the discretion of the judge. 152
- Persons apprehended for arson, for falsifying the coin or king's seal, or for treasons, are excluded from *replevin* by the stat. West. 151
- The sheriff therefore cannot release such offenders even by *homine replegiando*. 153. s. 46
- Yet if any be charged before the sheriff with any of the above offences, upon very light suspicion, it seems the sheriff is not bound by the statute to commit him. *ib.*
- If such offender be under an arrest, either of a magistrate or private person, the sheriff cannot *replevy* him. *ib.*
- By modern practice, sheriffs shall receive no one into their custody, but by warrant from a magistrate. *ib.*
- The king's bench not restrained by the stat. West. from bailing in all cases. *ib.*
- Persons of good reputation indicted of larceny before sheriffs in their towns, and lords in their leets, are replevisable by virtue of the statute of West. 154. s. 48
- Persons not excepted by the statute, who being of good repute are imprisoned upon light suspicion, are also replevisable. 155. s. 49
- Persons imprisoned for petit larceny, if there be any colour to presume their innocence, may also be bailed. 155. s. 50
- Trespass not extending to life or member, except the offence be open and manifest, is bailable by the statute. *ib.* s. 51
- The appellee of an approver is bailable. *ib.* s. 52
- Accessaries of good reputation are bailable till the principal be convicted. *ib.*
- Persons notoriously guilty as accessaries of crimes excluded from clergy, are not bailable. *ib.*
- By 31 Car. 2. c. 2. no person charged as accessory shall be removed or bailed by that act, otherwise than he might have been before. 156
- Where there are strong presumptions of guilt against an accessory, he was not bailable before the statute, nor is now bailable by it. *ib.*
- IN WHAT CASES JUSTICES OF PEACE MAY ADMIT OFFENDERS TO BAIL. *ib.*
- Wherever justices have jurisdiction over the offence, they may bail the offender indicted before them, upon the like circumstances as other courts may bail. 157. s. 54
- Two justices, one *quorum*, may bail persons indicted before the sessions; because any two such justices may try the offence. *ib.*
- One justice of the peace may bail any offence, under the degree of felony, over which the sessions has jurisdiction; for such justice, being a judge of the court, retains the discretionary power of judging of the propriety of admitting such an offender to bail. *ib.*
- One justice of the peace may either bail or imprison a person who has given another a dangerous wound, exercising his judgment on its probable mortality. 157
- By 1 Rich. 3. c. 3. every justice of peace may let persons arrested or imprisoned for suspicion of felony to bail or mainprise, in like form as if they had been indicted at sessions. *ib.* s. 55
- But by 3 Hen. 7. c. 3. the 1 Rich. 3. c. 3. is repealed, and power is given to two justices, one to be of the *quorum*, to let persons mainprisable by law to bail until the next session or gaol-delivery, the recognizance of which shall be certified to the said session, &c. 158
- Also by 1 & 2 Ph. & Mary, c. 13. no justices of the peace shall admit any persons to bail who are declared irreprevisable by the statute of Westminster. *ib.* s. 57
- And two justices, one to be of the *quorum*, shall not let to bail any person arrested for manslaughter or felony, or for suspicion thereof, unless the same justices be present together at the time of the bailment (except in open sessions), and the same shall be certified to the next gaol delivery under their hands. 158. s. 58
- And previous to bailing such prisoner, the said justices, or the one *quorum*, shall take his examination and the depositions of the witnesses in writing, as far as may be necessary to prove the felony, &c. and transmit the same to the next gaol-delivery. 159. s. 59
- Justices of the peace are authorized to bind over

- necessary witnesses to appear and give evidence against such prisoners at the gaol-delivery. 159. s. 60
- Justices of peace and coroners in *London, Middlesex*, and other cities, have authority to let to bail felons and prisoners in the same manner as before, and to bind over witnesses, &c. 159. s. 61
- The justices of gaol-delivery shall punish justices of the peace for offending against the above-recited act of Ph. & Mary. *ib.*
- Justices, as conservators of the peace, may bail any offence only tending directly to a breach of the peace. *ib.* s. 62
- One justice cannot bail a person for any other crime than that which barely tends to a direct breach of the peace, unless such power be limited by some statute or the party have been indicted at sessions. *ib.*
- No justice of the peace can bail a person imprisoned for treason against the king, arson, &c. or any crime declared not bailable by the stat. West. (*vide supra*). 160. s. 63
- But if such offender be only *accused on light suspicion*, the justice may take surety for his appearance. *ib.*
- And by virtue of 1 and 2 Ph. and Mary, c. 13. justices of the peace may bail any person imprisoned on a slight suspicion of a fact clearly appearing to be no higher offence than manslaughter, and *à fortiori* if it only amount to misadventure or self-defence. *ib.* s. 63
- The justices at their peril must take care that the offence in truth amounted not to murder. *ib.*
- Justices of the peace ought in no case to bail any person guilty of any homicide, by his own confession or the notoriety of the fact. *ib.*
- The above-mentioned statutes (*vide supra*) only shew the manner of bailing by justices, and do not point out the persons bailable; for which the stat. of West. must be observed. *ib.* s. 64
- Justices are not impowered to bail civil actions, persons taken on process of contempt, or rebellion out of chancery. 460
- IN WHAT CASES BAIL IS GRANTABLE BY JUSTICES OF GAOL-DELIVERY. 161. s. 65
- Such justices may bail on conviction of homicide by misadventure or *se defendendo*, to enable the offender to purchase his pardon. *ib.*
- If a convict of manslaughter purchase his pardon, they may bail him after their session is determined, &c. *ib.*
- They may bail a prisoner convicted before them of manslaughter against plain evidence. *ib.*
- Justices of peace cannot bail in any of the above cases: the reason of it. *ib.*
- Justices of gaol-delivery may bail an *appeller* in death or robbery, &c. &c. where the appellant is disabled by excommunication, until the plaintiff be absolved. *ib.*
- WHERE BAIL IS GRANTABLE BY THE KING'S BENCH. *ib.*
- The king's bench will exercise its discretion as to bailing prisoners on commitments by the privy council, where the crime is specially expressed. 162.
- Where a person is imprisoned upon a *usurped authority*, the king's bench will discharge him without bond. *ib.*
- The famous case of *Sir John Corbet* stated, in which it was determined that the king's bench will not bail on a commitment by the privy council, in which warrant no other cause of imprisonment was contained, but that it was at the king's command. 162 to 164
- This decision produced the *PETITION OF RIGHT*; since which it is agreed that wherever any commitment by the privy council hath not expressed, with some convenient certainty, the crime alleged against the party, he ought to be bailed upon his *habeas corpus*. 164, 165
- And by 16 Car. 1. c. 1. whoever shall be imprisoned by the command of the king or privy council shall have his *habeas corpus*, &c. &c. 164
- The court of king's bench will not bail a prisoner committed by either house of parliament during the continuance of the sessions. 165. s. 73
- Even if an excess of jurisdiction *plainly and expressly* appear, it seems questionable how far the Court would interpose. *ib.*
- The several cases of commitment by parliament enumerated. 166
- On a commitment by either house for a contempt, the court of king's bench has jurisdiction: *Lord Holt* said the power of the court only to commitments for contempt in the face of the house. 166 (N. 1)
- Modern opinions of the privilege of parliament to commit for contempts, and the impossibility of the courts to interpose to bail the prisoner. *ib.*
- It is agreed that the king's bench may bail a prisoner committed by either house for a contempt, after the dissolution or prorogation of the parliament. *ib.* s. 74
- Whether the king's bench will bail a lord committed by the house of lords and pardoned. *ib.* s. 75
- The dispute in the reign of James the First respecting the power of the king's bench to bail persons committed by the court of chancery. 167
- A commitment by the court of chancery for disobedience to a decree is good without shewing what the decree was. 168
- The king's bench may, in discretion, bail any person deprived of his liberty by an inferior court. *ib.* s. 77
- Instances in which the Court will exercise this discretion. *ib.*
- Of the proceedings in the king's bench upon a *habeas corpus*. *ib.*
- Neither the judges of the king's bench, nor of any other superior court of justice, are restrained from admitting any offenders to bail by the statute of Westminster; yet they will regard the rules prescribed by it, and not bail one

- one thereby declared *irrepleviable*, without some special circumstance. 170. s. 79
- Therefore, without special motive they will not bail persons convicted of felony, or notoriously guilty thereof. *ib.*
- The king's bench will bail a person for an erroneous description, who is taken on *capias ut legatum*. *ib.* s. 80
- Or where a person *outlawed* alleges an error in the record. *ib.*
- Or where a person is convicted of felony against manifest evidence. *ib.*
- Or where the prosecutor of an indictment hath unreasonably delayed the prosecution, &c. *ib.*
- Or where the prisoner in appeal hath pleaded the excommunication of the plaintiff. 171
- Or where the life of a prisoner is endangered by his continuance in prison. *ib.*
- The fact of indisposition upon which the Court will bail a prisoner must be immediate, and not be self-created, or the result of an habitual disease. 171. (N. 1)
- The king's bench has power to bail in all cases whatsoever, and will exercise their discretion in all cases not capital; in capital cases where innocence may be fairly presumed; and in every case where the charge is not alleged with sufficient certainty. 170. (N. 3)
- A variety of instances enumerated in which the court of king's bench have bailed prisoners. *ib.*
- The king's bench will not look into the deposition of the coroner in order to bail for *ib.*
- Cases in which the king's bench will not admit prisoners to bail. *ib.*
- IN WHAT CASES BAIL IS GRANTABLE BY THE OTHER COURTS OF WESTMINSTER-HALL. 171. s. 81
- The common pleas and exchequer at any time during term, and the Court of Chancery during term or vacation, may award a *habeas corpus* by the common law, &c. *ib.*
- By the *Habeas Corpus Act* (*vide supra*), any of the said Courts in term time, and any judge of either bench, or baron of the exchequer in vacation, may award a *habeas corpus*, and thereupon bail the prisoner. *ib.*
- The abovementioned clauses of the *habeas corpus* act extend not to treason or felony, plainly and specially expressed in the warrant. *ib.* s. 82
- No instance of such crimes having ever been bailed by the common pleas or exchequer. *ib.*
- In some instances, persons committed for felony are bailable by the court of chancery. 172
- IN WHAT FORM BAIL IS TO BE TAKEN. *ib.* s. 83
- The king's bench, in admitting to bail for felony, &c. take a several recognizance from each of the bail in a sum certain, and also in body for body. *ib.*
- Justices of peace may in discretion adopt the same form. *ib.*
- If the prisoner be bailed before the return of the *capias* in felony—or if he be bailed by an inferior court for an inferior crime, the recognizance shall only be in a sum certain, and not body for body. *ib.*
- Persons bound body for body are at this day only liable to fine, &c. 172. s. 83
- WHAT SHALL FORFEIT A RECOGNIZANCE OF BAIL. *ib.* s. 84
- How far standing mute on the trial amounts to a forfeiture *ib.*
- A man's bail are his gaolers of his own chusing. *ib.*
- Non-appearance to a second information, after a *nolle prosequi* entered on the first, and upon which a recognizance was taken, is a forfeiture. 173
- The recognizance in the above case shall not be forfeited by the non-appearance of the party the first day of every term after plea; as it may be before he hath pleaded. *ib.*
- By 4 Geo. 3. c. 10. the barons of the exchequer, upon affidavit and petition, may discharge persons liable to imprisonment upon estreated recognizances without any question. 173. s. 85
- No discharge shall be so given where any other debt is due to the crown, than by such recognizance. *ib.*
- Nor in any cases relating to frauds on the revenue. *ib.*
- If the party to an estreated recognizance takes his trial the next session, he may compound the forfeiture for a very small matter. *ib.* (N)
- If the money be levied, the Court will order the prosecutor's costs to be paid, and the surplus to be restored. *ib.* (N)
- On an acquittal, the bail, on motion, shall be discharged, though the acquittal be not entered. *ib.* (N)
- Neither the defendant nor his bail can be called on their recognizance without notice, except on the day they were bound to appear. *ib.* (N)
- On non-appearance, the Court will not discharge the recognizance, even though the attorney general consents; but will respite it till next term. *ib.* (N)
- A convict pardoned on condition of transportation, may surrender in discharge of his bail by *habeas corpus*, &c. *ib.* (N)
- But if the convict be actually on board the transport the Court will not award the *habeas corpus*. 173
- Whether a gaoler, &c. who bails a prisoner that is not bailable, is answerable for an escape, if he do not appear, &c. 192
- In what manner offenders who are apprehended in a different county from that in which the offence was committed, shall be admitted to bail. 50. 177
- How bail shall be taken on a process for contempt of Court. 207
- BAILIFF.
- See CONSTABLE. CORONER. ARREST. ATTACHMENT.
- In what cases a bailiff is liable to attachment. 208 to 209
- By 23 Hen. 6. c. 10. judges of assize shall inquire into the conduct of bailiffs, and punish them for any misdeed in office. 36
- A bailiff cannot distrain for an amercement without a special warrant. 97

A bailiff in his own precinct need not show his warrant. 135
 In what cases bailiffs of towns are authorised to arrest suspected persons. 132
 A special commission may issue to inquire into the oppression of bailiffs. 24. s. 27
 How far justices of assize may inquire into the conduct of bailiffs. 36, 37

BAR.

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BARRATRY.

Barrators may be indicted at the sheriff's torn. 106. s. 58

BATTERY.

A count of battery abates a writ of appeal of *mayhem*. 227. s. 20
 An appeal of *mayhem* will not bar an action of battery. 228. s. 22
 Whether battery may be barred on a nonsuit in *mayhem*. 229. s. 26
 Battery is an offence within the jurisdiction of a justice of the peace. 55. s. 63

BATTLE.

The defendant in an appeal of *maim* may wage battle. 230. s. 28
 An appellee by an approver may wage battle. 286. s. 23
 A trial by battle is in the election of the defendant in appeals of treason before the marshal; and in felony either by the appellants or approvers. 587
 The form, manner, and consequence of waging battle. *ib.*
 A defendant cannot wage battle either against the king or a peer of the realm. 588
 No battle shall be waged against a citizen of London. *ib.*
 No battle shall be waged in rape. *ib.*
 In what cases the plaintiff may counterplead an issue of battle. *ib.*
 Battle cannot be waged against a blind man. *ib.*
 Trial by battle abolished by 59 Geo. 3. c. 46. 587. (N)

BAWDY-HOUSE.

A constable is *ex officio* authorised to arrest all frequenters of bawdy-houses. 98. s. 34

BEHAVIOUR.

How far the scandalous behaviour of an offender ought to influence the discretion of the magistrate, as to refusing him to bail. 152. s. 44
 A person appealed of *high treason*, though by a disabled approver, shall be bound to his good behaviour. *ib.*
 How far a recognizance for good behaviour may be superseded by *certiorari*. 412

BIGAMY.

Where the first marriage is abroad, and the second within the realm, may be tried in

England. *Quare*, if the first is in England and the second abroad, if it may not be so tried. 303. s. 39
 Bigamy was anciently debarred of clergy. 471
 By 1 Ed. 6. c. 12. although a man be married to two wives or more, he shall have his clergy. 472
 Persons convicted of bigamy may be transported by 35 Geo. 3. c. 67. 516

BILLS OF EXCEPTION.

No bill of exception is grantable on indictments for treason or felony. 618

BISHOP.

An Irish bishop may be as well described by the addition of his bishopric as an English bishop may by his. 261. s. 109
 A special commission may be granted for inquiring into the temporalities of a bishopric while in the king's hands. 24. s. 25

BLACK ACT.

The rewards allowed to those who shall apprehend and convict offenders against this act. 123. s. 28
 Whoever shall rescue any person in lawful custody for any of the offences created by this act, or shall induce another to join in committing them, shall be guilty of felony without clergy.

BLANK WARRANT.

See ARREST.

The court may grant an attachment against the sheriff or bailiff for making an arrest by force of a blank warrant. 209. s. 3
 A justice cannot legally grant a blank warrant. 130.

BLOOD CORRUPTED.

A condemnation by the court of the Constable and Marshal, not being a court of common law, corrupts not the blood. 16. s. 11
 No sentence, in appeal, by virtue of 1 Hen. 4. c. 14. shall cause the blood to be corrupted. 226. s. 12
 The king's pardon cannot save the corruption of blood by attainder of treason or felony. 549. s. 57
 An attainder of treason or felony stains the blood, and renders the party ignoble. 547. s. 47
 Corruption of blood abolished, excepting treason or murder, by 54 Geo. 3. ch. 145. 639
 Instances of the course of descents which may be barred, by the corrupted blood of one, in the line through which it must pass. 648
 A person whose blood is corrupted, still retains a capacity to purchase lands, but he cannot hold them. *ib.* s. 50
 In what case corruption of blood shall create escheat. 649
 Blood once corrupted, cannot be restored to its original purity, but by the omnipotence of parliament. *ib.* s. 51
 But issue born after pardon, may inherit in the same

same manner as if the blood of the ancestor had never been corrupted. 649. s. 51
By 7 Ann. c. 21. and 17 Geo. 2. c. 39. after the death of the Pretender and his sons, no attainer for treason shall corrupt the blood. *ib.*

BREAKING.

See ARREST. HOUSE-BREAKING.

BREAKING-PRISON.

See ESCAPE. RESCUES.

Breaking of prison was felony by the common law, if the imprisonment was legal, whether it were for a criminal or a civil cause, or whether the prisoner was actually within the walls, or only in the stocks or personal custody of another. 183. ch. 18

It is immaterial whether it be the king's prisoner or one belonging to the lord of a franchise; for every person who is in lawful custody is the king's prisoner, and whoever breaks therefrom is by the statute *de frangentibus prisonam* guilty of felony. *ib.*

The confession of having broke prison before the coroner is not traversable at the common law. 184. ch. 18

By 1 Ed. 2. st. 2. none that breaketh prison shall have judgment of life or member for breaking of prison only, except the offence for which he was taken required such judgment. *ib.* s. 3

Any place whatsoever wherein a person, under a lawful arrest for a supposed crime, is restrained of liberty, is a prison within the act. *ib.* s. 4.

The imprisonment of a person, who is taken on a *captas* awarded on an indictment, is lawful, though eventually the prisoner appear to be innocent, or the prosecution groundless. 185. s. 5

A commitment by lawful *mittimus* on suspicion of a felony *actually done*, although the party be not indicted, is a lawful imprisonment within the act. *ib.* s. 6

But if no felony be done, nor the party indicted, his breaking from prison is no offence. *ib.* s. 7

If a felony were done, yet no just cause of suspicion, and the *mittimus* be not in legal form, the breaking prison is no felony. *ib.* s. 8

But if the causes of suspicion be strong enough to justify the arrest, the breaking will be felony although the *mittimus* be informal. *ib.*

A justice's *mittimus* is a good justification of imprisonment, and, under any circumstances, makes it dangerous to break therefrom. 186

There must be an *actual* breaking of the prison to come within the act. *ib.* s. 9

Every indictment for this offence as a felony must have the words *felonice fregit prisonam*. *ib.*

If a prisoner escape *without using violence*, he is only guilty of (an escape). 186

The breaking must be by the prisoner, or by his privity or procurement. *ib.* s. 10

An escape through a breach which others have made is not within the act. *ib.*

A prisoner who breaks a prison on fire in order to save his life, or from any other act of necessity, and thereby escapes, is not within the act. 186 s. 11

No breach of prison will amount to felony unless the prisoner escape. *ib.* s. 12

Nor is it felony, *it is said*, in a stranger who breaks a prison, unless felons thereby escape. *ib.*

A prisoner, whose offence is made capital by any statute since the statute *de frangentibus prisonam*, is equally within the act, if he break his confinement, as if it had been so by the common law, or made so before the act. *ib.* s. 13

The offence for which the party was imprisoned must be capital at the time the offence is committed. 187

If the *mittimus* charge the prisoner with an offence under the degree of capital, and in truth it be not capital, he cannot be guilty of felony by breaking the prison. *ib.* s. 15

And if in truth the offence be not capital, although the *mittimus* charge it to be so, it would be difficult to maintain that a breaking would be felony. *ib.*

A person committed for felony where in fact no felony hath been done, cannot be guilty of *felony* by breaking from his restraint. *ib.*

It is the crime itself, and not the nature of the charge, that constitutes the offence. *ib.*

The question examined, whether, in prison breach, the felony shall be construed from the charge in the *mittimus*, or from the *real nature* of the offence. 188

It is immaterial, whether the party who breaks his prison were under an accusation only, or actually attainted of the crime for which he is confined. *ib.*

A person committed for high treason, becomes guilty of felony only, by breaking and escaping *singly*; but if by his breaking he knowingly effectuates the escape of other traitors, he is thereby guilty of high treason. *ib.* s. 17.

As such assistance given to felons will make an accessory, so if given to traitors it will make high treason. 189

A person breaking prison may be arraigned for the offence before he is convicted for the crime for which he was imprisoned. *ib.*

The offender cannot be arraigned on the sheriff's return of a prison breach; he must be indicted. *ib.* s. 19

It must appear by the indictment that the offender was lawfully in prison, and for a capital offence. *ib.* s. 20

It is not sufficient to say *quod felonice fregit prisonam*. *ib.*

Breakers of prisons whose offence is under the degree of capital, shall be severely punished by fine and imprisonment. *ib.* s. 21

By 16 Geo. 2. c. 31. to assist the escape of a prisoner for treason or felony, or to convey instruments to him for the purpose, is transportation. But if the prisoner be confined for

for petty larceny, &c. it is a misdemeanour only (*Vide* "ESCAPE" for the particulars).
ch. 19 and 20

BURGESS.

"Burgess" is too general, and therefore not a good addition of the state and degree.

262. s. 112

BURGH.

A *visne* may come from a burgh. 255

BURGLARY.

A writ of appeal for burglary may be abated by the court *ex officio*, for the word *burgulitur*, instead of *burglariter*, or *burgulariter*.

258. s. 97

By 5 Ann. c. 31. whoever shall prosecute a burglar to conviction, shall have 40*l.* reward, and a certificate exempting from parish offices, &c.

123. s. 27

But the reward of 40*l.* abolished by 58 Geo. 3. c. 70. 126

An indictment must describe the offence by the word *burglariter*, or *burgulariter*, or *burguluriter*. 310

Principals and accessories before the fact in burglary, excluded from clergy. 497

An indictment for burglary is insufficient without the word *noctanter*. 310

Accomplices in burglary discovering, &c. two offenders, are entitled to a pardon. 532. s. 6

BURNING IN THE HAND.

By 4 Hen. 7. c. 13. convicts for murder, not in holy orders, shall be marked with an M; and for felony, with a T, in the brawn of the left thumb. 502. s. 121

By 18 Eliz. 7. every convict admitted to clergy and burnt in the hand, shall be delivered out of prison, and not to the ordinary. 503. s. 124

By 5 Ann. c. 6. persons convicted of larceny burnt in the hand, may be ordered to the house of correction. 506

By 19 Geo. 3. c. 74. made perpetual by 39 Geo. 3. burning in the hand abolished. 507

BUTLER.

A butler who has the bare charge of goods without the possession, cannot maintain an appeal. 237. s. 44

CALENDAR OF PRISONERS.

By 3 Hen. 7. c. 3. the sheriff shall certify a list of his prisoners to the justices of gaol-delivery, for the purpose of being calendared. 181

CANON LAW.

All persons in holy orders have the privilege of clergy by the canon law. 470

The canon law is of no force, except where it is allowed by, and is consistent with, the common or statute law of the realm. *ib.* s. 2

In what instances the common law has been received, with respect to the benefit of clergy. 471

CAPIAS.

See PROCESS.

Doors may be broke open to execute a *capias*, grounded on an indictment; or a *capias* from the king's bench, or chancery, to compel surety for the peace, &c. or a *capias utlagatum* or *pro fine* in any action. 136. s. 3, 4

A *capias* upon an indictment will bring the party imprisoned by virtue of it within the statute *de frangentibus prisonam*, if he break from custody, although no crime were in truth committed. 185. p. 5

In what case a *capias* shall issue, upon a *nihil* being returned to a *venire*. 395. s. 10

A *capias* is not, properly, the first process on an indictment, under the degree of *mayhem*, or felony, &c. unless given by some statute. *ib.* s. 11

A *capias* is the first process on information against a commoner for intrusion, &c. *ib.* s. 12

Where a *capias* shall issue in *QUI TAM*. *ib.* s. 13

A *capias* shall issue on a criminal information, if no appearance be entered in four days after *subpana*. 396. s. 14

A *capias* is the first process in all indictments of treason or felony. *ib.* s. 15

How many days must be between the *teste* and the return. *ib.* s. 16

A *capias* shall issue against a defendant who escapes. 397. s. 19

On every indictment under the degree of capital, there must be three *capias* before the *exigent* shall be awarded. 423

How many *capias* are required in *outlawry* on a capital offence. *ib.*

CAPITAGE.

What it is. 112. s. 2

CAPTION.

If it appear by the caption of an indictment, that it was found by less than twelve jurors, the proceedings upon it will be erroneous. 295. s. 16

Contrary to former determinations, the omission of the words *proborum et legulum hominum* in the caption of an indictment is not fatal. 296

The caption of every indictment must shew, that it was taken before such a court as had jurisdiction over the offence. 347. s. 119

Whether it be necessary in the caption of an indictment to insert the words *neon ad diversus felonias*, or the words *domini regis*, &c. 347. s. 121, 122

The caption of an indictment at sessions of the peace must mention before whom the sessions was holden, and set forth the nature of the commission of the justices, &c. 348. s. 123

If it does not name the justices, or if it omits the word *assignat*, it is insufficient. 348

A caption taken *ad magnum curiam cum lete tentum*, is sufficient. 348. s. 124

A caption taken at a leet, without shewing whether

- ther the court was held by grant or prescription, is sanctioned by many precedents. 349
- The caption of an indictment found at the leet, or other inferior court, *must expressly shew*, that the jurors were twelve in number; that they were of the place, &c. for which the court is holden, and that it was found upon their oaths. *ib.* s. 126
- And *quare*, if the omission of the jurors names in the caption is not error. *ib.*
- How far the omission of certain *technical phrases* in the caption will, or will not, vitiate the indictment. *ib.*
- The caption of an indictment must set forth the day and year when the court was holden. 350. s. 127
- It may be recorded as found in the *present tense*. *ib.*
- It must shew in the year of *what king* it was taken. *ib.*
- If the style of the day or year be set forth in any figures but Roman, it is insufficient. *ib.*
- The year of our Lord is not necessary. *ib.*
- An indictment taken at an *adjourned* session, must shew when the *original* session began. *ib.* (N. 1)
- If the court is stated to have been held on a day which is impossible, it is fatal. *ib.*
- If a caption set forth no place at all, where the indictment was found, or not with sufficient certainty, or set forth a place not within the jurisdiction of the court, it is insufficient. *ib.* s. 128
- CARRIER.
- A carrier to whom goods are delivered may have an appeal against those who shall take them feloniously away. 237. s. 44
- CASTLE.
- A *visne* may come from a castle. 256
- CEPIT.
- An appeal of larceny is insufficient without the word "*cepit*." 249. s. 77
- CERTIFICATE.
- "*Ne unques accouple*, &c. shall be tried by the bishop's certificate. 234. s. 36. 245. s. 62
- CERTIORARI.
- A writ or bill of appeal may be removed from the sheriff into the king's bench by a *certiorari* taken out by a stranger. 265. s. 126
- An appeal into the king's bench by *certiorari* ought to be arraigned on the crown side. 485. s. 4
- A *certiorari* is not the proper writ to remove a record of the conviction of a principal, as evidence on a trial of the accessories in the king's bench. 456
- The king's bench may award a *certiorari* to remove the proceedings from any inferior court, unless they are exempted by the charter of institution. 399. s. 22
- A *certiorari* from the king's bench lies to justices in eyre, gaol-delivery, and of a county palatine. 400
- It lies to the *College of Physicians* in cases where they are empowered to fine and imprison. 400
- It lies to *justices of the peace*, &c. even where they are impowered finally to hear and determine. *ib.*
- It lies to *commissioners of sewers*, notwithstanding the act says they shall not be compelled to certify their proceedings. *ib.*
- It lies to remove a presentment in a court leet. *ib.*
- It lies to remove the *examination of prisoners* before justices of peace taken pursuant to the statutes of Philip and Mary. *ib.*
- It lies to a *private jurisdiction* created by act of parliament. *ib.*
- It lies to commissioners of bankrupts. *ib.*
- If judges of assize proceed against a person for non-residence, it is a good ground for a *certiorari*. *ib.*
- A *certiorari* lies to remove an indictment for not doing statute-duty on the highway, or for not repairing a bridge. *ib.*
- It lies to the quarter-sessions of a corporation. *ib.*
- Or to remove proceedings before two justices. *ib.*
- It lies to remove an order on appeal from a scavenger's rate. *ib.*
- It lies to remove an inquisition taken by the sheriff under a private act of parliament, and the verdict and judgment thereon. *ib.*
- It lies to remove an order of bastardy. *ib.*
- A *certiorari* will lie to the *courts of the Cinque Ports* to remove all criminal proceedings. *ib.* s. 24
- A *certiorari* will lie to the grand session, or a session of the peace for *Wales*, to remove any indictment for a crime non-capital. 401
- A *certiorari* has removed an indictment for murder from *Wales*. *ib.* (N. 1)
- A *certiorari* may be granted to remove any indictment from *London or Middlesex*, on three days notice being given. *ib.* s. 26
- But by a *certiorari* to *London*, only the *tenor* of the indictment shall be removed. *ib.*
- The king's bench is bound to grant a *certiorari* to remove an indictment at the instance of the king. *ib.* s. 27
- But if the defendant pray a *certiorari* it is in the discretion of the court whether they will grant it or not. 402
- And the absolute right of a prosecutor to a *certiorari* is confined to cases where the crown itself is concerned, by the attorney-general. *ib.* (N. 1)
- Where a private prosecutor only uses the king's name, it is also granted, *unless cause be shewn against it*. *ib.*
- But every defendant must lay a special ground before the court will grant a *certiorari*. *ib.* (N. 1)
- The court will never grant a *certiorari* for the removal of an indictment before justices of gaol-delivery, without some special cause. 402
- Instances in which the court have removed indictments from justices of gaol-delivery. *ib.*
- The court of king's bench will not grant a *certiorari* for a conviction of recusancy upon a default at sessions. *ib.* s. 29
- It seems a good objection against the granting a *certiorari*

- certiorari*, that issue is joined below, and a venire awarded. 402. s. 30
- A *certiorari* shall never be awarded to remove an indictment *after conviction*, unless for special cause. *ib.* s. 31
- A *certiorari* may issue to remove a conviction upon the forest law: the reason of it. *ib.*
- The court will refuse a *certiorari* to remove a recognizance from justices of oyer and terminer. 403
- No orders of commissioners of sewers ought to be filed without notice. *ib.*
- In what manner the king's bench will proceed on a *certiorari* to commissioners of sewers. *ib.*
- By 1 & 2 Philip and Mary, c. 13. no *certiorari* shall be granted to remove any recognizance, unless signed by the chief justice, or, in his absence, one of the other judges, &c. *ib.* s. 35
- By 5 and 6 W. and M. c. 11. in term time no *certiorari*, at the prosecution of the party indicted, shall be granted by the king's bench to remove any indictment or presentment from sessions *before trial*, unless on motion in open court. *ib.* s. 36
- But in vacation such writ may be granted by any of the judges of B. R. whose name, and also the name of the person to whom granted, shall be indorsed thereon. 404. s. 36
- To whom the writ of *certiorari* is to be directed. 404
- Where a record may be removed into the king's bench without any *certiorari*. 405
- By 1 R. ac. 1. c. 8. *certiorari's* for the removal of an indictment of riot, forcible entry, or assault and battery, from the quarter-sessions, shall be delivered in open court, and before allowance the defendant shall be bound in 10*l.* with sureties, to pay the prosecutor his costs and damages. *ib.* s. 42
- The king's bench, upon the removal of any indictment, required a recognizance from the defendant to carry down the record. 406
- By 5 & 6 W. and M. c. 11. and 8 & 9 Will. 3. c. 33. defendants prosecuting *certiorari's* at sessions shall enter into a recognizance of 20*l.* with two sureties, before one justice of the peace, or judge of king's bench, &c. to appear and plead to issue in the king's bench at his own costs, to try the indictment at the next assizes or term, on notice to the prosecutor. 407. s. 44
- Such recognizances, *certiorari's*, and indictments, shall be filed in the king's bench, and the name of the prosecutor (if he be the party grieved, or some public officer) indorsed on the back of the indictment. 406
- By 5 & 6 Will. and Mary, c. 11. if the defendant prosecuting such *certiorari* be convicted, the king's bench shall award taxed costs to the prosecutor, if he be the party grieved, or a civil officer, &c. *ib.* s. 45
- The prosecutor, within ten days after demand, shall have an attachment for the recovery of the costs so taxed, and the defendant's recognizance shall not be discharged till they are paid. 407
- By 5 & 6 W. and M. c. 11. the same is enacted concerning *certiorari's* to the counties palatine. 407. s. 46
- The justices must make a return, although a proper recognizance be not given according to the act. *ib.* s. 47
- The above statutes only refer to defendants indicted, therefore *certiorari's* obtained by prosecutors remain as at common law. *ib.* s. 48
- The above statutes do not restrain the power of the king's bench in taking recognizances upon granting *certiorari's* at common law. *ib.* s. 49
- If such a recognizance varies, either in the sum or the condition, from the directions of the act, yet it is of the same force as before the act was made. *ib.*
- A *certiorari* procured by a defendant under the statutes will not be a *supersedeas* to the courts below, unless the conditions are complied with. *ib.*
- If the sureties appear to be worth 20*l.* the justices cannot refuse them. *ib.* s. 50
- Quare, If some of several defendants find sureties, whether the indictment shall be removed as to all. 408. s. 51
- The taxation shall only be of the costs subsequent to the *certiorari*. *ib.* s. 52
- The prosecutor, by accepting taxed costs, is not restrained from aggravating the fine. *ib.* s. 53
- But under a *certiorari* at common law, the acceptance of costs is entire satisfaction. *ib.*
- The prosecutor, to be entitled to costs, must be either a civil officer, or the party injured. *ib.*
- If the prosecutor be a party injured, or a civil officer, and the same is omitted to be indorsed on the back of the indictment, the truth of the fact may be supplied by affidavit. *ib.*
- If the prosecutor receive the third part of the fine, and then applies for his costs under the recognizances, what he has received shall be deducted. *ib.*
- The payment of the fine does not discharge the defendant's recognizance for the costs. *ib.*
- When the costs are taxed they become a vested debt, and the personal representatives of the party may recover them. *ib.*
- The court will not order a recognizance at common law to stand as a security for costs. *ib.*
- But the recognizance shall not be forfeited for not going on to trial, unless the prosecutor give rules according to the practice of the court. *ib.* s. 54
- After the recognizance, the court will not listen to any motion to quash the indictment or *certiorari*. 409. s. 55
- By 5 Geo. 2. c. 19. No JUDGMENTS OR ORDERS OF JUSTICES OF THE PEACE shall be removed by *certiorari*, unless the party suing the *certiorari* shall first enter into a recognizance, with sureties, before the justice or sessions where the judgment or order is made, or before one of the judges of king's bench, in the sum of 50*l.* to prosecute the same at their own costs without delay, and to pay the other party their full costs and charges within one month after such judgment or order is confirmed. *ib.* s. 57

The recognizance shall be certified to king's bench, and filed with the *certiorari* and judgment, &c. If the judgment is confirmed, the party entitled shall have an attachment for his costs, if not paid within ten days after demand. 409

By 13 Geo. 2. c. 18. no *certiorari* shall issue to remove any proceedings before justices of peace, unless applied for within six calendar months, and on oath, that six days notice thereof in writing to the justice, &c. who may show cause against the issuing of such *certiorari*. *ib.*

The decisions on these statutes enumerated. 410
After a *certiorari* is allowed, all subsequent proceedings on the record below are erroneous. *ib.* s. 57

How the delivery of a *certiorari* operated before the 21 Jac. 1. 411

If execution has been awarded below, the justices, &c. should issue a *supersedeas* to the sheriff, which will make a subsequent execution void. *ib.*

If the execution be partly levied before the delivery of the *supersedeas*, a writ of *venditioni exponas* will authorize the sheriff to proceed. *ib.* s. 58

A *certiorari coram nobis*, &c. makes all proceedings on the record, subsequent to its delivery, erroneous, whether before or after its return. *ib.*

A *certiorari* in this respect is stronger than a writ of error, which is ineffectual unless the record be certified in a reasonable time. *ib.*

It is said, the very issuing of a *certiorari* is a *supersedeas*. *Sed quare.* *ib.*

For if a *certiorari* to remove an indictment be not delivered before the jury sworn, the trial may proceed. *ib.*

A *certiorari* is of no effect unless it be delivered before its return is expired. *ib.*

A *certiorari* is no *supersedeas* of an indictment at sessions, without a proper recognizance. 412

A *certiorari* removes all proceedings done between the *teste* and the return. *ib.* (N)

A *certiorari* for the removal of a recognizance of good behaviour, or for an appearance at sessions, will not *supersede* its obligation. *ib.* s. 60

If an indictment be removed by *certiorari* after issue joined and remanded, the trial shall proceed as if no *certiorari* had issued. *ib.* s. 61

Inferior courts proceeding after *certiorari* delivered, are guilty of contempt. *ib.* s. 62

A *certiorari* once filed, the proceeding below can never be revived by *procedendo*. *ib.* s. 63

But the *certiorari* may be taken off the file, if improperly obtained, and then a *procedendo* may be moved for. *ib.* (N. 1)

If the defendant be convicted and the prosecutor sues out a *certiorari*, the defendant shall have *procedendo*. *ib.*

The return to a *certiorari* must be under the seal of the court or person to whom it is directed. *ib.* s. 65

A return held bad, because upon paper instead of parchment. *ib.* (N)

The return must be made by the very person to

whom the *certiorari* is directed, unless he have power to make a deputy, and that power be shewn in the return, or otherwise nothing is removed by it. 412. s. 66. (N)

If the return differ from the writ in the description of the person, yet it is good, provided he is equally well known by either description. *ib.*
Quare, how the Court shall proceed upon a *certiorari* returned by a part only of the persons to whom it was directed. *ib.*

Before a recognizance taken by a justice is recorded at the sessions, it must be returned by the justice, although it may be in the custody of the clerk of the peace. 413. s. 67

A return by justices shall have the clause *necon ad diversas felonias*, &c. 413

If the person to whom a *certiorari* is directed make a false return, no affidavits shall be received of its falsity, but the party injured must sue or inform for the false return. *ib.* s. 68

But if the public good be immediately concerned, the Court will refuse to file such false return. *ib.*

The return to a *certiorari* ought to certify the record itself, or the tenor of it, or the tenor of the tenor, according as the writ may require. *ib.* s. 71

Where the writ requires the record a return of the tenor only is naught. *ib.*

Except in London, where a return of the tenor only is warranted by the city charters. *ib.*

If the purport of the *certiorari* be only to try the issue of *nul tiel record*, it is sufficient to certify the tenor, though the writ require the record. 414

Also if the court awarding the *certiorari* have no jurisdiction to proceed upon the subject matter of the record itself, the court below ought only to certify the tenor. *ib.*

Nothing can be removed where the *certiorari* is improperly directed. *ib.*

A *certiorari* may remove a record before its return, though such record be not in *esse* at the time of the *teste*, or delivery. *ib.*

A verdict cannot be removed from sessions before judgment. *ib.* (N)

A *certiorari* will remove an indictment, notwithstanding a discontinuance on it in the court below. *ib.*

Where the *certiorari* requires an indictment or other record taken before justices of a certain description, and that certified appears to have been taken before justices of a different description, nothing is removed. *ib.* s. 76

Where the writ describes an indictment for stealing two horses, and that certified is for stealing one only, nothing is removed. 415. s. 77

Nor where the variance is between foreign salt and salt in general; or in the description of a place. *ib.* s. 78

Nor where the record required is against A. B. and C. and that certified it against A. only. *ib.* s. 80

But a *certiorari* to remove a record against A. only, will remove it as against him, although others may be included in it. *ib.*

Where

Where there is a material variance between the writ and the record certified, in the names or addition of the parties, nothing is removed. 415. s. 80

Yet if the variance be only in the spelling, and the words have the very same sound, it is immaterial. *ib.*

If the writ name more defendants than are named in the record, it is variance. 416. (N)

Where the record required is not removed, the Court will quash the writ, and award a new one, or suffer the Court below to proceed, as in discretion shall appear proper. *ib.* s. 82

What process is to be awarded after the removal of a record by *certiorari* into a superior court. *ib.*

CHALLENGES.

See JURORS.

A prisoner for any crime may, by the common law, challenge any of the *Grand Jury*, as being outlawed for felony, villeins, returned by the prosecutor, or not returned by the proper officer, &c. 295

Whether a prisoner who challenges more jurors than the law allows, shall be adjudged to stand mute. 458. s. 2

No challenge can be taken either to the array or the polls of the *Petty Jury*, until a full jury appear. 563

No juror can be challenged, either by the king or the prisoner, after he is sworn, except by consent, unless for some cause subsequent to his being sworn. *ib.*

The array cannot be challenged after any of the jurors are sworn. *ib.* s. 1. (N)

A juror, after he has sworn, may be peremptorily challenged another day. *ib.*

Formerly the king might challenge peremptorily any number of jurors. But by 33 Edw. 1. he shall now assign a cause certain, the truth of which shall be tried, as in other challenges. 569. s. 2

This statute extends as well to all criminal cases as to civil. *ib.* s. 3

The king need not shew his cause of challenge till the whole panel is perused, and it appears there will not be sufficient without the person so challenged. *ib.*

If the defendant challenge *pours paravails*, he shall shew his causes, before the king need shew any. *ib.*

A peer can take no challenge to any of his peers. *ib.* s. 4

Where several are tried on a joint *venire*, the challenge of one is a challenge as to all. *ib.*

By 24 Geo. 2. c. 13. no challenge shall be taken by a peer to any panel for want of a knight. *ib.*

The prisoner must take all such challenges himself, even in cases where counsel are allowed. 570

By the common law, a *peremptory* challenge was allowable in all capital cases. *ib.*

By 33 Hen. 8. c. 23. it shall not be allowed in high treason or misprision of high treason. *ib.*

But as to high treason, the right of peremptory

challenge is revived by 1 Mary, c. 10. 570

Quare, whether a peremptory challenge shall be allowed upon the trial of a collateral issue. *ib.* s. 6

At common law the prisoner might challenge any number of jurors peremptorily under the number of thirty-six. 571. s. 7

By 22 Hen. 8. c. 14. no person arraigned for any petit treason, murder, or felony, shall be admitted to challenge peremptorily above twenty. *ib.* s. 8

But the 1 and 2 Phil. & Mary, c. 10. has revived the old challenge of thirty-five as to petit treason. *ib.*

Contrary to the opinions of Hale and Hawkins, if a prisoner challenge more than twenty, the challenge shall be over-ruled, and the juror sworn. *ib.* s. 9

Where a juror is challenged for cause by the prisoner, the cause shall be immediately shewn, and not as in a challenge as by the king, after the panel is perused. *ib.* s. 10

If the cause of challenge be disallowed, the same juror may be challenged *peremptorily* before he is sworn. *ib.*

It is a good cause of challenge that a juror is an alien, a minor, or a villein. 572

A peer may be discharged from the jury by writ of privilege, or he may challenge himself as being a peer, or he may be challenged, for that cause, by the party. *ib.* s. 11

In what cases want of freehold is a good cause of challenge against jurors (See JURORS). *ib.*

It is a good cause of challenge that a juror is outlawed or sentenced to any infamous punishment, or that he hath been convicted of treason, felony, perjury, conspiracy, forgery on 5 Eliz. &c. 576

Such exceptions are not saved by a pardon, *quare*. 577

Anciently excommunication was a good cause of challenge. *ib.*

But such causes, unless the record be shewn, are not principal, but to the favour only. *ib.*

The conviction of conspiracy must be at the king's suit. *ib.* (N)

It is no good cause of challenge to a juror that he is returned upon the panel contrary to the statute West. 2. c. 38. *ib.* s. 26

By 25 Edw. 3. c. 3. No indictor who has indicted a party for the same cause, shall be upon the inquest. *ib.* s. 27

If the juror have any claim to the forfeiture which may follow conviction, it is a good cause of challenge. *ib.* s. 28

Or that he hath declared an opinion against the prisoner maliciously. 578

A juror cannot be examined as to such fact upon a *voir dire*, because it sounds in reproach. *ib.* (N)

It is no good challenge that the jury has found others guilty on the same indictment. *ib.* s. 29

If a juror hath given his dogs the names of the king's witnesses, it is a good cause of challenge for the king. *ib.* s. 30

The king may make a principal challenge or to the favour, where he is a party. 578. s. 31

A subject cannot take a challenge for the favour against the king. *ib.* s. 32

The subject cannot challenge for the malice of the sheriffs, unless some instance of partiality be shewn. *ib.*

It is no principal challenge, where the king is a party, that the juror is his immediate tenant. *ib.* s. 33

A challenge for such cause ought to conclude to the favour. *ib.*

By 28 Edw. 3. c. 13. Aliens and Denizens shall be tried by jurors the one half denizens and the other aliens, if so many aliens can be found in the place, &c. *ib.* s. 34

The English half of the jury ought to be qualified as jurors (See Jurors). *ib.*

Quere, if any omission which the law requires in a jury *per medietatem lingue*, be a good cause of challenge. 580

CHAMPIONS.

See BATTLE.

CHANCERY.

See BAIL.

CHARGE.

He who has the bare charge of goods without the possession, cannot maintain an appeal of larceny for them. 237. s. 44

CHEAT.

Any one may arrest a notorious cheat actually caught playing with false dice. 20. s. 20

CHIEF PLEDGES.

Constables of tithings, now called petit constables, were anciently called chief pledges. 98. s. 33

CHURCH-WARDENS.

See APPEAL.

CINQUE PORT.

See CERTIORARI.

CITIZEN.

Citizen is too general, and therefore not a good addition of the state and degree. 262. s. 112

CITY.

A *vicus* may well come *de vicineto civitatis*, which does not exclude the city. 256

A city and the county thereof shall be taken *prima facie* to be of the same extent. 264

Who may be jurors for trials in cities. c. 43. s. 12. 19. 24

CIVIL LAW.

The civil law, where it is admitted, is part of the common law. 16. s. 11

The court of the constable and marshal shall be guided by the civil law, in cases not within its own practice. *ib.*

What appeals are to be tried by the civil law. 226

CLERGY.

Anciently the clergy insisted that the sacredness of their characters exempted them from the punishments of secular tribunals. 470. s. 1

498. s. 110

And, by the canon law, all persons in holy orders were intitled to the *privilegium clericale*. 470

Before the statute of *articuli cleri*, 9 Edw. 2. the privilege of clergy was denied to those who had abjured the realm, or confessed their guilt, &c. 471. s. 3

By 25 Edw. 3. c. 4. all manner of clerks, as well secular as religious, shall enjoy the benefit of holy church. *ib.* s. 4

All persons were construed to be within this statute who could *reud a verse*, except convicted heretics, Jews, Mahomedans, Pagans, persons blind, or maimed, or those guilty of bigamy. *ib.*

But by 1 Edw. 6. c. 12. persons guilty of bigamy are admitted to clergy. 472

By 21 Jac. 1. c. 6. women guilty of such larceny for which men were admitted to clergy, shall be burnt in the hand and imprisoned. *ib.* s. 6

By 3 and 4 Will. and Mary, c. 9. where a man may demand his clergy, a woman, upon her prayer for the benefit of this statute, shall have it also, and be burnt in the hand and imprisoned. *ib.* s. 8

Sacrilege and breaking the prison of the ordinary, where only intitled to clergy at the discretion of the ordinary. *ib.*

By 4 Hen. 7. c. 13. every person not within orders, who has once received the benefit of clergy, shall not be admitted to it a second time. 473. s. 11

Every person within holy orders claiming clergy a second time, shall lose the benefit, if he fail to produce his letters, or a certificate on a day given by the Court. *ib.*

By 28 Hen. 8. c. 3. persons in holy orders shall be under the same pains as persons not in holy orders, as to the offences mentioned in this statute. *ib.* s. 12

By 32 Hen. 8. c. 2. persons in holy orders admitted to clergy, shall be burnt in the hand, and suffer in all respects as lay persons so admitted. *ib.*

By 1 Edw. 6. c. 12. all persons convicted of other offences than those mentioned in the act, shall have the benefit of clergy, as before the first of Hen. 8. *ib.* s. 13

Where lay persons are not excluded from clergy the first time, persons in holy orders shall have it as often as they want it, except, &c. *ib.*

But where the offence is generally excluded from clergy, persons in holy orders shall have no more benefit than lay persons. 474

By 34 and 35 Hen. 8. c. 14. the clerks of the peace shall certify the attainders of clerks convict unto the king's bench, and, on being written to, shall certify the same to the judges of great delivery. *ib.* s. 14

The

The justices may write in their own name to the clerk of the crown in the king's bench, for the certificate of the transcript of an attainder. 474. s. 2

By 3 and 4 Will. & Mary, c. 9. the clerks of the peace, &c. shall certify convictions, at the request of the prosecutor, which shall be evidence on a second indictment for an offence within clergy. 475. s. 19

In what manner a Counterplea may be filed, in order to oust an offender of his clergy. *ib.* (N)

Clergy is demandable by the common law, upon an indictment or appeal, for any crime whatsoever which subjects the offender to the loss of life or member, except high treason and sacrilege. 476. s. 20

New-created treasons against the king are also excluded, without special words. *ib.* (N)

Petit treasons seem to have been excluded by the common law. But by 25 Edw. 3. *de clero*, c. 4. it is allowed for any treasons or felonies touching other persons than the king himself. *ib.* s. 21

The construction also, that *insidiatores viarum* and *depopulatores agrorum* were ousted of clergy, is revived by 4 Hen. 4. c. 2. *ib.* s. 22

From the above statutes it follows, that all persons who were intitled to the benefit must, if not intitled to it, be denied it by some statute made since the 25 Edw. 3. *ib.* s. 23

Wherever an offence is made felony by statute it shall have clergy, unless expressly excluded. *ib.* s. 24

To oust an offender from the benefit of clergy, the indictment must expressly bring his case within the statute by which the privilege is taken away. *ib.* s. 25

A murder must be laid and proved of *malice prepense*; the offence of an accessory before must be *maliciously*; of a cutpurse *clam et secretè à personâ*; robbery must be *in or near the highway*, or the offender shall have his clergy. *ib.*

But with respect to accessories, words which are tantamount in sense, and differ only in the manner of expression, are sufficient. *ib.*

Where a statute takes away clergy from an offence which was capital at common law, the indictment need not conclude *contra formam statuti*. 477

A statute excluding the principals from clergy doth not thereby exclude accessories before or after. *ib.* s. 26

Neither doth a statute excluding the accessories thereby exclude principals. *ib.*

Where a statute excludes those from clergy who shall be found guilty of any crime, it shall be construed to exclude principals only. *ib.*

Where clergy is allowable, it shall be allowed as well to one who stands mute, &c. as to one who is convicted. *ib.* s. 27

But a statute taking clergy from those who shall be found guilty, doth not take it from those who shall stand mute, &c. *ib.* s. 28

But such a statute extends as well to those who

shall confess, as to those who are convicted by verdict. 477. s. 28.

OF STATUTES TAKING AWAY CLERGY. 478. s. 29
By 23 Hen. 8. c. 1. no person found guilty of petit treason, murder of *malice prepense*, robbing churches, &c. or persons in their dwelling-house, any of the family being therein and put in fear, robbing in or near the highway, burning houses, or barns of corn, nor any accessories to such offenders, shall be admitted to clergy, persons in holy orders excepted. *ib.*

This statute does not extend to persons standing mute, challenging, &c. or outlawed, and was therefore easily evaded. *ib.* s. 31

By 25 Hen. 8. c. 3. this defect is remedied. *ib.* s. 32

But this statute extends not to appeals, nor to accessories before, nor to persons outlawed. *ib.* s. 33

By 1 Edw. 6. c. 12. the above offences and all horse-stealers are again ousted of clergy; but all other cases of felony shall be entitled to clergy in the same manner as before the 1 Hen. 8. 479

The statute extends to appeals, persons in holy orders, and persons outlawed. *ib.* s. 35

The defects of this statute pointed out. *ib.*

By 5 and 6 Edw. 6. c. 10. the 25 Hen. 8. is revived. *ib.*

The question examined, whether this statute revives the whole of the 25 Hen. 8. &c. &c. *ib.*

By 4 and 5 Phil. & Mary, c. 4. accessories before to petit treason, wilful murder, robbery in a dwelling-house, or near the highway, and arson, are debarred of clergy. 482

This statute is restrained to such robberies in a dwelling-house only as were deprived of clergy by the former acts. 483. s. 46

An indictment or appeal to oust an accessory of clergy, must pursue the substance of this statute exactly. *ib.* s. 47

By 3 and 4 Will. & Mary, c. 9. such persons as were before excluded by former acts, on conviction by verdict or confession, are excluded on standing mute, challenging, &c. or being outlawed. *ib.* s. 48

This statute does not extend to appeals, nor to felonies by subsequent statutes. *ib.* s. 49

By 23 and 25 Hen. 8. principals in Petit Treason are excluded from clergy upon indictment, &c. &c. 484. s. 50

Quare if they are not excluded in appeals. *ib.* s. 51, 52

By 23 and 25 Hen. 8. and 1 Edw. 6. c. 12. wilful Murder of *malice prepense* is excluded in all cases. *ib.* s. 54

It is not excluded in appeals upon challenging more than twenty. *ib.*

By 4 and 5 Phil. & Mary, c. 4. accessories before are excluded as well upon indictments as appeals in all cases. 485. s. 56

By 1 Jac. 1. c. 8. Homicide by Stabbing is excluded; but those who abet this offence are not. *ib.* s. 57

By 3 and 4 Will. & Mary, c. 9. those indicted Of

- of such manslaughter are excluded, as well on standing mute, &c. as on conviction. 485. s. 58
- By 8 Eliz. c. 4. Larceny from the person of another *privily without his knowledge* was excluded from clergy. *ib.* s. 59
- This statute does not extend to accessaries either before or after. *ib.*
- This statute was repealed by 48 Geo. 3. c. 129. 485
- By 1 Edw. 6. c. 12. and 2 and 3 Edw. 6. c. 33. principals in Horse Stealing, &c. are excluded from clergy. 486. s. 61
- By 31 Eliz. c. 12. all accessaries both before and after are also excluded. *ib.* s. 63
- By 10 and 11 Will. 3. c. 23. to commit larceny in any shop, warehouse, coach-house, or stable, *privately*, and to the value of five shillings, or to aid therein, is excluded from clergy. 486. s. 64
- But by stat. 1 Geo. 4. this statute is repealed as to privately stealing in the warehouses, &c. under 15*l.*, and by 4 Geo. 4. c. 53. clergy restored in cases above 15*l.* 487
- By 12 Ann. c. 7. to steal from any dwelling-house or out-house, to the amount of forty shillings is excluded from clergy. *ib.* s. 66
- Apprentices under fifteen years of age who shall rob their masters are not within the act. *ib.* s. 67
- Persons outlawed and accessaries are not within this act. *ib.* s. 68
- By 22 Car. 2. c. 5. to steal cloth or Woollens from the Rack or tenter in the *night-time* is excluded from clergy. *ib.* s. 69
- By 4 Geo. 4. ch. 53. clergy restored. 487
- By 22 Car. 2. c. 5. embezzling *Neighbour's* Stores to the amount of twenty shillings is excluded from clergy. 488. s. 70
- Clergy restored by 4 Geo. 4. c. 53. 488
- By 14 Geo. 2. c. 6. and 15 Geo. 2. c. 34. to steal Sheep, or the other cattle therein mentioned, is excluded from clergy. *ib.*
- By 24 Geo. 2. c. 45. to steal goods on Navigable Rivers to the value of forty shillings is excluded from clergy. *ib.*
- Clergy restored by 4 Geo. 4. c. 53. 489
- By 26 Geo. 2. c. 19. stealing from Vessels in Distress, &c. is excluded from clergy. *ib.*
- By 23 Hen. 8. c. 1. 25 Hen. 8. c. 3. and 3 and 4 Will. & Mary, c. 9. Sacrilege, or robbing any church, chapel, or holy place, is excluded from clergy. *ib.* s. 72
- It is not sacrilege within this act, unless the robbery be accompanied with a breaking. *ib.* s. 73
- But by 1 Edw. 6. c. 12. all persons are ousted of clergy for feloniously *taking* goods out of any church, &c. *ib.* s. 74
- The offender may be tried in a different county than that in which the offence shall be committed. *ib.*
- Accessaries to such a robbery or taking are not excluded by any statute, unless the offence amount to burglary. *ib.* s. 75
- Quare*, if sacrilege is not excluded from clergy by the common law. *ib.* s. 76
- All persons not in holy orders, indicted of "robbing in or near the highways," are excluded by 23 and 25 Hen. 8. 1 Edw. 6. c. 12. and 3 and 4 Will. & Mary, c. 9. 490
- No robbery is within these statutes but such as is laid "in or near the highway, and to have put the person robbed in fear." *ib.* s. 79
- By 25 Hen. 8. c. 3. and 3 and 4 Will. & Mary, c. 9. robberies and burglaries tried in a different county from that in which they were committed, are excluded from clergy, if they be of such a kind as would have been excluded upon a conviction in a proper county. 490, 491
- There is no need of an entry on record that the felony was committed in a different county. 491. s. 82
- But it is usual to write on the margin of the indictment, that it is for felony in another county. *ib.*
- What judgment an offender shall receive who is convicted of an offence within clergy in the second county, &c. 492. s. 83
- By 3 and 4 Phil. & Mary, c. 4. accessaries before the fact in robbery in or near any highway, are excluded clergy. *ib.* s. 84
- By 23 and 25 Hen. 8. and 3 and 4 Will. & Mary, c. 9. to rob any person in his dwelling-house, any of the *family* being within and put in fear, is excluded from clergy. *ib.* s. 85
- By 3 and 4 Phil. & Mary, c. 4. accessaries before are also excluded. *ib.* s. 86
- By 1 Edw. 6. c. 12. to *break* a house in the day, and commit felony therein, *any person* being within at the time, is excluded from clergy, whether tried in the same or a different county. *ib.* s. 87
- By 4 and 5 Phil. & Mary, c. 4. accessaries before are also excluded. *ib.*
- The breaking of a cupboard, door, or trunks, &c. or any fixture only, is not a breaking within the act. 493. s. 88
- By 3 and 4 Will. and Mary, c. 9. to take away goods in any dwelling-house, any person being therein and put in fear, or to aid in so doing, is excluded from clergy. *ib.*
- By 5 and 6 Edw. 6. c. 9. persons *found guilty* of robbing any other in their dwelling-house, or any part thereof, any of the *family* being within the precincts of the same, shall be excluded from clergy, whether the family there being shall be sleeping or waking. *ib.* s. 89
- No person *found guilty* of robbing any person in any booth or tent in any fair or market, the owner or *any of his family* being within, shall be admitted to clergy, whether the family there being be sleeping or waking. *ib.* s. 90, 91
- No robbery is within this statute which is not accompanied with an actual breaking. 494. s. 92
- A sojourner being in the house at the time of robbery, will not bring it within the statute. *ib.*
- It is only necessary to state, that *divers persons* were in the house, without shewing they were under any relation to the party robbed. 494
- By

- By 3 and 4 Will. and Mary, c. 9. to rob any house in the day-time, any person being therein, or to aid in so doing, is excluded from clergy. 494
- Quere*, if accessaries to a robbery in a booth or tent are excluded, except it be from the person of a man. 495
- By 39 Eliz. c. 15. any person found guilty for felonious taking away, in the day-time, money or goods to the value of 5s. in any dwelling-house, or the outhouse thereto belonging, although no person be therein at the time, shall be excluded from clergy. *ib.* s. 95
- The statute shall only extend to such a felonious taking as is accompanied with a breaking of the house, &c. *ib.* s. 96
- A chamber in an inn of court is a dwelling-house within this act. *ib.* s. 97
- A lodging in Somerset-house (an old palace), or Whitehall, is not within this act. *ib.*
- No accessary is ousted of clergy by this statute. 496. s. 98
- By 3 and 4 Will. and Mary, c. 9. whoever shall assist another to break any dwelling-house, shop, or warehouse thereunto belonging, in the day-time, and steal money or goods to the value of 5s. although no person be therein, shall be excluded from their clergy. *ib.* s. 99
- This statute not mentioning outhouses, an assistant to such a felony in an outhouse, not being a shop, &c. is clearly entitled to his clergy. 497. s. 100
- The accessaries before to such a felony in an outhouse, not being a shop, &c. are still entitled to clergy. *ib.* s. 101.
- But all principals in any felony within 39 Eliz. are excluded from clergy, whether in the same or a different county. *ib.* s. 102
- By 3 and 4 Will. and Mary, c. 9. whoever shall rob any other person, or shall assist, &c. to commit such offence, shall not have the benefit of his clergy. *ib.* s. 103
- In BURGLARY the principal is ousted of clergy, by 1 Edw. 6. c. 12. if any person be in the house at the time of the breaking, and thereby put in fear. *ib.* s. 104
- By 18 Eliz. c. 7. principals in burglary are excluded generally. *ib.* s. 105
- By 3 and 4 Will. and Mary, c. 9. accessaries before the fact are excluded. *ib.*
- By 23 and 25 Hen. 8. and 3 and 4 Will. and Mary, c. 9. principals in ARSON are excluded from clergy. *ib.* s. 107
- By 4 and 5 Phil. and Mary, c. 4. accessaries to the fact before, in all cases, are also excluded. 498. s. 108
- By 1 Edw. 6. c. 12. every peer is allowed clergy in all cases wherein others are excluded by that act, except wilful murder. *ib.* s. 109
- Therefore peers are entitled to clergy, unless ousted by some statute made since 1 Edw. 6. or revived by 5 and 6 Edw. 6. c. 10. *ib.*
- By the above statutes clergy is taken from the offences, but aiders and abettors are not named in them. *ib.* (N)
- CLERGY might be demanded by the ancient common law as soon as the prisoner was brought to the bar. *ib.* s. 110
- But ever since the reign of Hen. 6. it has been held not demandable till after trial. 498. s. 110
- And clergy may now be allowed by the person authorized to grant it, at any time, or under any circumstances, before execution actually done. 499. s. 111
- The Court might always admit to clergy, without its being demanded, upon evidence of the prisoner being a clerk. *ib.*
- Except the conviction was for sacrilege, or breaking the prison of the ordinary. *ib.*
- The temporal judge is to decide whether the offence be within the privilege, and whether the prisoner is entitled to the benefit. *ib.* s. 113
- How far the canon law is part of the common law. 500
- While the title to clergy depended upon reading the *verse*, the temporal judge over-ruled the ordinary, and recorded *legit* or *non legit*, according to his own judgment. *ib.*
- By 1 Edw. 6. c. 12. the necessity of such an ability to read, in the case of a peer, is taken away. *ib.* s. 114
- And by 5 Ann. c. 6. the necessity of such reading is also taken away as to every common person. 501. s. 115
- Anciently, if the ordinary demanded or refused his clerk against law, his temporalities might be seized. *ib.* s. 116
- But since 25 Edw. 3. c. 6. the ordinary is only liable to a fine for contempt of the *quare non admisit*. 501
- In what manner a clerk was to be delivered to the ordinary, and afterwards *demanded* by the common law. *ib.*
- By 4 Hen. 6. c. 13. commoners convict of murder shall be marked with an M, and of other felony with a T, on the brawn of the left thumb in open court, before they are delivered to the ordinary. 502. s. 121
- By 8 Eliz. c. 4. persons admitted to clergy, who have before committed any other such offence, and have not been indicted for the same, may be indicted and tried for the same, as if they had not been admitted to clergy. 503. s. 122, 123
- All persons admitted to their clergy shall, notwithstanding, be put to answer for all other felonies. 504. s. 126
- Since these statutes a conviction for a felony within clergy, and an allowance of it thereon, is as much a discharge of all precedent felonies within clergy (though not of any others) as it was before the statutes. *ib.* s. 127
- A clerk convict admitted to clergy, has by it a kind of statute pardon, the same as if he had made his purgation at common law. *ib.* s. 128
- The reasonableness of these constructions defended. *ib.*
- The admission of clergy restores the party to his credit, and enables him to be a witness. 505. s. 129
- Quere*, if a pardon would have this effect. *ib.*
- The admission to clergy gives the party a capacity to purchase goods and to retain the profits of his land. *ib.* s. 130
- The lands, &c. which the offender had at the time

time of conviction being thereby vested in the king, shall not be divested either by pardon or purgation. 505. s. 129

A pardon never avoids any precedent legal act. *ib.*

Purgation was rather connived at than allowed by the common law. *ib.*

Those who are exempt from burning in the hand shall have the same privilege without it, as others have with it. 506. s. 131

After a man is admitted to his clergy, it is actionable to call him a felon. *ib.* s. 132

By 5 Ann. c. 6. where persons shall be burnt in the hand, &c. the judge may also in his discretion commit the offender for not less than six months, nor more than two years, to the house of correction, &c. *ib.* s. 134

By 19 Geo. 3. c. 74. persons convicted of felony within clergy, and liable to be burnt in the hand, may, *instead of such burning*, be ordered to pay a moderate fine, or to be publicly or privately whipped, but not more than three times. 507. s. 135

Such whipping, &c. shall have the like effects and consequences as burning in the hand. *ib.*

But this act shall not abridge the power of the Court to imprison convicts for manslaughter for one year, nor any of the powers or punishments given by 5 Ann. c. 6. *ib.*

CLERK OF THE CROWN, ASSIZE, AND PEACE,

In what manner to certify the conviction or attainder of one admitted to his clergy, in order to oust him on a demand of it a second time. 474

CLIPPING.

See COIN.

COIN.

By 6 and 7 Will. 3. c. 17. whoever shall convict a counterfeiter or clipper of the coin, shall have 40*l.* &c. 122. s. 25

But this reward abolished by 58 Geo. 3. ch. 70. 126

By 15 Geo. 2. c. 28. whoever shall convict counterfeiters of the gold, silver or copper coin of the realm, shall have 40*l.* for the two first, and 10*l.* for the two last offences. 122

But this is abolished by 58 Geo. 3. ch. 70. 126

COLLATERAL

See ISSUE.

COLLEGE OF PHYSICIANS.

See PHYSICIANS.

COMMAND.

See ACCESSARY.

Commons of counties in the reign of Edward the Third were equivalent to freeholders. 75. s. 10

COMMISSION.

The court of the constable and marshal may be holden by commissioners. 17. s. 14

Such commissions may be granted notwithstanding the Petition of Right; provided they are founded in necessity, and the furtherance of justice. *ib.*

The king cannot grant *judicial* commissions, not warranted by ancient precedents, *vide* Courts.

Commissions to seize the property or person upon suspicion, without process or indictment, are illegal and void. 2. s. 7

All commissions must be agreeable to known stated forms. 19

Whether commissions of *oyer*, &c. do not come under the general notion of *writs*. 13

The form of a commission of the peace. 42

Whether judges' commissions be determined by the demise of the king. 3, 4

What commissions of the peace are not so determined. ch. 8

COMMITMENT.

Persons apprehended for offences not bailable, or who refuse bail for such offences as are bailable, must be committed. 174. s. 1

A person in the custody of a messenger, who has not his bail ready upon a *habeas corpus* to the king's bench, must be recommitted to the marshal. *ib.* (N. 1)

A justice of the peace may lawfully commit a person who refuses to perform a duty which the justice is authorised to require. *ib.* s. 2

All persons, as well private as official, having a right to apprehend for treason or felony, are justified in carrying their prisoner to the common goal; except that officers may do this by the command of another, and a *private person* cannot. *ib.* s. 3

And it is most advisable for *private persons*, who may apprehend another for treason or felony, to carry him before a magistrate, that he may, *by such magistrate*, be committed or bailed. *ib.*

The privy council, or a secretary of state, may commit for high treason. 175. s. 4

The question examined, whether a secretary of state, not having a power to examine upon oath, can have a power to commit. *ib.* (N)

The common law of England knows of no such committing magistrate as a secretary of state. *ib.* (N)

The several cases in which commitments have been made by secretaries of state. *ib.* (N. 4)

Commitments must be to some prison in *England*, and regularly it ought to be to a common prison. 176, 177

By 31 Car. 2. c. 12. whoever shall send a subject of *England* prisoner into Scotland, Ireland, Jersey, Guernsey, Tangiers, or any of the king's dominions abroad, shall be liable to treble costs, 500*l.* damages, and incur a *praemunire*. 176. s. 5

By 14 Edw. 3. c. 10. the sheriffs shall have the custody of gaols, and employ responsible under-keepers. *ib.* s. 6

By 5 Hen. 4. c. 10. none shall be imprisoned by any justice of the peace, but only in the common gaol. *ib.*

The king's grant of the custody of prisoners committed by justices of peace is void. *ib.* s. 7

None

- None can claim a prisoner as a franchise unless he have also a gaol delivery 476. s. 7
- By 6 Geo. 1. c. 19. justices may commit vagrants and other criminals either to the common gaol or to the house of correction. 177
- An offender apprehended in one county for a crime committed in another, may be brought before a justice of the county where the offence was committed. *ib.* s. 8
- But it seems the stronger opinion, that such an offender ought to be carried before a justice of the county in which he is taken, &c. *ib.*
- An offender may be committed to the next gaol where he is taken, whether in the same county or not. *ib.*
- By 23 Geo. 2. c. 26. and 24 Geo. 2. c. 55. an offender may be apprehended in one county for an offence done in another by virtue of the warrant being indorsed. *ib.*
- If it be a bailable offence, he may be bailed by a justice of the county in which he is apprehended. If it is not bailable, or he cannot find bail, he shall be carried back into the county from whence the warrant issued, and there be either committed or bailed. *ib.*
- If a gaoler refuse to take the charge of a felon from a constable, the town shall keep him till the gaol-delivery. *ib.* s. 9
- No one, without special reasons, can justify the detention of a prisoner out of the common gaol. *ib.*
- Practice seems to have authorised a commitment to a messenger for the purpose of conveying him to gaol. *ib.*
- By 31 Car. 2. c. 2. no person in custody upon a criminal charge, shall be removed from such custody unless by *habeas corpus*, or other legal writ, except where the constable is carrying him to the common gaol, &c. &c. 176
- By 2 & 3 Phil. and Mary, c. 10. every justice of peace upon a charge of manslaughter or felony, shall, previous to commitment, take the examination of such prisoner, and the information of those that bring him, respecting the fact and circumstances, and within two days after shall put as much thereof as may be material to prove the felony into writing, and certify the same to the next gaol-delivery. 178. s. 11
- The justices shall also bind the witnesses to appear and give evidence, &c. *ib.*
- A justice cannot detain a prisoner an unnecessary length of time under pretence of further examination: it is said, three days is a reasonable time. *ib.*
- A COMMITMENT must be in writing, under hand and seal, expressing the magistrate's office and authority; the time and place at which it is made, and be directed to the gaoler. 179. s. 13
- It may be made in the king's name, or the name of the person who makes it, or it may be merely tested by him. *ib.* s. 14
- The usual clause in a commitment desiring the gaoler to keep his prisoner in safe custody, is merely admonitory. *ib.* s. 15
- A commitment must set forth the crime alleged against the party with convenient certainty, or he may be discharged upon *habeas corpus*. 179. s. 16
- So also he may be bailed if the offence be loosely expressed. *ib.*
- Commitments for high treason, or felony in general, are good. *ib.*
- It is safe, but not necessary, to set forth that the party is charged upon oath; for where the magistrate hath jurisdiction, the legality of his warrant does not depend upon the truth or falsehood of the information on which it is granted. *ib.* s. 17
- Every mittimus must have a lawful conclusion. 180. s. 18
- What shall be said to be a lawful conclusion. *ib.*
- By 3 Jac. 1. c. 10. persons committed to gaol by justices of the peace shall bear their own charges, which shall be levied by distress upon their goods, &c. *ib.*
- By 27 Geo. 2. c. 3. if the offender shall not have wherewith to defray the charges of his commitment, the justice shall order the treasurer of the county to defray the same. *ib.* s. 20
- In *Middlesex* the expenses of conveying a prisoner to gaol shall be paid by the overseers of the poor of the parish where the person was apprehended. 181
- By 3 Hen. 7. c. 3. every sheriff or gaoler shall certify the names, &c. &c. of their several prisoners to the next gaol-delivery to be calendaried. *ib.* s. 21
- A prisoner lawfully committed cannot be discharged but by the king; or by the grand jury indorsing *ignoramus*; or by acquittal by the trial jury; or on proclamation by the gaol-delivery. *ib.*
- But a person committed upon a suspicion which afterwards appears to be groundless, may be lawfully discharged. *ib.*
- COMPUTATION.
See YEAR AND DAY.
- CONCEALMENT.
See COURT LEET.
- CONFESSION.
- How far those are excluded from bail who shall appear guilty by confession. 150. s. 40
- By 5 and 6 Edw. 6. c. 11. and 7 Will. 3. c. 3. high treason must be proved by two lawful witnesses, unless the party without violence confess the same in open court. 352. s. 134
- These words mean a confession upon the arraignment of the party. 353. s. 140
- If a prisoner pleads or confesses, he shall not be treated as one who stands mute if he be afterwards obstinately silent, but shall be tried or condemned. 459. s. 4
- An express confession is, where a person directly confesses the crime, which is the highest conviction that can be, and may be received after *not guilty*, notwithstanding the repugnancy. 466. s. 1
- A confession of an indictment of trespass estops the defendant to plead *not guilty* to an action for the same trespass. *ib.* s. 2

Quere, whether a confession of a capital crime will estop *not guilty* to an appeal for the same offence. 466. s. 2

Judges will not record a confession which *probably* proceeds from fear, folly, or ignorance. *ib.*

An *implied confession* is, where a defendant in a case not capital doth not directly own his guilt, but in a manner admits it by yielding to the king's mercy. *ib.*

The effect of an implied confession. *ib.*

No confession whatever before final judgment will deprive the defendant of taking exceptions in arrest of judgment, to errors on the face of the record. 467. s. 3

Before the statute *articuli cleri*, clergy was refused to those who confessed themselves guilty. 470. s. 3

By the construction of *articuli cleri* clergy was allowed to such as confessed on arraignment. *ib.*

A statute which *ousts* clergy from those who shall be found guilty, extends to those whose confession is recorded. 478

The party's own confession is the highest conviction. 502

A confession, whether upon examination in pursuance of 1 and Ph. & M. c. 13. or on a bailment or commitment on 2 and 3 Ph. & M. c. 10. or by the common law, or in discourse with private persons, may be given in evidence against the party confessing, but not against others. 594

The identity of the examination must be proved before it can be read in evidence. 595

Confessions obtained by the flattery of hope, or extorted by the impressions of fear, are not admissible in evidence. *ib.*

All acts and facts which arise in consequence of even an extorted confession may be given in evidence. *ib.*

The statute 7 Will. 3. prevents a confession of high treason, unless in open court, from having the force of a conviction. 596

A confession must be taken all together, and not by parcels. *ib.*

CONSENT.

By 6 Rich. 2. c. 6. if women after ravishment consent to the ravishers, they shall forfeit their estates, &c. to the next of blood. 244

The consent of a woman under twelve years of age is considered as the consent of one under the years of discretion: and therefore such a female consenting shall not lose her lands, &c. 246. s. 69

It is not conclusive evidence of consent, that the woman lived with the ravisher, and bore children to him, if during the whole time she was under his coercion. *ib.*

CONSERVATORS.

Conservators of the peace were by the common law either *ex officio*, or by commission. 38

The king is the principal conservator, from whom all authority of this kind is derived. *ib.* s. 1

Neither dukes, earls, nor barons, are conservators. *ib.*

The lord chancellor, keeper of the seal, the lord high steward, the lord high constable, the judges of king's bench, and master of the rolls, are conservators. *ib.* s. 2

But neither privy counsellors nor secretaries of state are conservators. *ib.*

The justices of every court of record are conservators within their respective precincts. *ib.*

Every sheriff and coroner is a principal conservator within the county. 39

So also is every high and petit constable within their respective limits. *ib.*

There were also, by the common law, conservators of the peace by tenure. *ib.* s. 7

Conservators of the peace by election were chosen by the king's writ. *ib.* s. 9

Extraordinary conservators of the peace were also appointed in times of danger. 40. s. 12

The power of conservators. 38 to 40

CONSTABLES.

See ARRESTS. BAIL. COMMITMENT.

Constables are officers originally instituted by the common law, and were not first appointed by the statute of Winchester. 98. s. 33

The object of their office is the preservation of the peace, and therefore they are authorised to arrest felons, and all suspicious persons, and to suppress affrays. *ib.* s. 34

Their duty is to present all offences inquirable in the torn or leet. *ib.*

The constable is the proper officer of the justice of the peace; and bound to execute his warrants. *ib.*

The office of constable is wholly ministerial, and no way judicial. *ib.* s. 36

Upon special cause a constable may appoint a deputy. 99

By 1 Will. & Mary, c. 18. Protestant dissenters elected to the office of constable, who scruple to take the oaths, may appoint a deputy. *ib.*

Both high and petit constables are to be chosen and appointed and sworn in by the sheriff in his torn. *ib.* s. 37

A custom of choosing constable by either the torn or the decennary is good. 99. s. 37

The court leet has this power of common right. *ib.*

Quere, if a custom to serve the office by turns is good. 100

The sheriff of the torn, and steward of the leet, having power to appoint constables, have also power to remove them. *ib.* s. 38

A sworn attorney, or rather officer of the courts at Westminster, may have a writ of privilege to excuse him from serving the office of constable. *ib.* s. 39

And no custom whatever can be pleaded against this privilege. *ib.*

Practising barristers, and servants of members of parliament, have the same privilege. *ib.*

An alderman of London is not compellable to be a constable. *ib.* s. 40

A captain of the king's guards has no privilege of exemption from serving the office of constable against a special custom. *ib.* s. 41

A practising physician shall serve the office of constable. 100
 But perhaps both the captain and physician may be relieved by the king's bench, if chosen, where there are sufficient besides, and no special custom against it. *ib.*
 Even a custom cannot exempt fit persons from serving the office. *ib.*
 A tenant in *antient demesne* is liable to serve the office. *ib.* (N)
 By 5 Hen. 8. c. 6. the wardens and fellows of the company of the *barber-surgeons* were exempted from the office of constable. 101. s. 42
 By the equity of this act, and by custom, all surgeons are allowed the like privilege. *ib.* s. 43
 By 18 Geo. 2. c. 15. which divided the *surgeons* from the *barbers* company—all freemen of the corporation of surgeons shall be exempted while they practise. *ib.*
 By 32 Hen. 8. c. 40. the president and fellows of the college of physicians shall not be chosen constables in *London*, &c. *ib.* s. 44
 This act does not extend to any other physicians. *ib.*
 By 6 Will. 3. c. 4. regular bred apothecaries are exempted during their practice. *ib.* s. 45
 By 1 Will. & Mary, c. 18. Protestant dissenting teachers are exempted. *ib.*
 By 10 & 11 Will. 3. c. 23. those who convict *burglars* or *shoplifters* shall have a certificate to discharge them from serving the office. 102
 By 31 Geo. 2. c. 17. persons at or above 63 years of age are in *Westminster* exempted from the office. *ib.*
 A naturalized foreigner excluded from offices of trust, is thereby rendered ineligible to the office of constable. *ib.*
 A college barber of *Oxford* seems exempted from this office. *ib.*
 A younger brother of the Trinity-house is not, as such, exempted from the office of constable by the charters of that fraternity. *ib.*
 In what manner a person chosen may be punished for refusing to serve the office; and how the indictment must state the offence. *ib.* s. 46
 The king's bench may award a *mandamus* to an inferior court to swear in, restore, or discharge a person to, of, or from the office of constable. 103. s. 47
 A constable is the principal peace-officer; and it is necessary that every vill should be furnished with one. *ib.* s. 59
 Justices may not only swear constables chosen at the torn or leet, but may also nominate and swear constables on neglect of the sheriffs or lords. *ib.*
 Justices also may displace constables so nominated and sworn. *ib.*
Quere whether the sessions may not swear in a constable unduly rejected by the steward of a leet. *ib.*
 A single justice may swear in a constable chosen by the leet. 104. (N. 4)
 In all cases of necessity justices may chuse any number of constables. *ib.*

Justices had power to nominate and swear constables on default of the torn or leet. 104. s. 50
 By 13 & 14 Car. 2. c. 12. if any constable, &c. shall die or go out of the parish, any two justices may make and swear a new one, until the lord shall hold a court, or until the next sessions, who shall approve of him, or appoint another, &c. *ib.*
 The justices in sessions may discharge a constable after the expiration of a year, and put another in his place, until the lord shall hold a court as aforesaid. *ib.*
 But the sessions, by this statute, cannot discharge constables *chosen and sworn in* at the leet. *ib.* (N. 5)
 An appointment by the sessions "for a year, or until others are chosen" is not good: the statute must be strictly pursued. *ib.*
 The sessions, upon this statute, have no power to appoint a constable, but upon the default of the leet. *ib.*
 The king's bench will grant a *quo warranto* against a constable elected at a vestry, and sworn in by the sessions. *ib.*
 A constable, &c. may apprehend a person exposing a child in the streets, &c. 120. s. 19
 Where in making an arrest, they need not shew their warrant. 135
 In what cases they may execute a warrant out of their own precincts. *ib.* s. 30
 Whether they have power to commit or bail those whom they have arrested. 140, 145, 174

CONSTABLE and MARSHAL.

The office of high constable of England was antiently hereditary. 11. c. 4
 But since the reign of Hen. 8. he has only been appointed *pro hac vice*. *ib.*
 The history and antient jurisdiction of the constable. *ib.*
 The history of the antient marshals. *ib.*
 By 8 Rich. 2. c. 5. no pleas concerning the common law shall be heard or determined by the constable and marshal. 12. s. 4
 By 13 Rich. 2. c. 2. the constables shall have cognizance of contracts touching deeds of arms and war out of the realm, and of things touching war within the realm, not cognizable by the common law. *ib.* s. 5
 If the constable exceed this jurisdiction, the party grieved shall have a privy seal directed to the constable to surcease his plea until it be discussed in the council. 13
 By 1 Hen. 4. c. 14. appeals of things done out of the realm shall be tried by the constable. *ib.* s. 6
 How far the court of the constable and marshal hath cognizance of points of honour in general. *ib.* s. 7
 Whether this court can punish private persons for marshalling funerals. *ib.* s. 8
 Whether this court can be holden by the lord marshal alone without the constable. *ib.*
 Whether this court can take cognizance of treason. *ib.*
 In what manner, and by what law the court of the constable and marshal proceeds. *ib.*

It is questioned, whether an information may not be brought in this court by the attorney-general. 16. s. 12

This court, if it exceed its jurisdiction, may be prohibited by the courts of common law. *ib.* s. 13

This court, upon urgent necessity, may be holden by commissioners, without the earl marshal. 17

The lord high constable of England is by virtue of his office a conservator of the peace. 38. s. 2

CONSTRUCTION.

See STATUTE.

CONTEMPTS.

Every court of record may impose reasonable fines on all such as shall be guilty of contempt in the face of the court. 4. s. 15

It is said that every such court except the court leet, may also imprison the offender. 5

It is a contempt to use opprobrious language to a judge; or for an officer to refuse to do his duty. 4

The sheriff, in his torn, may fine for contempt. 23
And this fine needs no other affectment than the judge's order. 95. s. 19

A commitment by the chief justice, without shewing any cause whatsoever, shall be intended to be for a contempt. 149

Persons committed for contempts are not bailable. 149, 161, 167

An attachment is grantable against persons guilty of contempt. 206. s. 1

A contempt in the face of the court, or by confession on oath, may be immediately recorded, and the offender committed and punished. 206

On a contempt, complained of by affidavit, the court will either order the offender to answer it, or make a rule to shew cause why an attachment should not issue against him. *ib.*

If the contempt be of an exorbitant nature, affecting the court itself, they will grant an attachment in the first instance. *ib.*

In what manner the offender may purge the offence in answering interrogatories. 207

Where a sheriff shall be in contempt for not executing a writ, &c. 208, 209

In what instances the misconduct of attorneys shall be considered as contemptuous to the court. 210, 211

How far jurors may be punished for contempts. 212, 216

How far the conduct of inferior judges shall be thought contemptuous of the superior courts. 217

In what cases barristers may be punished for contempt. 219

Gaolers may be guilty of contempt, &c. *ib.*
Peers of the realm are punishable for contempts, &c. 220

The most remarkable instances of contempts. *ib.*
Where persons are punishable for contemptuous words or writings concerning courts. 221

Of contempts to the rules and awards of the court. 222

CONVICTION.

Conviction establishes the guilt of the offender, and, by destroying the probability of his innocence, renders him incapable of being bailed, except by the superior discretion of the king's bench. 154, 170

CONVICTS.

See CLERGY. TRANSPORTATION.

COPY OF INDICTMENT.

By the common law it was always denied in treason and felony. 557. s. 14

On a legal exception being taken, the court will grant a copy of so much of the indictment as relates to the exception. *ib.*

The court will grant a copy of the heads of an indictment, so as to enable a prisoner to frame a plea in bar, &c. to the charge against him. *ib.*

By 7 Will. 3. persons indicted for high treason, except counterfeiting the coin, &c. &c. shall have a true copy of the whole indictment five days before their trial. *ib.*

This must be intended five days before his arraignment, because the prisoner pleads *instantur* upon his arraignment. *ib.*

By 7 Ann. c. 21. copies of all indictments for high treason, except, &c. shall be delivered to the party indicted ten days before the trial in the presence of two witnesses. *ib.*

Lord George Gordon's the first trial upon this act after it took effect. 558

CORONERS.

Coroners were formerly the principal conservators of the peace. 73

They are of equal antiquity with the sheriffs. *ib.*
Coroners are either *virtute officii*, or by charter, or by election. *ib.* (N)

By the stat. West. they shall be chosen through all shires, of the most sufficient knights, who shall best attach the pleas of the crown. *ib.*

It is no good cause to remove a coroner that he is not a knight. *ib.*

By 14 Edw. 3. no coroner shall be chosen, unless he have sufficient in the county to answer. 74. s. 4

Coroners are elected by the freeholders by virtue of the king's writ issuing out of, and afterwards returned into the chancery. *ib.* s. 5

Therefore their authority does not determine by the demise of the king. *ib.*

The form of the writ for the election of a coroner. *ib.* s. 6

The coroner elected by virtue of this writ, shall be sworn by the sheriff lawfully to execute his office. *ib.* s. 7

If he is insufficient, to pay his fines, &c. the county, as his superior, shall answer for him. *ib.* s. 8

By 28 Edw. 3. c. 6. all coroners of counties shall be chosen by the freeholders at full county court. *ib.* s. 9 and 10

The king may claim the franchise of appointing coroners by prescriptions. And other lords may

- may claim it by grants from the crown. No subject can claim it by prescription: 73. s. 11
- Coroners may be discharged by the writ *de exonerando* exonerando for want of leisure to execute their office; or by being chosen *verdictor*; or for not having sufficient property; or for bodily infirmity, or old age; and *perhaps* for following a trade. *ib.* s. 12.
- This writ recites the cause of his discharge, and then commands the sheriff to chuse another. *ib.*
- The issuing of this writ is in the discretion of the court of chancery; and the defendant must have notice of the application made for it. *ib.* (N)
- The power of the old coroner is *ipso facto* extinguished by the election of a new one by the freeholders. *ib.* (N)
- The old coroner may controvert the truth of the suggestion upon which a writ *de coronatore exonerando* is obtained by a commission from the chancery, and on disproving it he shall not be removed, or if removed, restored. 75
- A coroner may inquire of a felony committed on the arms of the sea, and on the sea between high and low water mark when the tide is out. 76. s. 14
- The coroner has jurisdiction on board a vessel lying in a harbour, to take an inquisition of *felo de se*. *ib.* (N)
- How far a coroner of the county may intermeddle with offences done within the verge of the court, and *vice versa*. *ib.*
- The statute *de officio coronatoris* recited, which describes, very circumstantially, the manner in which the coroner shall take an inquisition of death. 78
- This statute is only in affirmance of the common law, and therefore the coroner shall still take inquisition of such as die, &c. in gaol, although this is not directed by the act. 79. s. 21
- It is sufficient if the inquisition state that it was taken by the oaths of *lawful persons of the county*, although the act directs it to be by the oaths of persons of the next adjacent towns. 80. s. 22
- It must appear at *what place*, and by *what jurors*, *by name*, the inquisition was taken, and that they were sworn, and *perhaps*, that they were of the next towns, &c. *ib.*
- The coroner has no manner of power to take an inquest of death without a *view of the body*. *ib.* s. 23
- If a dead body be buried, or suffered to putrify, before the coroner hath taken his view, the offender shall be amerced. *ib.*
- And it is indictable as a misdemeanor also. *ib.* (N. 5)
- The coroner, within convenient time, may order a buried body to be taken from the grave in order to take his view, where it has been either omitted or insufficient, or where the first inquisition is quashed. 80
- But this must be by order of the king's bench, who will exercise their discretion upon the time which has elapsed subsequent to the interment. *ib.* (N. 6)
- If a view cannot be had by the coroner, an enquiry shall be made by justices, &c. on the testimony of witnesses. 80
- Nones can take an inquest, on view, in any case, but the coroner. *ib.*
- The king's bench will refuse to file a coroner's inquisition, if, on an affidavit of the proceedings, it appears to have been improperly taken. *ib.* s. 24
- It is not necessary that *the view* and *the inquisition* should be both taken at the same place. 81. s. 25
- A coroner has no power to inquire of any accessaries to a felony *after the fact*. *ib.* s. 26
- A coroner may inquire of accessaries *before* as well as of principals, and also whether they did *fly* for the offence; for which *flight* they forfeit all their goods and chattels. *ib.*
- The coroner ought also to inquire into the circumstances, and of the thing which caused the death; and if it happened from a bridge, &c. being out of repair, the town shall be amerced. *ib.* s. 28
- A coroner who is remiss in doing his office on *being sent for*, shall be amerced. *ib.* s. 29
- By 3 Hen. 7. c. 1. the coroner may inquire if the township have been negligent in not apprehending a murderer; and if the coroner be remiss, and not make inquisition on the dead body, he shall forfeit 5*l.* *ib.*
- An inquisition by justices, on the default of the coroner, must be done *openly*, or it shall be quashed. *ib.* (N. 8)
- A coroner who imposes on his jury may be committed. *ib.* (N. 9)
- By 3 Hen. 7. c. 1. coroners shall certify their inquisitions to the next general gaol-delivery. *ib.* s. 30
- By 1 & 2 Philip and Mary, c. 13. coroners shall take the depositions of the witnesses in writing, and bind them over to appear at the next gaol-delivery, &c. &c. 82
- By 1 Hen. 8. c. 7. if any coroner shall *not do* his office himself, he shall forfeit 40*l.* *ib.* s. 32
- By 25 Geo. 2. c. 29. coroners convicted of extortion or neglect of duty shall be amerced and displaced. *ib.* s. 33
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- This act only extends to coroners of counties. *ib.*
- A coroner's record of an abjuration, or confession by an approver of felony, or of prison breach, cannot be traversed. 88
- But the circumstances may be inquired of by witnesses, to inform the conscience of the judge. *ib.*
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- Any one may be counsel for a prisoner, without assignment, for matters collateral to the point in issue, as the pleading a pardon, assigning error to reverse outlawry, or any special matter. *ib.* s. 5
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The finding any collateral matter, expressly alleged in an indictment, to have happened in a different county, is void. *ib.*

If the county be expressed in the margin of the indictment, the vill in which the offence is laid shall be intended within the county. *ib.*

A man cannot be found guilty on evidence of the fact being done out of the county in which it is laid in the indictment. *ib.*

By 2 and 3 Edw. 6. c. 34. if a man be stricken or poisoned in one county, and die thereof in another, the offender may be tried where the death shall happen. 302. s. 36

If a fact in one county prove a nuisance to another, it may be tried in either county. *ib. s. 37*

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A woman taken by force in one county and carried into another, may be tried in the second county. *ib. s. 40*

Stat. 59 Geo. 3. c. 27. where goods are stolen in transitu from on board any barge or boat in which they are carrying the fact may be alleged to have happened in any county through which they pass. 302. (N. 1)

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Regularly all offences are to be determined in the county where they are committed; and the king cannot authorise them to be heard in any other. 23. s. 10

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By special custom indictments of offences within a county may be taken in a place out of it. *ib.*

The king may grant that indictments found in one county shall be determined in another; but the jurors must come from the proper county. *ib.*

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The king cannot himself sit in judgment upon any indictment, because he is a party. 1. s. 2

Anciently, kings sat in courts, spectators, and for the purpose of adding solemnity to the proceedings. *ib.*

The king has delegated all his power of judicature to the several courts of justice. 2

The known and established rules which by immemorial usage prevail in courts of justice, can only be altered by the legislature. *ib.*

The king cannot give any addition of jurisdiction to an ancient court; and therefore the *common pleas* cannot be authorised to inquire of felony or treason. 2. s. 4

The king cannot even grant a *judicial office* for life, which has *usually* been granted at will. *ib.* s. 5

The administration of justice highly concerns the safety of the subject, and the law is, therefore, jealous of any kind of innovation. *ib.* s. 6

Commissions to seize the property or imprison the person upon suspicion, without indictment or legal process, are void. *ib.* s. 7

The king cannot grant any new commission not warranted by ancient precedents. *ib.* s. 8

Judges must derive their authority from the crown by a legal commission; and they must also exercise it in a legal manner. *ib.* s. 9

Where there are divers judges of a court of record, the act of one of them is effectual, except the commission expressly require more. 3. s. 10

By the common law, all patents of justices of either bench, barons of the exchequer, sheriffs, escheators, commissioners of oyer and terminer, gaol-delivery, and of the peace, determine by the death of the king who made them. *ib.* s. 11

But no *judicial office* by charter so determines. *ib.*

By 7 and 8 Will. 3. c. 27. no commission, either civil or military, shall determine by the king's death, but shall continue in force for six months after, unless sooner determined by the successor. *ib.* s. 12

By 1 Ann. c. 8. the same is enacted of patents or grants of officers. *ib.* s. 13

No commission of assize, oyer and terminer, gaol-delivery, association, or the peace, writ of admittance, *si non omnes*, or assistance, shall be determined by the death of the king, &c. 4

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By 12 and 13 Will. 3. c. 2. the judges commissioners shall be made *quandiu bene se gesserit*, &c. *ib.*

By 1 Geo. 3. c. 23. judges commissions shall remain in force notwithstanding any demise of the crown, and the judges shall only be removable upon the address of both houses of parliament; and their salaries shall be paid out of the civil list. *ib.*

All courts of criminal jurisdiction must be of record, as no other can either fine or imprison. *ib.* s. 14

No proceedings from a criminal court can be removed, but by writ of error or *certiorari*. *ib.*

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All who are not bound to attend the leet were formerly obliged to swear allegiance at the sheriff's torn. *ib.* s. 2

The origin of courts leet. *ib.*

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No man can be within two leets at the same time. *ib.* s. 3

The inhabitant of a leet cannot be compelled to attend the sheriff's torn, unless the jurisdiction of the leet be limited. *ib.*

A grand leet may oblige a certain number of its inhabitants to appear and inquire of such offences as have not been noticed by inferior leets. *ib.*

The sheriff's torn may inquire of such offences, &c. as have been neglected by the leet. *ib.* s. 4

If a leet be seized into the king's hands, those who owed suit to it ought to attend the torn. *ib.*

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Unless there be some break or chasm in the proceedings, the *original* is not discontinued by other errors. *ib.*

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Lands given jointly to husband and wife were only forfeited for the year, day, and waste. *ib.* s. 43

A woman may pursue her title to dower within five years after the reversal of her husband's attainder, having previously levied a fine of her lands. 647. s. 44

By 1 Edw. 6. c. 12. a wife shall have her dower, although her husband be attainted of treason or felony. *ib.*

By 5 and 6 Edw. 6. c. 11. the wife shall not have her dower while the attainer of the husband for treason stands in force. *ib.*

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 The imprisonment at the time must be for the crime; therefore it is not criminal to suffer a prisoner to escape who is detained only for his fees, except the payment of them be part of the punishment, and due to some other person than the gaoler. *ib.* s. 4
 To bail an unbailable prisoner, or to suffer a prisoner to go beyond the limits of his prison, are escapes. *ib.* s. 5
 It is no escape if a gaoler retake a prisoner without losing sight of him. *ib.* s. 6
 If a gaoler kill a prisoner in endeavouring to retake him, it is an escape. *ib.*
 While the privilege of a sanctuary prevailed, if a gaoler conducted his prisoner through the limits of such a franchise, and he claimed the privilege, it was an escape. *ib.*
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 A gaoler who liberates his prisoner, with an intent to defeat either his trial or his execution, is guilty of a voluntary escape. *ib.*
 If an officer, not having authority to take bail, bail a prisoner who is not bailable, it is a voluntary escape. *ib.*
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Wilfully to suffer the escape of a capital offender shall not in all cases be deemed voluntary. *ib.* s. 11

An officer making *fresh* pursuit, and perhaps without making *fresh* pursuit, after a prisoner escaped, may retake him either in the same or any other county. *ib.* s. 12

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If a gaoler retake his prisoner after being fined, yet it does not avoid the fine. 194

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It is a good defence to an action against a gaoler for an escape, that he retook his prisoner upon fresh pursuit after notice of his escape. *ib.*

Every INDICTMENT FOR AN ESCAPE, whether voluntary or negligent, must expressly shew that the party was actually in the defendant's custody for a crime, &c. *ib.* s. 14

It is not sufficient to say that he was in the defendant's custody, and charged with such a crime. 195

The indictment must shew expressly that the prisoner went at large, which is well expressed by *exivit ad largum*. *ib.* s. 14.

The time when the offence was committed for which the prisoner was in custody, must also appear: the reason of this rule. *ib.*

Every indictment for a *voluntary* escape must allege, that the defendant *felonice et voluntarie* permitted the prisoner *ad largum ire*. *ib.*

It must also shew the *species of crime* for which the prisoner was in custody. *ib.*

It seems that an indictment for a *negligent escape* need not state the particular crime. *ib.*

Where a prisoner is committed to a gaoler by the court, if the gaoler shall fail to produce him on demand, the court will adjudge him guilty of an escape without further inquiry; for he shall be concluded by the record of commitment to deny that the prisoner was in his custody. *ib.* s. 15

But in case of *other commitments* the escape cannot be punished until it be presented. *ib.* s. 16

By *stat. West. 1. c. 3.* nothing shall be demanded for an escape until it be so adjudged by the justices in cyre. 196. s. 17

This statute does not restrain the king's bench from receiving presentments for escapes. *ib.* s. 18

By 31 Edw. 3. c. 14. the escape of thieves, felons, &c. to be judged by the king's justices, shall be levied from time to time, &c. *ib.* s. 19

Justices of gaol-delivery may punish justices of the peace for a negligent escape in admitting persons to bail, who are not bailable. *ib.*

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Wherever an escape is *fineable*, the presentment of it is *traversable*. 196. s. 21

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VOLUNTARY ESCAPE amounts to the same kind of crime, and is punishable in the same degree as the offence of which the party was guilty, who has escaped. *ib.* s. 22

It is equally an escape, although the person escaping be under the arrest and not actually committed to gaol. *ib.*

It is not material whether the prisoner who escapes were attainted or only accused. *ib.*

Quære, if it be any excuse for suffering a voluntary escape, that the prisoner had been acquitted on an indictment of death, and was only detained till the year and day for the appeal expired. *ib.*

A gaoler who has wrongfully assumed the custody of a prison, is equally liable for suffering an escape as if he had been the rightful officer. 197. s. 23

If the warrant expressly charge the person committed with treason or felony, the gaoler shall be punished for suffering his escape, although the warrant may in some other respect be erroneous. *ib.* s. 24

No escape can amount to a capital offence, unless the cause for which the party was committed were actually a capital offence at the time of the escape. *ib.* s. 25

Therefore in homicide, where an escape is suffered between the stroke given and the subsequent death, it is only trespass, for it was not felony till the death happened. *ib.*

He who suffers another to escape, who was in his custody *for felony*, cannot be arraigned for such an escape *as for felony*, until the principal be attainted. *ib.* s. 26

But one accused of such an escape may be indicted and tried for a *misprison* before the attainer of the principal offender. *ib.*

And *quære*, if the commitment be for high treason, whether the person suffering the escape shall be tried as a principal until the person guilty of the treason be convicted. 198. s. 26.

No one but the very person who suffers it shall be deemed guilty of a voluntary escape. *ib.* s. 27

But the principal gaoler may be fined for a voluntary escape suffered by his deputy. *ib.*

A gaoler *de facto* only is equally liable for suffering an escape as a gaoler *de jure*. *ib.* s. 27

A sheriff is liable for an escape suffered by his bailiff. *ib.* s. 29

If a deputy gaoler be not sufficient to answer for a negligent escape, his principal must answer for him. *ib.*

Quære, if a gaoler who suffers an escape have an estate in the office, how far the reversioner may be punished. *ib.*

A voluntary escape deprives the gaoler of his office, and the court, in their discretion, may *mult* him for negligent escapes. *ib.*

The punishment for suffering a negligent escape is a fine, in a certain sum of money, to the king. *ib.* s. 31

The distinction between a fine and an amercement, as they relate to the punishment for suffering escapes. 198. s. 31

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In what manner the ancient common law punished the offence of suffering negligent escape. *ib.* s. 33

By 5 Edw. 3. c. 8. any marshal who shall suffer *indictes* or *appelles* to escape, shall be punished by half a year's imprisonment and ransom at the king's will. *ib.*

By 10 Hen. 7. c. 10. the custody of gaols is committed to the sheriffs. *ib.* s. 35

When a defendant for suffering an escape is brought up for judgment, affidavits may be read both for and against him, in aggravation and in mitigation of his punishment. 199. note in the margin.

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If a private person who hath another lawfully in his custody, whether upon an arrest by himself or another, he is guilty of an escape, if he suffer him to go at large before he is delivered by law. *ib.*

If one private person deliver a felon, whom he has arrested on suspicion, over to another private person who suffers the felon to go at large; both are guilty of escape. *ib.* s. 2

But not if he had delivered his prisoner over to the proper officer. *ib.* s. 3

If no officer will receive such a prisoner, the safest way is to deliver him to the township, who are bound to keep him till the next gaol-delivery. *ib.* s. 4

If the township refuse to take charge of such prisoner, still the person who made the arrest cannot discharge him. 201

The private person, to excuse himself, must shew what officer by name he delivered his prisoner over to. *ib.* s. 5

A private person is punishable in the same manner as an officer for a voluntary escape. *ib.* s. 6

For a negligent escape he is punishable by fine and imprisonment at the discretion of the court. *ib.*

ESCHEAT.

A felon's lands in fee simple, being *vested* in the lord of whom they are holden by *escheat* from the time of the felony, shall not be *divested* by a subsequent attainer for treason. 525. s. 4

The lord cannot enter upon the lands which *escheat* to him for petit treason or felony without a special grant, until the king hath had his year, day, and waste. 637

Inheritances which, not lying in tenure, cannot be holden, can neither *escheat* nor descend, but shall be forfeited to the king by an attainer of high treason. *ib.*

The *escheat* to the lord for felony is only *pro defectu tenetis*, occasioned by corruption of blood; and therefore where a statute saves the corruption of blood, it, by necessary consequence, saves the land to the heir. 644. s. 29

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Justices of gaol-delivery may award execution against such prisoners as have been outlawed for felony before justices of the peace. 30. s. 7

By 1 Edw. 6. c. 7. persons found guilty by justices of gaol-delivery of treason and felony, and reprieved, may be ordered for execution by subsequent justices of gaol-delivery. 51. s. 17

This power does not extend to convictions before judges of oyer and terminer. 32. s. 18

And *quare*, if by this statute they can award execution, if the convict has received judgment by the former judges, and then been reprieved. *ib.*

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A peer attainted of treason or felony may be brought before the king's bench, and demanded why execution should not be awarded against him. 585

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A peer convicted of murder shall have execution done upon him pursuant to 25 Geo. 2. c. 37. 586. 628. (N)

By the common law the king, after execution done, may order the body to be hung in chains. 629. (N)

The king's bench may award execution, on a conviction in any other court, the record being first removed, and the convict brought up by *habeas corpus*. 655. s. 1

St. Thomas a Watering is the usual place where the marshal does execution, when it is awarded by the king's bench sitting in *Middesex*. 656. (N)

Execution,

Execution, by any other court than the king's bench, ought not to be awarded into a different county from that wherein the party was tried and convicted. 656. s. 2

If a convict, on the award of execution, deny that he is the same person, the identity shall be immediately tried by a jury returned for that purpose. *ib.* s. 3

Quere, if on such trial the party is intitled to a peremptory challenge. *ib.* (N)

The Court may demand execution to be done without writ. *ib.* s. 4

No execution is warranted unless it be pursuant to the judgment. *ib.* s. 5

But the king cannot reverse the execution so as to aggravate the judgment. *ib.* (N. 3)

An execution cannot be lawfully executed by any but the proper officer. 657. s. 6

Execution must be performed by the sheriff or his deputy. *ib.* (N)

The warrant for execution was anciently by precept under the hand and seal of the judge, as it is still practised in the court of the lord high steward, upon the execution of a peer. *ib.*

In the court of the peers in parliament execution is done by writ from the king. *ib.*

The modern practice is, in common cases, for the judge to sign the calendar, which is a list of all the prisoners' names, with their separate judgments in the margin, &c. *ib.* (N)

This calendar is left with the sheriff, who, in a convenient time after the receipt of their warrant, is to do execution, which time in the county is left at large. *ib.*

The manner in which execution is awarded in London and *Middlesex*. *ib.*

Execution is not completely performed until the party be dead. *ib.* s. 7

Every court which has power to award an execution has also a discretionary power of granting a reprieve. *ib.* s. 8

A woman may allege that she is *quick with child*, in stay of execution. *ib.* s. 9

A woman cannot demand such respite of execution by reason of her being quick with child more than once. 658. s. 10

By 25 Geo. 2. c. 37. persons found guilty of murder shall be executed on the day but one next after sentence passed, unless *Sunday* intervene, and then on the *Monday* following. 628

If such conviction and execution be in *London* or *Middlesex*, the body of such murderer shall be immediately conveyed to Surgeons-hall for dissection. *ib.*

If such conviction shall be in any other county, the body of such murderer shall be delivered to such surgeon as the judge shall direct. *ib.*

Upon all executions in *London*, &c. the recorder, after reporting to the king in person the cases of the several prisoners, and receiving the royal pleasure, &c. issues his warrant to the sheriffs, directing them to do execution on the day and at the place therein mentioned. *ib.*

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- The goods, upon such a finding, are forfeited absolutely, and also the issues of the offender's lands, till he be acquitted or pardoned. *ib.*
- Where a prisoner, either as principal or accessory before or after, is acquitted before justices of oyer, &c. of a capital felony, but is found to have fled, he shall forfeit his goods, but not the issues of his lands. *ib.*
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- But they are saved by a reversal of the award of the exigent. 641
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- Goods are also forfeited, by being waived by a felon in his flight, whether they are his own goods, or those of others which he has stolen. *ib.* s. 17
- OF FORFEITURE BY STATUTE. *ib.* s. 18
- By 26 Hen. 8. c. 13. all estates of inheritance in use or possession are forfeited by an attainder of high treason. *ib.* s. 19
- By 33 Hen. 8. c. 20. attainders for high treason by the common law, shall be as effectual as attainder by parliament, and forfeitures vested in the king without office. *ib.*
- The rights of strangers how saved. 642. s. 20
- These statutes are not repealed by the 1 Mary, c. 1. *ib.* s. 21
- Estates in tail are forfeited by force of the words "any estate of inheritance," in the 26 Hen. 8. *ib.* s. 22
- Where lands are given to a man and his wife, and the heirs of their two bodies, the entail is forfeited by his attainder. *ib.*
- The right to a writ of error to reverse an erroneous common recovery is not forfeited by these statutes. *ib.* s. 23
- The mere right of action to lands in the hands of a stranger, as of a discontinuance, or of the heir of a disseisor, is not forfeited. *ib.*
- A right of entry into lands to which a person attainted of high treason is intitled, is as much forfeited as lands in possession. 643
- The king shall not be adjudged in possession of such lands till office, and scire facias, and seizure on such office. *ib.*
- How the king became possessed of such lands at common law. *ib.*
- Where a tenant in tail of the gifts of the crown makes a feoffment in fee, the reversion being still in the crown, and afterwards is attainted of high treason, the right of the entail is forfeited to the crown. *ib.* s. 24
- Where

Where one attainted of high treason, is seized of a defensible estate in tail, and hath at the same time a right to an ancient entail which is discontinued, he forfeits both the entail in possession, and the right to the old entail. 643 s. 25

A power of revoking the uses of a settlement may be forfeited by force of the 33 Hen. 8. if the execution of it require nothing but what may be as well performed by any other person as by the party by whom it was reserved. 643. s. 26

In what cases the form of the *proviso* by which such a power is reserved, will keep the forfeiture out of the statute. 644

An annuity granted to a man *pro consilio impendendo*, is not forfeitable by these statutes. *ib.*
Quære, if an office granted to a man for life, and requiring skill and confidence, be forfeitable. *ib.*

If an office be granted *in fee*, it may be forfeited by the common law. *ib.*

Estates tail are forfeited by force of the words "all interests of what nature soever," in an act of parliament. *ib.* s. 28

The statutes of *premunire*, which give a general forfeiture of all the lands and tenements of the offender, extend not to land in entail. *ib.*

A saving of corruption of blood in a statute concerning felony doth, by necessary consequence, save the land to the heir. *ib.* s. 29

A saving of land to the heir prevents corruption of blood and loss of dower. *ib.*

A saving of the corruption of blood in a statute concerning treason, doth not save the land to the heir. *ib.*

The forfeiture upon an attainder of either treason or felony shall have relation to the time of the offence, for avoiding all subsequent alienation of the lands. 645. s. 30

But as to chattels, the forfeiture shall only relate to the time of the conviction or *fugam fecit* found. *ib.*

Quære, whether in *premunire* the forfeiture shall relate to the time of the offence, or only to that of the judgment. *ib.* s. 31

The attainder as to mean profits, shall only relate to the time of the attainder. *ib.* s. 32

Any one indicted or appealed of treason or felony may *bona fide* sell any of his chattels, real or personal, for the sustenance of himself and family, until they are forfeited. *ib.* s. 33

The goods of such a person cannot be removed till they are forfeited. 645. s. 31

Whether the goods of a person indicted may be inventoried, and detained in custody before the conviction, and till they are forfeited. *ib.* s. 35

Quære, where a person is found guilty of murder the coroner's inquest, whether the coroner shall inquire, and value his goods, and deliver them to the township. 646. s. 36

The party's goods may be appraised by the sheriff upon a *non est inventus* returned to the second capias. *ib.* s. 37

But by 1 Rich. 3. c. 3. no sheriff, &c. shall seize the goods of any person imprisoned on

suspicion of felony, until such person be convicted, or his goods forfeited. 646. s. 38

This statute extends as well to the seizure of money as to any other chattel. *ib.* s. 39

The goods may be seized as soon as forfeited by force of this statute. &c. *ib.* s. 40

Quære, whether the king takes the goods forfeited subject to the debts of the party. *ib.* (N)

At common law it was no plea for the township that the goods were delivered to a particular person, and that he had embezzled them. *ib.* s. 41

But by 31 Edw. 3. c. 3. if any man or town charged with the goods of felons will allege, in discharge of himself, another who is chargeable, he shall be heard. *ib.*

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Forgery is not within the jurisdiction of the justices of the peace. *ib.* s. 55

In what cases the forged writs and other proceedings of courts may be proceeded against by attachment. 223

The Court will not, without special cause, remove an indictment for forgery by *certiorari* at the prayer of the defendant. 402

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Restitution of goods in an appeal of larceny is the necessary consequence of making fresh suit after the offender. 239. s. 50

Anciently the party, to make fresh suit, ought to have raised the hue and cry. *ib.* s. 51

Now if the party be guilty of no gross neglect in endeavouring to apprehend the offender, it is sufficient fresh suit. *ib.*

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Upon the finding of the fresh suit by such jury, the court may award restitution.

How the court may inquire of the fresh suit, and award restitution where the appellee is convicted by confession. *ib.*

The

The inquest which inquire of the fresh suit is a mere inquest of office, to satisfy the conscience of the judge. 240. s. 52
The inquest of the fresh suit is in the discretion of the court. *ib.*

GAME.

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GAOL.

See COMMITMENT.

By 14 Edw. 3. c. 10, the custody of goals is re-joined to the office of sheriffs. 176. s. 6

By 5 Hen. 4. c. 10, none shall be imprisoned but in the common gaol. *ib.*

None can claim a person as a franchise, unless he have also a gaol-delivery. *ib.* s. 7

By 11 and 12 Will. 3. c. 19, justices of the peace are enabled to rebuild and repair the gaols at the expense of the county. *ib. note in marg.*

Every gaol in the kingdom is the gaol of the king's bench. 7. s. 5

No person can justify the detaining a prisoner in custody out of the common gaol without some special cause. 177. s. 9

GAOL-DELIVERY.

See ASSIZE. Oyer.

The commission of gaol-delivery is a patent, in nature of a letter from the king to certain persons appointing them his justices, or two or three of them, of which number such a particular person is specially required to be, authorising them to deliver his gaol at a particular place of the prisoners then in it. 28. s. 1

For this purpose it appoints them to meet at such a place, at such a time, &c. where the sheriff is commanded to bring the prisoners. *ib.*

These commissions must be agreeable to ancient precedents. 2. 18. 28

Justices of gaol delivery may, by the common law, proceed upon any indictment of felony or trespass found before other justices against any person in the prison they are commissioned to deliver. 28. s. 2

By 4 Edw. 3. c. 2, in affranchise of the common law, justices of gaol-delivery may deliver the gaols of persons indicted before justices of the peace. *ib.*

But justices of *oyer* and *terminer* can only proceed against persons indicted before themselves. *ib.*

Justices of gaol-delivery have power to take an indictment themselves. *ib.* s. 3

They can only deliver the gaol by proclamation where there is no indictment, and by proper trial where there is one. 29

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Justices of gaol-delivery, on proclamation, may discharge all prisoners who are either not indicted or not prosecuted. But this power does not extend either to judges of *oyer* and *terminer*, or justices of the peace. 30. s. 6

Justices of gaol-delivery may award execution against such prisoners as have been outlawed for felony before justices of the peace. *ib.* s. 7

Justices of gaol-delivery have power after their commission is expired, either to order the execution or the reprieve of the persons who have been condemned before them. *ib.* s. 8

They may by the common law punish those who unduly let prisoners to bail. *ib.* s. 9

By 28 Edw. 1. they may award process into a foreign county against persons appealed before them by an approver. *ib.* s. 10

By 27 Edw. 1. c. 3, they shall punish sheriffs for letting prisoners to bail contrary to the statute of Westminster. *See quere.* *ib.* s. 11, 12

By 4 Edw. 3. c. 2, they shall punish sheriffs and gaolers for delivering their prisoners on bail, when they are not bailable. 31. s. 13

And this punishment, though not expressed, shall be according to the statute of Westminster. *ib.* s. 14

By 1 and 2 Phil. and Mary, c. 13, justices of gaol-delivery shall fine justices of the peace and coroners, either as to hailing prisoners, or for not taking their examination, or the information of the witnesses, or not reducing it to writing, &c. &c. &c. 31. 82

By 4 Edw. 3. c. 10, justices of gaol-delivery shall punish sheriffs and gaolers refusing to take felons into their custody from constables without being paid. 31

By 1 Edw. 6. c. 7, prisoners convicted of treason and capital felony, who shall be reprieved by the justices of one gaol-delivery, may have judgment passed upon them by the judges at a subsequent gaol-delivery. *ib.* s. 17

This statute extends not to convictions before justices of *oyer* and *terminer*. 32. s. 18

It only extends to prisoners reprieved before judgment, and gives subsequent commissioners no manner of power over persons condemned by former justices. *ib.* s. 19

If a person condemned by former justices plead a pardon before their successors, they have no power to allow it. *ib.*

The manner in which such a pardon must be pleaded. *ib.*

Subsequent justices commissioned by the next king to that who commissioned the former justices, have the same power as if both commissions had been made by the same king. *ib.*

An enumeration of sundry statutes giving jurisdiction to justices of gaol-delivery. *ib.* s. 20

By 6 Rich. 2. c. 5, justices of gaol-delivery shall hold their sessions in the chief towns of the several counties. *ib.* s. 21

Justices of gaol-delivery may bail any person convicted before them of homicide by misadventure or in self-defence. 161

They may bail a person convicted of manslaughter, 3 d 2

slaughter, who has purchased his pardon after the session is determined. 161

So also if a man be convicted of manslaughter before them against plain evidence, they may bail him till the next session. *ib.*

So also they may bail an appellant from day to day, who pleads excommunication in disability of the appellant. *ib.*

Justice of gaol-delivery have power to assign a coroner, and therefore may take an appeal by an approver. 284. s. 16

The king's bench will never remove an indictment from justices of gaol-delivery without special cause. 402

By 34 and 35 Hen. 8. c. 14. s. 16. justices of gaol-delivery are authorised to write to the clerk of the pence for the certificate of the conviction of a defendant, for the purpose of preventing his receiving the benefit of clergy a second time. 474

The justices of gaol-delivery may have a panel returned without any precept or writ, and by a bare award: the reason of it. 561

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See HABEAS CORPUS.

In what cases gaolers shall be liable to an attachment. 219. s. 31

They are punishable by the justices of gaol-delivery for refusing to take the custody of felons from constables, &c. 31. s. 16

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What pleas in bar to an appeal are consistent with the general issue. 272. s. 137

A prisoner who pleads in avoidance of an indictment taken contrary to 11 Hen. 4. c. 9. and 3 Hen. 8. c. 12. which relate to the return of grand juries, may also plead the general issue. 299. s. 26

The defendant to a *qui tam* action or information cannot plead a special plea together with the general issue. 383. s. 62

A pardon *sub pede sigilli* cannot be pleaded with, or after the general issue, unless it bear a date subsequent to such issue. 551. s. 67

A defendant *qui tam* may take advantage on the general issue, that the offence arose in a different county. 375. s. 32. 386. s. 70

A defendant *qui tam* cannot give a discharge by a subsequent statute, as he may a *proviso* in the statute upon which he is sued, in evidence on the general issue; but he must plead it specially. 386. s. 69

If a suit be brought on a penal statute after the time limited, he may take advantage of it on the general issue. 378. s. 45

In capital cases the general issue may be pleaded with any other plea, either in bar, or in abatement, which is not repugnant to it, even after such plea is found against the defendant. 553

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GENTLEMAN.

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In what cases scandal touching the character of a gentleman will abate a writ of *habeas corpus* of the constable and the court of honour. 16

GRAND JURY.

See JURORS.

A grand jury are returned to inquire of all offences in general in the county for which they are returned. 287

Upon a bill of indictment being preferred before them, they must either find *billa vera*, or *ignoramus* for the whole. 288

If they find a bill either specially or conditionally it is void. *ib.*

This relates only to cases where they find part of the same indictment to be true, and part false, and do not either affirm or deny the fact submitted to their inquiry. 2. (N. 1)

Where a bill contains two counts for distinct offences, they may indorse *billa vera* as to the one, and *ignoramus* as to the other. *ib.*

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The grand jury must be at least twelve in number, all of the same county, and returned by the sheriff or other proper officer, without any nomination. *ib.* s. 16

Grand jurors ought to be freemen and liege subjects, and not under an attainder for treason or felony, nor *villains*, aliens, or outlaws, whether for a criminal, or perhaps personal matter. *ib.*

Any person under prosecution may, before he is indicted, challenge a grand juror as being outlawed for felony, &c. a *villain*, or returned at the instance of the prosecutor, or not returned by the proper officer. *ib.*

But grand jurors, like all other men, shall be intended legal and honest, until the contrary appear. *ib.*

One outlawed on an indictment of felony may plead in avoidance of it, that one of the grand jury was outlawed for felony. 296. s. 18

It is unsettled at the common law, whether grand jurors ought to be freeholders. *ib.* s. 19

Hale says, they ought to be freeholders, but to what value is uncertain. *ib.* (N)

Upon the equity of the *stat West. 2. c. 28. old men*

men above seventy years of age, persons perpetually sick, or living out of the county, shall not be returned upon grand juries. 296
 By such persons being returned upon the grand jury, may lawfully serve on it if they think fit. *ib.*
 Grand jurors in the sheriff's torn shall have 20s. a year freehold, 10s. a year copyhold. 297
 By 3 Hen. 7. c. 1. every grand juror for the inquiry of concealments, &c. before justices of the peace, shall have 40s. yearly. *ib.*
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 Edw. 1. c. 1. sheriffs shall put those in the lists as by their neighbours most sufficient. 298. s. 22
 By 34 Edw. 1. c. 1. panels shall be made of the best people which shall not be suspected. *ib.*
 Both grand jurors and grand jurors. *ib.*
 By 1 Edw. 1. c. 1. grand jurors shall be of the best and most sufficient people, and returned by the sheriff at their request, without any denomination. 299. s. 23
 Upon this statute, a person who is not returned, but procures his name to be read among those of the grand jury, may be indicted and fined. *ib.* s. 24
 It is questioned, whether a coroner's inquest is within the purview of this statute; but all other inquests are within it. *ib.* s. 25
 A person arraigned or outlawed upon an indictment taken by a grand jury, contrary to 11 Hen. 4. may plead it in avoidance of it. *See quare*, if he has taken trial on it without exception. *ib.* s. 26, 27
 If one grand juror returned contrary to 11 Hen. 4. join in finding an indictment, it vitiates the whole. 300. s. 28
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 In objecting to an indictment for such a defect, the record must be in court. *ib.* s. 30
 By 3 Hen. 8. c. 12. justices of gaol-delivery and justices of the peace, may reform the panel of grand jurors returned by the sheriff, by taking out and putting to the names which be so impanelled. *ib.*
 Therefore if a grand juror who is nominated to the sheriff, except by the justices in pursuance of the above act, it shall vitiate the indictment he joins to find, according to the 11 Hen. 4. *ib.* s. 33
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Grant of the goods of a felon standing mute shall not be delivered until good grant in the king's court proved. 464. s. 20
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HABEAS CORPUS.

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 A gaoler is punishable by attachment for disobeying writs of *habeas corpus*. 219. s. 31
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By 1 Edw. 6. c. 12. no person convicted of felonious stealing of horses, geldings, or mares, shall be admitted to clergy. 478. s. 34

By 2 & 3 Edw. 6. c. 23. (the above statute being plurally expressed), stealing one horse, gelding, or mare, shall be put from clergy in the same manner as stealing of two, &c. 480

By 31 Eliz. c. 12. accessories both before and after the fact in horse-stealing are put from clergy. 486. s. 63

By 10 and 11 Will. 3. c. 23. if any horse-stealer, being out of prison, shall discover two or more who had then been guilty of horse-stealing, and cause them to be convicted, he shall be entitled to a pardon. 531

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"Hostler" is a good addition, as coming properly under the notion of a mystery; but he may be sued by the addition of "labourer," 263. s. 118

HOUR.

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If the hour as well as day be set forth in alleging the offence of the principal, it is fatal to mention the day only in describing the offence of the accessory. 253

It is sufficient to say the fact was done about such an hour; and a mistake of the hour will not be material upon evidence. *ib.*

HOUSE.

By 12 Ann. c. 7. whoever shall feloniously steal money or goods to the value of 40s. out of any dwelling-house, or out-house thereunto belonging, shall be debarred from the benefit of clergy. 487. s. 66

This act shall not extend to apprentices under the age of fifteen years. *ib.* s. 67

Persons outlawed, and accessories, are not within this statute. *ib.* s. 68

HOUSEBREAKING.

See ROBBERY.

By 1 Edw. 6. c. 12. no person convicted of breaking any house, any person being therein and put in fear, shall be admitted to clergy. 478. s. 34

This statute extends both to indictments and appeals. 479. s. 35

It doth not exclude those who challenge more than twenty. *ib.* s. 36

Sed quare, if those who challenge more than twenty are not included in the word "convicted." *ib.* note in margin

This statute omits accessories. *ib.* s. 37

The breaking of the house must be such as the law construes to be felonious. 480. s. 40

By 3 and 4 Will. and Mary, c. 9. housebreakers who challenge more than twenty are ousted of clergy upon an indictment, whether in the same or a different county. 492. s. 37

By 4 & 5 Ph. and Mary, c. 4. accessories before to such breaking, if accompanied with stealing in a dwelling-house, are ousted of their clergy in all cases. *ib.*

No breaking is within the 1 Edw. 6. which does not amount to an actual breaking of an house, or of some part of it, as of a cupboard, &c. fixed to the freehold, and therefore the breaking a trunk, &c. is not within the statute, &c. 493. s. 38

By 39 Eliz. c. 15. whoever shall be found guilty of feloniously taking away in the day-time any goods to the value of five shillings in any dwelling house or out-house, &c. shall not be admitted to clergy, though no person be within the same at the time. 495. s. 95

This statute shall only extend to a taking as is accompanied with a felonious breaking. *ib.* s. 96

A chamber in an inn or court is a house within the intent of this statute; but a lodging in Whitehall or Somerset-House is not. *ib.* s. 97

No accessory is ousted of his clergy by this statute. *ib.* s. 98

Nor is an aider or abettor ousted, unless it appear that he was actually within the house. *ib.*

By 3 & 4 Will. and Mary, c. 9. whoever shall aid and abet another to break any dwelling-house, shop, warehouse, &c. and shall feloniously take to the value of five shillings, shall be excluded from clergy. *ib.* s. 99

An assistant, or an accessory before, to such a felony in an out-house, not being a shop or warehouse, &c. without entering it, is still entitled to clergy. 496. s. 100. 101

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HOUSE OF CORRECTION.

By 6 Geo. 1. c. 19. justices of the peace may commit vagrants and other offenders charged with small offences, either to the common gaol or house of correction, as they shall think proper. 117

By 5 Ann. c. 6. persons convicted of larceny, who are liable to be burnt in the hand, may be committed to the house of correction for not less than six months, nor more than two years, &c. 506

By 19 Geo. 3. c. 74. a further punishment inflicted. 507

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What lands shall be forfeited by attainder of the husband, which he holds in right of his wife. 638

In what cases dower shall be forfeited. (See DOWER.) 647. s. 42

In what cases they may or may not give evidence against each other. 600

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HUE AND CRY.

The sheriff in his torn may inquire of all those shall levy hue and cry without cause, or neglect to levy it where they ought.

106. s. 58

Private persons are justified to apprehend offenders upon a hue and cry levied against them.

118. s. 14

Hue and cry is the pursuit of an offender from town to town till he is taken.

115. s. 5

All who are present when a felony is committed, or a dangerous wound is given, are bound both by common law and by statute, to raise the hue and cry against the offenders who escape.

ib.

A man may lawfully raise it against one who sets upon him in the highway to rob him.

ib.

By 13 Edw. 1. c. 4. hue and cry shall be levied upon a thief who will not obey the arrest of the watch in the night time.

ib.

By 21 Edw. 1. s. 2. it may be raised against trespassers in parks.

ib.

To levy hue and cry without cause is considered as a disturbance of the public peace.

ib.

The manner in which the hue and cry shall be levied.

ib. s. 6

By the statutes of Winton, if the country will not answer for the bodies of such as commit robberies and felonies within forty days, by levying the hue and cry, the inhabitants where the offence was committed, shall be answerable, &c.

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But to make the country liable, the robbery must be open and violent, and not done in any house.

ib. (N)

But it is not necessary that it should be done in the public highway; if committed in a coppice it is sufficient.

ib.

By 27 Eliz. c. 18. the inhabitants of every hundred where the offence shall be committed shall pay half the damages recovered against the hundred for neglecting hue and cry.

ib.

No hue and cry shall be deemed sufficient, unless made both with horsemen and footmen.

ib.

No person robbed shall maintain any action upon these statutes, unless he give immediate intelligence, and within twenty days before the action be examined before a magistrate, &c.

ib.

By 8 Geo. 2. c. 16. the person robbed must also give notice to a constable near the place, describing the particulars of the robbery, &c.

ib.

No hundred shall be chargeable, if the felony be apprehended within forty days after notice, &c. in the Gazette.

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By 22 Geo. 2. c. 24. no person shall recover more than 200*l.* unless two persons are in company at the time of the robbery.

ib.

Nor by 30 Geo. 2. c. 3. and 4 Geo. 3. c. 2. unless three persons be together, if the plaintiff is receiver of the land-tax.

ib.

Those who are taken upon a hue and cry are irreplevisable by the statute of Westminster.

151. s. 41

HUNDRED.

See ESCAPE. HUE AND CRY.

HUSBAND AND WIFE.

A *feme covert* being appealed without the husband cannot have damages on her acquittal; *sed quare.*

278. s. 149

A conspiracy may be sustained at common law by husband and wife, for a malicious appeal against the wife only.

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If a husband and wife are appealed and acquitted, they shall have a joint judgment for the damage to the wife, and shall have separate executions for their several damages.

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An appeal lies against a *feme covert* without taking notice of the husband.

238. s. 46

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IDENTITATE NOMINIS.

To reverse an outlawry upon an indictment for a variance in the name of the defendant, between the record and the process, the diversity must be shewn by the writ *identitate nominis.*

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IDROT.

See APPEAL. APPROVER.

JEOFAILS.

The statutes of jofails do not extend to criminal prosecution.

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By 9 Ann. c. 20. they shall extend to informations in the nature of *quo warranto.*

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IMPARLANCE.

Where an appeal may be abated before and after imparlance.

259. s. 102

IMPEACHMENT.

See TRIAL BY PEERS.

A lord committed by the house of lords on an impeachment of treason, and afterwards pardoned, cannot be *discharged* by the court of king's bench. *Sed quare*, if the court may not bail, especially if no parliament be sitting.

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By 12 & 13 Will. 3. c. 2. no pardon under the great seal shall be pleaded to an impeachment by the commons in parliament.

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But after the impeachment is tried, the offender may be pardoned.

ib.

The necessity of making a high steward for the trial of an impeachment for high treason, has been denied by the house of commons.

581. s. 1. *note in marg.*

IMPRISONMENT.

See COMMITMENT. ARREST. HABEAS CORPUS.

INCENDIARIES.

See ARSON.

INDICTMENT.

An indictment is an accusation at the suit of the king, found to be true by the oaths of twelve

- twelve men of the county returned to inquire of all offences therein committed. 287
- The difference between an indictment and a presentment and inquisition. *ib.*
- A grand jury must either find *billa vera*, or *ignoramus* for the whole, or the finding is void. 288. s. 2
- So also, if they indorse a bill conditionally, or true as to a different crime than that which the indictment charges, it is void. *ib.*
- But where the bill consists of two distinct counts, as *riot* and *assault*, they may indorse *billa vera* as to the one, and *ignoramus* as to the other. *ib.* (N. 1)
- An indictment is so far the king's suit, that the party who prosecutes it is a good witness to prove it. *ib.* s. 3
- No damages can be given upon an indictment even if the king were, by his commission to any new court, so to direct. *ib.*
- But if a statute expressly direct that a party shall recover damages by indictment, they may be so recovered; otherwise they ought to be sued for in an action on the statute. 288
- The king's bench, by virtue of a privy seal, may give to a prosecutor the third part of a fine assessed on a criminal prosecution. *ib.*
- And to induce defendants to pay prosecutors their costs, it is the practice to intimate an inclination to mitigate the fine to the king. 289
- All crimes of a public nature, all disturbances of the peace, all oppressions, and all misdemeanours of a public evil example against the common law, may be indicted. *ib.* s. 4
- No injuries of a private nature, unless they some way concern the king, can become the subject of indictment. *ib.*
- Wherever a statute prohibits a matter of public grievance, or commands a matter of public convenience, an offender is punishable both by action and indictment, unless such a mode of proceeding is expressly excluded. *ib.*
- Quære*, if the offender has, in an action, been *fined to the king*, whether he can afterwards be indicted for the same offence. *ib.*
- No offence against a statute of a private nature will bear an indictment. *ib.*
- Instances of injuries which are not indictable. *ib.* (N. 1)
- Where a new offence, not prohibited by the common law, is created by statute, and a particular manner of proceeding appointed, but no mention made of indictment, no indictment can be maintained on such statute. 290. (N. 2)
- But if such a statute give a recovery by action, bill, plaint, information, or otherwise, then it authorises a proceeding by way of indictment. 290
- Where a statute adds a further penalty to an offence prohibited by the common law, the offender may still be indicted as at common law. *ib.*
- If such an indictment conclude *contra formam statuti* and cannot be made good upon the statute, it may be maintained as an indictment at common law. *ib.*
- Where new created offences are prohibited by a general prohibitory clause, an indictment will lie; but not if the clause be particular, and specific remedies are appointed. 290. (N. 2)
- Where a new offence is created, an indictment will lie on a substantive prohibitory clause, although there be afterwards a particular provision and remedy given. *ib.*
- An indictment will not lie where a statute creating a new offence is not prohibitory, but only inflicts the forfeiture and specifies the remedy. *ib.*
- Where the offence was punishable before the statute, the particular remedy given in it is cumulative: but where the offence was not punishable at common law, the particular remedy given must be pursued. *ib.*
- WHERE INDICTMENT IS UNNECESSARY. 290
- Anciently a person taken upon immediate pursuit, with the property stolen upon him, might be brought into court, and tried without indictment. *ib.* s. 5
- But by 25 Eliz. c. 4. &c. proceedings upon the *mainwre* are wholly taken away. 291. (N. 6)
- In trespass for goods in the king's bench, if the jury find they were stolen, the defendant may be tried, on such finding, for the felony without indictment. *ib.*
- But such a finding, except in a court of criminal jurisdiction, has no effect. *ib.*
- Even in the king's bench, on an indictment, if the jury find that some other than the defendant did the fact, yet that other cannot be tried on such finding without being first indicted. *ib.*
- But it is otherwise on the finding of a coroner's inquest. *ib.*
- A verdict upon a declaration for a misdemeanour in a proper court, will serve for an indictment against the persons found guilty by it. *ib.*
- Where a person may be tried without indictment upon an appeal not prosecuted. 291. s. 7 to 14
- Whether one may be tried at the suit of the king for a capital offence upon the sheriff's return without any indictment. 294. s. 14
- A man may be arraigned upon an indictment while an appeal is depending. *ib.* s. 15
- Who may be indictors, and in what manner they are to be returned (*See GRAND JURY*). 295
- Within what place the offences inquired of by the grand jury must arise (*See GRAND JURY*). 295
- If it doth not appear by an indictment that the offence arose within the county, or riding, or other special division or precinct for which the jury which found it was returned, it is erroneous. 301
- A fortiori*, if it appear that the offence were in a different county than that for which the grand jury are returned. *ib.*
- Quære*, if the finding of collateral matter, expressly alleged in the indictment to have happened in a different county, is not void. *ib.*
- In what manner the county and place in which the offence arose must be expressed in the indictment. *ib.*
- If upon not guilty pleaded it shall appear that the offence was committed in a different county

- county from that in which the indictment was found, the defendant shall be acquitted. 301. s. 35
- By the common law, if a man had died in one county of a stroke received in another, he could not be indicted in either. 302. s. 36
- But by 2 & 3 Edw. 6. c. 24. where any person shall be stricken or poisoned in one county, and die of the same in another, an indictment may be found in the county where the death shall happen. *ib.*
- So if a fact done in one county prove a nuisance in another, it may be indicted in either. *ib.* s. 37
- If one guilty of larceny in one county carry the goods stolen into another, he may be indicted in either. *ib.* s. 33
- If a man marry two wives, the first in a foreign country, and the second in *England*, he may be indicted in *England*. 303. s. 39
- If a woman be taken, by force in one county, and carried into another, and there married, the offender may be indicted and tried in the second county. *ib.* s. 40
- But if a record be stolen or avoided, &c. partly in one county and partly in another, he cannot be indicted for the felony in either. *ib.* s. 40
- By 26 Hen. 8. c. 6. offences committed in *Wales* may be inquired of in the next *English* county where the king's writ runneth. 304
- By 28 Hen. 8. c. 15. treasons and felonies committed upon the sea shall be inquired of in such places as shall be limited by the king's commission, in like manner as if done upon land. *ib.* s. 43
- But this statute extends not to offences done in creeks, &c. within the body of a county. *ib.* s. 44
- By 11 & 12 Will. 3. c. 7. accessories before and after to piracy, shall be inquired of according to 28 Hen. 8. c. 15. 305
- By 1 Geo. 4. c. 90. offences against the 43 Geo. 3. c. 58. when committed at sea, shall be tried under the stat. of Hen. 8. 305
- By 8 Geo. 1. c. 24. persons deemed accessories by 11 & 12 Will. 3. c. 7. shall be proceeded against as principals. 306
- All piracies and felonies upon the sea may be inquired of upon the land, or tried at sea, &c. *ib.* s. 47
- Ancient opinions, how high treason done out of the realm was to be indicted. *ib.* s. 48
- By 35 Hen. 8. c. 2. all treasons committed out of the realm shall be inquired of by the king's bench, or in any county by the king's commission. *ib.* s. 49
- If the king's bench, or the king's commissioners, remove into a different county from that in which the indictment is found, the jury shall come from the first county. 307
- How the commissioners and county for such trials are well assigned. *ib.* s. 51
- Whether treasons committed in Ireland by a peer may be tried in England *ib.* s. 52
- By 2 & 3 Edw. 6. c. 24. accessory in one county to a felony in another, may be tried in the county where the offender is accessory. 308
- Other instances where a jury may inquire of offences committed out of their county. 309. (N)
- THE FORM OF THE BODY OF AN INDICTMENT. 309
- Of setting forth THE FACT AS TO THE PRINCIPAL. *ib.*
- No periphrasis will supply those words of art which the law hath appropriated for a description of the offence. 310. s. 55
- Where no technical words have been adopted, the special manner of the whole fact ought to be set forth with such certainty, that it may judicially appear to the court that the indictors have not gone upon insufficient premises. *ib.* s. 57.
- An indictment for breaking prison without showing the cause of imprisonment is bad. *ib.*
- An indictment for refusing to be sworn constable after *legitimo modo electi*, must show the manner of the election. *ib.*
- An indictment of burglary must have the word "*noctanter*." *ib.*
- An indictment for nuisance for doing that which, in its consequences only, and not in itself, is so, must shew the circumstances which cause the nuisance. 311
- But where the thing done is in itself a nuisance, as keeping a bawdy-house, &c. the particular circumstances are not necessary. *ib.*
- An indictment for coining *alchemy* like the king's money, must shew what money: the reason of it. *ib.*
- An indictment for perjury not shewing in what manner and in what court the false oath was taken, is insufficient. *ib.*
- It is necessary, both in indictments and appeals of mayhem and murder, to set forth particularly in what manner the hurt was given. *ib.*
- An indictment for extortion *colore officii*, without shewing for what it was extorted, held good. *ib.*
- An indictment for procuring, &c. must shew the false tokens. *ib.* (N. 1)
- An indictment for words against a justice, must shew the words. 312
- An indictment charging a man disjunctively, is void, as *murdravit et murdrari causavit*, &c. 311. s. 58
- Every indictment must charge some particular offence, or else several offences particularly, and certainly expressed, and not with being an offender in general: the reason of this rule. 312. s. 59
- Instances in which, upon this ground, indictments have been held too general and insufficient. *ib.*
- Anciently, indictment for conspiracy in general was held good, and the general charge of *insidiatores viarum et depopulatores agrorum* ousted of clergy; but this is remedied by 4 Hen. 4. c. 2. *ib.*
- But a man may be generally indicted as a common barrator; but the defendant must have a note of the facts intended to be proved delivered to him previous to the trial. 313

- There is no need to name any particular place where the defendant was a barrator. 313
- An indictment for barratry need not conclude *ad nocumentum omnium ligcorum; diversorum* is sufficient. *ib.*
- Quere*, Whether an indictment of a common scold may so conclude, or whether it must be *ad commune nocumentum*? *ib.* (N)
- An indictment against one as a common scold is good without setting out the particulars, for the same reasons that such indictment of barratry is good: the reason given. *ib.*
- Every charge in an indictment must be laid positively, and not by way of recital, as with a *quod cum, &c.* and the want of a direct allegation of any thing material cannot be supplied by intendment. *ib.* s. 60
- An indictment *felonice murdravit* cannot amount to murder without *ex malitia premeditata*. *ib.*
- An indictment of death is bad without an express allegation that the deceased both received and died of the hurt laid; and the want cannot be supplied by any implication. 314
- An indictment for breaking prison must aver, that a prisoner for felony did thereby escape. *ib.*
- It is an incontrovertible rule, "*that in an indictment nothing material shall be taken by intendment or implication.*" *ib.*
- But if, in the first part of an indictment of death, the assault be laid with *malice prepense, &c.* there is no need to repeat it in the subsequent clause which shews the giving of the wound. *ib.*
- So also where it states that one was arrested by virtue of a plaint, &c. the warrant shall be intended a good warrant. *ib.*
- Where a warrant is alleged authorising an arrest *within the liberties of London*, and the indictment lays the execution of it in such a *parish and ward of London*, without saying they are within *the liberties*, the Court will intend the *parish and ward laid* to be within *the liberties of London*. *ib.*
- Where an indictment finds that the defendant, being so and so, committed such a fact, it shall be intended that *he was* so and so, without any express allegation to that purpose: the reason of it. *ib.* s. 61
- But where an indictment of forcible entry finds that *A.* disseised *B.* of such land, *existens liberum tenementum* of *B.* it is insufficient; for there is no certain antecedent to which the *participle* can refer. *ib.*
- Upon the subject of nice exception to an indictment there is no general rule. There is a maxim, *nimia subtilitas in jure reprobatur*; but the application of it is in the discretion of the Court. 315
- It is a certain rule, *that where one material part of an indictment is repugnant to another, the whole is void.* *ib.* s. 63
- If an indictment charge a forged writing by which *A.* was bound to *B.* or that the defendant disseised *I. S.* of lands, *when it appears that I. S. had no freehold*; every such indictment is void for its manifest inconsistency and repugnancy. 315. s. 63
- An indictment of death laying the stroke at *A.* and the death at *B.* or the stroke on the 1st, and the death on the 10th, and then concluding that the defendant in such manner murdered the party at *A.* aforesaid, or on the first of *May* aforesaid, is repugnant and void. *ib.*
- An indictment for selling iron with false *weights* and *measures*, is inconsistent. *ib.*
- If an indictment taken on the 13th find that the defendant had been absent six months from church, from the first of the same month and year, it is repugnant. *ib.*
- An indictment which charges any thing as a *felony*, which appears to be only a *trespass*, as with cutting down trees, the Court will not arraign the defendant on it. 316
- But the Court will dispense with a *small impropriety of expression*, as for having moved *unam acram juni*, when in fact it was *grass* only and not *hay*. *ib.*
- Of setting forth THE FACT AS TO THE ACCESSARY. *ib.* s. 63
- A repugnancy in setting forth the offence of the accessory is equally fatal as in setting forth that of the principal. *ib.*
- If an indictment of death which lays the stroke on one day, and the death on a subsequent one, charge the accessory with having abetted the fact at the time of the felony and murder only, it is insufficient. *ib.*
- Where several are present and abet a fact, and one only actually does it, an indictment may lay it generally, as done by them all; or specially, as done only by one, and abetted by the rest. *ib.*
- But an indictment which barely charges a man with having been present is void. *ib.*
- An indictment against an accessory for receiving four principals is naught, unless it says *eos receptavit, &c.* *ib.*
- An indictment against a constable for suffering the escape of a person arrested for suspicion of felony, must shew what the felony was, and that it was committed. *ib.* s. 66
- But an indictment for receiving, or suffering to escape, persons whose guilt is upon record, need only set out such record properly. 317
- Quere*, If a man is more bound to take notice of an attainder in his own county than in any other? *ib.*
- Quere*, If an indictment finding that *J. S. scilicet receptavit* such a one being a felon, is good? *ib.* s. 67
- HOW AN INDICTMENT MUST DESCRIBE THE PERSONS. *ib.*
- An indictment that the king's highway in such a place is in decay, through the default of the inhabitants of such a town, is good without naming any person in certain. *ib.*
- No *inditee* can take any advantage of a mistaken *surname* in an indictment, as an appellee may in an appeal. *ib.*
- Every other *misnomer* of the defendant, except that of the surname, and also every defective addition,

- addition, are as fatal in an indictment as an appeal. 317. s. 69
- A *misnomer* of the defendant's name of baptism may be pleaded in abatement. *ib.*
- The addition of "*knight*" instead of "*baronet*" is pleadable in abatement. 318
- If Garter king at arms be not styled Garter in an indictment, it, or the omission of any other name of dignity, is pleadable in abatement. *ib.*
- The omission of the defendant's name of baptism is, *perhaps*, equally fatal. *ib.*
- Indictments are within 1 Hen. 5. c. 5. concerning additions, and therefore the omission of those additions which that act requires are equally fatal to an indictment as an appeal, if process of outlawry lie upon it. *ib.* s. 70
- It is a fatal fault to apply such addition to the name which comes under the *alias dictus* only, and not to the first name. *ib.*
- It is not material whether any addition be put to the name which comes under the *alias dictus* or not. *ib.*
- It is so great a fault to put no addition to the first name, that the omission of it as to one defendant renders the indictment vitious as to all. *ib.*
- An addition in English was always as good as in Latin. *ib.*
- Where several defendants have the same addition, it is safest to repeat it after each of their names. *ib.*
- Where the son is of the same name and addition with the father, he ought to be distinguished by some further description. *ib.*
- What is a sufficient addition of the estate, or degree, or mystery (*Vide APPEAL*).
- How the town, hamlet, place, and county, of the defendant, ought to be added (*Vide APPEAL*).
- In what cases a defective addition may be saved by the appearance and plea of the defendant (*Vide APPEAL*.)
- HOW OTHER PERSONS MUST BE DESCRIBED. 319. s. 71
- They must be described with convenient certainty, so as to enable the Court to impose the proper fine; and to enable the defendant to make his defence, or to plead the indictment in bar to any subsequent prosecution. *ib.*
- An indictment for taking *divers* sums of *divers* persons for toll, without naming any persons in particular, is naught. *ib.*
- Where, in common presumption, it may be very difficult, if not impossible, to know the names of the persons referred to in an indictment, it may be good without naming any of them: instances given. *ib.*
- In many books it is said, that regularly the persons offended, as well as the defendant, ought to be certainly described in every indictment. 320
- An indictment for stealing *quandam peciam panni linei cujusdam J. S.* without adding *de bonis et catallis*, is insufficient. *ib.*
- Wherever the person injured is known to the jurors, his name ought to be put into the indictment. *ib.*
- An indictment for an assault on *John*, parish priest of *D.* in the county of *C.* is good without mentioning his surname. 320. s. 72
- Quere*, If an indictment for a wrong done to a person well known describe him only by his name of baptism, without some addition to distinguish him from others of the same name, can be good? *ib.*
- An indictment for stealing the goods *cjusdam ignoti* is good. 321
- A repugnancy or absurdity in the description of the person injured will vitiate an indictment; as where one is indicted for stealing *bona predicti J. S.* where no *J. S.* was mentioned before. *ib.*
- But if the indictment will be good by rejecting the words, they shall be considered as surplusage. *ib.* (N. 12)
- If the word "*aforsaid*" refer with equal uncertainty to two antecedents, the indictment is void. *ib.*
- It is not necessary, in an indictment of death, to allege that the person killed was "*in the peace of God and of our Lord the King, &c.*" *ib.* s. 73
- HOW THE THING MUST BE DESCRIBED. *ib.* s. 74
- No indictment can be good which wants convenient certainty of this kind. *ib.*
- An indictment for forging a lease of certain lands, without naming some one certain parcel, is insufficient. *ib.*
- An indictment for stealing *the goods and chattels of J. S.* without any farther description of them, is void for uncertainty. *ib.*
- An indictment for trespass in *two closes of meadow or pasture*; or for diverting *quandam partem aque* running from such a place to such a place; or for engrossing *magnam quantitatem straminis et feni*, or *diversos cumulos tritici*, &c. &c. without shewing how much of each, is void for uncertainty. *ib.*
- The case of the *King v. Wetwang* impeached. 322
- If an indictment be uncertain as to some particulars only, and certain as to the rest, it is void only as to those which are uncertainly expressed, and good as to the residue. *ib.*
- Whether an indictment of larceny be good without expressing to whom the property belonged, if it be for a living thing, &c. *ib.*
- It seems questionable, whether the price of the goods be otherwise necessary in an indictment of trespass than to aggravate the fine; or in an indictment of larceny, other than to shew the offence amounted to grand larceny. 323
- HOW AN INDICTMENT MUST STATE TIME AND PLACE. *ib.*
- By the stat. 56 Geo. 3. c. 73. property stolen from mines may be laid to be the property of *A. B.* and others his partners, and by 1 and 2 Geo. 4. c. 102. this provision is extended to the property of all partners. 323. (N)
- It is not necessary to mention the hour in an indictment. 324. s. 76
- But no indictment whatsoever can be good without precisely shewing a certain year and day of the material facts alleged in it. *ib.* s. 77

The sheriff's return of a rescous is bad without shewing the year and day, both of the arrest and rescous, because it is in lieu of an indictment. 324. s. 77

An indictment which lays the offence on an uncertain or impossible day, is void; as where it lays it on a future day; or lays one and the same offence on different days; or lays it on such a day that makes the indictment repugnant. *ib.*

No defect of this kind can be helped by verdict. *ib.*

An indictment of death laying the assault at a certain time and place, is not sufficient without repeating the time and place in the clause of the stroke. *ib.*

An indictment of death ought as well to set forth the year and day of the death as of the stroke, &c. *ib.*

The words *ad tunc et ibidem* in the subsequent clauses of an indictment are of the same effect as if the year and day mentioned in the former part had been expressly repeated. 325. s. 78

An indictment laying the offence on the Thursday after the day of Pentecost or *Utus of Easter* in such a year, is good: the reason of it. *ib.*

Where an indictment charges a man with a bare omission, as the not securing such a ditch, no time need be shewn. s. 79

The year of the king may be dispensed with if the very year be otherwise sufficiently shewn. s. 80

A mistake in not laying an offence on the very same day on which it is afterwards proved upon the trial, is not material upon evidence. *ib.* s. 81

If an indictment charge a man with having done such a nuisance on such a day and year, &c. and on divers other days, it is void only as to the fact on those days which are uncertainly alleged. *ib.* s. 82.

An indictment charging a man *generally* with several offences at several times, without laying any one of them on a certain day, is void. *ib.*

The particular reason of this rule in extortion. *ib.* (N. 2.)

A conviction of deerstealing, setting forth the offence between 8 and 12 July, &c. is sufficient. *ib.*

How THE INDICTMENT MUST SHEW THE PLACE. *ib.* s. 83

No indictment can be good without expressly shewing some place wherein the offence was committed, which must appear to be within the jurisdiction of the court, and be free from all repugnance. 326

Instances of repugnance in alleging the place. *ib.*

There is no need, in an indictment on a statute setting forth the description which brings the defendant within the purview of it to set forth any place where those things happened. *ib.*

Where a statute makes it high treason for a person born within the realm, and in popish orders, to come into or remain in the kingdom, there is no need to shew in the indictment where he was born. *ib.*

A mistake of the place in which the offence is

laid will not be material upon not guilty, if the fact be proved at some other place in the same county. 326

But if there be no such place within the county as that laid in the indictment, all process on such an indictment is made void by statute. *ib.*

WHERE AN INDICTMENT IS VITIATED BY FALSE WORDS. 327. s. 86

An indictment shall not be quashed for any false concord between the *substantive* and the *adjective*. *ib.*

An indictment against two or more, laying the fact charged against them in the singular number, is insufficient: the *probable* reason of it. 328

Such a defect cannot be amended. *ib.*

Where an indictment lays the fact in the plural number against two, and it is found *billa vera* as to one only, it is good. *ib.*

The word *solvet* instead of *solvat* is not fatal. *ib.*

Formerly an indictment wholly in *English*, was void by 36 Edw. 3. c. 15. But by 4 Geo. 2. c. 26. and 6 Geo. 2. c. 14. all proceedings shall now be in *English*, &c. except terms of art, &c. 330

Instances where a word which is not *Latin* would have vitiated an indictment. *ib.* s. 87

Nothing that can be rejected as surplus and immaterial shall vitiate an indictment. *ib.*

What faults, while indictments were in *Latin*, were holpen by an *Anglicè*. 330

WHERE THE OFFENCE INDICTED MAY BE LAID JOINTLY, and WHERE SEVERALLY. 331. s. 89

If an offence wholly arise from any such joint act, which in itself is criminal, without regard to any particular personal default in the defendant, the indictment may either charge the defendants jointly and severally, or jointly only. *ib.*

Instances in which indictments may be joint or several. *ib.*

Though the words of an indictment purport only a joint charge, yet some of the defendants may be acquitted and others convicted; for the law looks on the charge as several against each. *ib.*

But where the offence doth not wholly arise from the joint act of all the defendants, but from such act joined with some personal and particular defect or omission of each, without which it would be no offence, the indictment must charge them severally, and not jointly. 332

Keeping a bawdy-house, unlawful hunting deer, maintenance, or extortion, may be laid either jointly and severally, or jointly only. *ib.*

Several defendants cannot be joined in perjury; but two may be joined in an assault, and in a libel. *ib.* (N. 1)

One indictment against two justices for not enquiring of a riot, or against two persons for speaking the same words, may be maintained. *ib.* (N)

WHETHER THE WORDS "VI ET ARMIS" ARE NECESSARY. *ib.* s. 90

Whether

Whether the words "*contra pacem*" be necessary. 334

No indictment or information can be good, except it expressly suppose the offence to have been done *against the peace* of the king in whose reign it was committed. *ib.*

But an information for intrusion or other wrong of a civil nature against the king, does not require the words *contra pacem*. *ib.*

In what manner an indictment for erecting a weir, done in one reign, may be made good in another reign. 335. s. 93

It seems that the words *contra coronam et dignitatem regis* are not absolutely necessary in an indictment. *ib.* s. 94

Quære, if the words in *contemptum regis* are necessary. *ib.* s. 95

It seems the word *illicite* is not absolutely necessary in an indictment at common law, especially for a riot; but where a statute uses the word *unlawfully*, the indictment on it must use the word *illicite* or some other tantamount. 336. s. 96

WHETHER A DEFECTIVE INDICTMENT BE AMENDABLE. 336. s. 97

No criminal prosecution is within the benefit of any of the statutes of amendment; and therefore all amendment which can be made must be by the common law. *ib.*

Generally, an indictment removed from an inferior court can in no case be amended. *ib.*

But the body of an indictment removed from *London* may be amended, because the tenor only is removed. *ib.*

Quære, if in either case an amendment can be made when the record is filed. *ib.*

The caption of an indictment from any place may, upon motion, be amended, so as to make it agree with the original record, during the term in which it came in; but not in a subsequent term. *ib.*

And *quære*, if it can be amended after it is filed. *ib.*

The want of continuances in a record of attainder of felony cannot be amended. 337

No discontinuance in any criminal prosecution is amendable without consent. *ib.*

But a mere misprision in joining issue in a criminal prosecution may be amended at any time. *ib.*

It is every day's practice to amend criminal informations, and the pleadings thereon, by rule of court, while all is in paper. *ib.*

And *quære*, if the record may not be so amended by the paper book at any time before judgment. *ib.*

A bill of indictment as to matter of form may be amended by the Court with the consent of the grand jury. *ib.* s. 98

THE FORM OF INDICTMENT UPON STATUTE. *ib.* s. 99

There is no necessity to recite a public statute upon which a prosecution is founded; for the judges are bound *ex officio* to notice it; and if there be several statutes on which the offence is founded, the Court will take that which is most for the king's advantage. 338. s. 100

WHAT MISRECITALS ARE FATAL. 338. s. 101

If a prosecutor take upon him to recite a public statute, and materially vary from a substantial part, and conclude *contra formam statuti*, he vitiates the indictment. *ib.*

Instances given in which a *variance* from the statute on which the prosecution is founded, vitiates the indictment. *ib.*

But the omission of a synonymous word, having no other meaning than what is fully expressed in the words which are recited: or the joining of words which are either wholly synonymous, or much of the same sense, as signifying such things as generally include one another, are not fatal. 339. s. 102

Instances in illustration of this rule. *ib.*

No advantage can be taken of any part of a private statute, without shewing such private statute in a proper manner. *ib.* s. 103

A misrecital of the place or time at which the parliament in which the statute passed was holden, vitiates the indictment; instances given. *ib.*

A repugnancy also in setting forth the time when the parliament was holden, is fatal. *ib.*

It seems, that the admission of the party with respect to the misrecited statute will not make good the indictment. 340

Whether the misrecital of the *title* of a statute be fatal. *ib.* s. 105

A variance in reciting a statute to commence after the making, where the statute is express that it shall commence after the sessions, is fatal. *ib.* s. 106

Sed quære, if a variance no way altering the sense of the statute does any hurt. *ib.*

A variance from an *immaterial* part of a statute does no hurt. *ib.*

If a recital vary only in such a part of the description of the offence as is put into the statute only by way of flourish *et ex abundanti*, and makes no necessary ingredient in the offence prohibited, nor needs any proof, it is not fatal. *ib.*

A misrecital of the preamble of a statute is not material, where the substantial part of the purview is well recited. *ib.* s. 107

The Court has not been so strict in reciting a statute so far as it concerns the indictment, a misprision in what concerns other matters has been helped by the several authorities. 341

A total omission of the clause of a statute which ordains what the party shall forfeit does no hurt. But see exceptions to this rule. *ib.* s. 109

HOW FAR THE OFFENCE MUST BE BROUGHT WITHIN THE VERY WORDS OF THE STATUTE. 342. s. 110

Unless the statute be recited, neither the words *contra formam statuti*, nor any periphrasis, intendment, or conclusion, will make good an indictment which does not bring the offence within all the material words of the statute. *ib.*

Every indictment must bring the defendant within all the descriptions mentioned in the body of the act, except they are such as carry with

with them the bare denial of a matter, the affirmation whereof is a proper and natural plea for the defendant; this rule illustrated.

343. s. 112

In describing the defendant, there is no need to set forth the place where the thing happened which brought him within the description. *ib.*

In describing the defendant, it is sufficient to say that he, *exists*, so and so, did the fact. *ib.*

There is no need to allege in an indictment, that the defendant is not within the benefit of the *provisoes* of a statute whereon it is founded. *ib.* s. 113

But a conviction on a penal statute ought expressly to shew that the defendant is not within any of its *provisoes*; the reason of this rule. 344

If a statute whereon an indictment is grounded be particularly recited, the general conclusion *contra formum statuti*, after the allegation of the fact, will supply an omission in it of a circumstance mentioned in the statute, which would be fatal without such recital and conclusion. *ib.*

But the want of a certain description of time or place or thing; or persons concerned, or of the conclusion *contra pacem*, or an express and direct allegation of the fact itself, cannot be supplied. *ib.*

An indictment grounded on a statute which will not maintain it, may be made good as an indictment at common law. *ib.* s. 115

How far it is necessary for an indictment on a statute to conclude *contra formum statuti*. 345

What ought to be the form of the caption of an indictment (See CAPTION). 346. 350

Upon what proof, and within what time after the offence, an indictment may be found (See EVIDENCE). 350

IN WHAT CASES AN INDICTMENT MAY BE QUASHED. 354. s. 146

The Court, in discretion, may quash any indictment, the judgment upon which would be erroneous. 355

Judges are in no case bound *ex debito justitiæ* to quash an indictment, but may oblige the party to demur. *ib.* s. 146

In heinous offences, the Court will not quash the indictment; neither will they if the recognizance or *certiorari* is forfeited. *ib.*

The difference between quashing and arresting the judgment. *ib.* (N. 1)

By 7 Will. 3. c. 23. no indictment for high treason, &c. &c. shall be quashed on motion of the prisoner, before evidence given thereon in open court, &c. &c. 355

And no exception can be taken on this act after plea pleaded. *ib.* s. 148

Quære, whether the court will quash an information. *ib.* s. 149

What may be pleaded to an indictment, and in what manner. 356. s. 150

The defendant may plead any plea *in abatement* to a felony, and also plead over *in bar*, and also take the *general issue*. *ib.*

It is no good plea to an indictment that another is depending. ch. 34. s. 1

What is the proper process on an information (See PROCESS). ch. 27

INFAMY.

Where it disables a man to be a witness or juror (See EVIDENCE, JURORS). 603

How far infamy is cleared by pardon (See PARDON). 547

INFORMATION.

Informations are of two kinds *viz.* at the *suit of the king* and *qui tam*. 356. ch. 26

IN WHAT CASES AN INFORMATION AT THE SUIT OF THE KING WILL LIE. *ib.* s. 1

Informations will lie for offences of a *public nature*, done either to the king himself, or to a subject: instances enumerated. *ib.*

Information will lie for offences against statutes, unless expressly or impliedly excluded. 357. s. 2

No information will lie for any capital crime, or for misprision of treason. *ib.* s. 3

WHAT OUGHT TO BE THE FORM OF SUCH INFORMATION. *ib.* s. 4

Information is in every respect like indictment, only that indictment is found by the oaths of twelve men, and information is only the allegation of the officer who exhibits it. 357

Whatsoever certainty is requisite in an indictment, the same is also necessary in an information: the material parts of the crime must be precisely found in the one, and alleged in the other, and not by way of argument or recital. *ib.*

Exception as to an information for perjury. *ib.*

By 4 and 5 Will. and Mary, c. 18. the master of the crown office shall not, without the express order of the court, file any information, nor issue process thereon, until he has taken a recognizance from the prosecutor in 20*l.* to proceed with effect, &c. 358

The recognizance shall be filed in the crown office for the purpose of public inspection. *ib.*

In what cases the court will order an information to be filed. 359. 361

How party may move the court to set aside process issued against him, previous to a recognizance having been given by the informer. 361

WHERE THE DEFENDANTS SHALL HAVE COSTS. 361

OF INFORMATIONS QUO WARRANTO. 363

INFORMATION QUI TAM.

IN WHAT CASES IT WILL LIE. 368

It will not lie on any penal statute, unless the whole or part of the penalty be expressly given to him who will sue for it. *ib.* s. 17

Where a penalty is given to an informer, any one may sue for it, and lay his damage *tam pro domino rege quam pro seipso*. 369

Where a statute prohibits or commands a thing, the doing or omission whereof is an immediate damage to the party, and concerns the public, the party grieved may sue *tam pro domino, &c.* *ib.*

Wherever

- Wherever the king is to have a fine on an action on a statute, there are contrary opinions whether the action may be brought *tam pro domino, &c.* 369
- What ought to be the form of an information or action *qui tam*. *ib.* s. 18
- There is no need to conclude *contra pacem*. 370
- Quere*, if it be necessary to conclude *in contemptum regis*. *ib.*
- They need not recite the statute whereon they are grounded. *ib.*
- What misrecitals of such statute will be fatal (See INDICTMENT.)
- How far it is necessary to bring the case within the very words of the statute (See INDICTMENT.)
- How far it is necessary to conclude *contra formam statuti*. 370
- If an information contain several offences against a statute, and be well laid as to some only, the informer may have judgment for so much as is well laid: instances given. *ib.* s. 19
- If the whole time that the defendant hath offended be expressed inconsistently, the whole is repugnant and void. *ib.*
- An informer on a *qui tam* statute may have a writ against the defendant, either *quas eis debet, &c.* or *quas ei debet*, which is good, in the declaration, in the name of the plaintiff only. *ib.* s. 20
- Quere*, if the writ or count need express that the action was brought for the king as well as the party. *ib.*
- But every information must be in this form, that the informer *tam pro domino rege quam pro seipso sequitur*, even where the statute gives one third of the penalty to a third person. *ib.*
- How the form of the information shall be in such case. 371
- It is safest for every information or action *qui tam* to demand the very sum due to the informer, and neither more nor less. *ib.* s. 21
- If an action on a statute demand the whole forfeiture for the informer, where the statute gives part of it to the king, it is insufficient. Sed *quere*, if it is not good for the part due to the king. *ib.*
- Quere*, if where the *quantum* of forfeiture depends on the finding of the jury, a *blank* may be left for the sum. *ib.*
- A popular action may conclude *ad gratiam dominum*, without adding of the plaintiff. *ib.*
- By 18 Eliz. c. 5. "no person shall be sued upon a penal statute, but by way of information or original action"—if such statute inflict a penalty generally. *ib.* s. 22.
- But former statutes, which expressly give a recovery by bill, plaint, &c. are not within the exception of this act; the reason of it. *ib.*
- No suit by bill or plaint, by a party grieved, suing upon a clause impliedly relating to himself only, is within the 18 Eliz. c. 5. 372
- But where the party particularly grieved sues for a forfeiture generally limited to any who will sue for it, he is as much within the restraint of the statute, as if he were not the party grieved. *ib.*
- In an action on a statute against an officer for not qualifying, it is safest to shew when the defendant was admitted to his office; that he neglected to qualify in time; and that he exercised the office after the neglect. 372. s. 23
- The fact is sufficiently alledged after a *quod cum* in a *qui tam* action, but not in an information. 373. s. 25
- Where a statute appoints that a penalty shall be recovered in any of the king's courts of record, the offence may be indicted before justices of *oyer and terminer*. *ib.*
- Where a statute limits suits by an informer *qui tam* to other courts, yet any one may, by construction of law, exhibit an information in the exchequer for the whole penalty, for the use of the king. *ib.*
- IN WHAT COUNTY A QUI TAM ACTION OR INFORMATION MAY BE BROUGHT. *ib.* s. 26
- By 31 Eliz. c. 5. the suits by common informers on any penal statute shall lay the offence in any other county but where the matter alleged was in truth done, which fact may be traversed by the defendant. *ib.*
- Suits for champerty, buying of titles, extortion, the king's customs, &c. or usury, or forestalling, &c. are excepted from the restraints of the act. *ib.*
- All suits for unlawful games, for not having bows and arrows, for using a trade contrary to 5 Eliz. shall be sued in the general quarter-sessions or assizes of the same county where the offence shall be committed, &c. &c. *ib.* s. 27
- The defendant can only take advantage of the offence being laid in a wrong county, by way of plea. 374. s. 28.
- The clause restrains not an information in the king's bench or exchequer, for an offence happening in the same county where those courts are sitting, for the prerogative of these courts shall not be restrained without express words. *ib.* s. 30
- By 21 Jac. 1. c. 4. suits for offences against any penal statute by a common informer, shall be commenced by action, bill, plaint, information, or indictment, before justices of *assize, nisi prius, oyer and terminer, and gaol-delivery*, or before *justices of the peace*, in every county of England and Wales wherein the offences shall be committed, only at the choice of the parties who shall commence the suit, &c. *ib.* s. 31
- The same process shall be awarded in every popular action commenced according to this act, as in an action of trespass *vi et armis* at common law. 375
- And all other informations, &c. either by the attorney-general or any officer, or by a common informer or other person, shall be void. *ib.*
- If on the general issue the offence be not proved in the same county, the defendant shall not be found guilty. *ib.* s. 32
- No information shall be filed until the relator hath made oath that the offence was not committed in any other county. *ib.*
- No information *qui tam*, &c. can be brought in *Westminster Hall* on any penal statute made before 21 Jac. 1. for which the offender may be

- be prosecuted in the country, unless committed in the county where the Court shall sit. 375. s. 34
- Where a subsequent statute gives a remedy in any court of record generally, the informer may sue in *Westminster Hall*, notwithstanding 21 Jac. 1. 376. s. 35
- The 21 Jac. 1. gives no jurisdiction to the courts therein mentioned over any other offences where they had none before. *ib.* s. 36
- The 21 Jac. 1. does not hinder the removal of any indictment into the king's bench by *certiorari*, after which it may be either tried there or at *nisi prius*. *ib.* s. 37
- A writ of error also lies from the king's bench to the exchequer chamber in a *qui tam* action of debt. *ib.*
- The want of the informer's oath will not make the proceedings *erroneous*; but the Court may be moved to set the process aside. *ib.* s. 38
- No suit by a party grieved is within the restraint of the 21 Jac. 1. c. 4. *ib.* s. 39
- WITHIN WHAT TIME SUCH INFORMATION, &c. MUST BE BROUGHT. 377. s. 40
- By 31 Eliz. c. 5. all informations, &c. &c. upon any penal statute, where the forfeiture is limited to the queen only, shall be brought within two years after the offence is committed. *ib.* s. 41
- And all informations, &c. upon any penal statute where the forfeiture is limited to the queen, and to any other that shall prosecute, shall be brought by such prosecutor within one year, and in default thereof the queen may prosecute any time within two years after that year ended. *ib.*
- By 18 Eliz. c. 5. upon exhibiting an information on a penal statute, a special note of record shall be made of the very day, month, and year, or no process shall be sued on the same. *ib.* s. 42
- By 21 Jac. 1. c. 5. no suit shall be filed upon any penal statute, within the provisions of this act, until the informer hath made oath that the offence was committed within the county within one year preceding. *ib.* s. 43
- If an offence prohibited by any penal statute be also an offence at common law, the prosecution of it at common law is no way restrained by these statutes. 378. s. 44
- If a suit on a penal statute be brought after the time limited, the defendant need not plead the statute, but may take advantage of it in the general issue. *ib.* s. 45
- If an information *qui tam* be brought after the year, it is bad only as to the informer, but good as to the king. *ib.* s. 46
- The party grieved is not within the restraint of the above statutes, but may sue in the same manner as before. *ib.* s. 47
- Suing out a *latitat* within the year, is a sufficient commencement of the suit to avoid the limitation of these statutes. *ib.* (N. 1)
- Quere*, if a suit by a common informer on a penal statute which first gives an action to the party grieved, and, in his default, after a certain time to any one who will sue, be within the restraint of these statutes. 378. s. 49
- And *quere*, whether the exception of certain offences out of the 31 Eliz. c. 5. do except the said offences. *ib.* s. 50
- By 31 Eliz. c. 5. none but the party grieved shall inform, &c. upon a penal statute, if he hath been ordered by any of the queen's courts not to sue, &c. *ib.* s. 51
- A corporation cannot sue as a common informer. *ib.* 379
- The king cannot be nonsuit in any information or action wherein he himself is the sole plaintiff. *ib.* s. 52
- Yet an informer *qui tam*, or plaintiff in a popular action, may be nonsuit, and thereby determine the suit, as well for the king as for himself. *ib.*
- The attorney-general may enter a *noli prosequi* to any information by the king only. *ib.*
- Whether the informer or defendant may appear by attorney. *ib.* s. 53
- By 18 Eliz. c. 5. every informer shall exhibit his suit in proper person, and pursue the same only by himself or his attorney. *ib.* s. 54
- By 29 Eliz. c. 5. the defendant to a penal suit, ifailable by law, or by leave of the Court, may appear by attorney at the day and time contained in the first process, and shall not be urged to personal appearance, or to put in bail to such suits. *ib.* s. 55
- By 31 Eliz. c. 10. this shall extend only to subjects natural-born, and to denizens. 380. s. 56
- OF COSTS ON AN INFORMATION, &c. *ib.*
- An informer upon a popular statute can in no case have costs, unless they are expressly given him by such statute; the reason of this rule. *ib.* s. 57
- But an action on a statute, by the party grieved, for a certain penalty given by a popular statute, is within the statute of *Gloucester*, which gives the demandant his costs in all cases where he shall recover his damages; and such penalty is in lieu of damage. *ib.*
- No costs shall be recovered in an action on a statute creating a new offence, which gives no certain penalty to the party grieved, but only his damages in general, &c. *ib.*
- But the jury in this case may give the party a full satisfaction by way of damages. 381
- By 18 Eliz. c. 5. if an informer on a penal statute shall delay his suit, or discontinue or be nonsuit, or have judgment against him, he shall pay the defendant his costs, charges, and damages, &c. *ib.*
- No action on any statute by the party grieved is within the purview of this statute; it relates to common informers only. *ib.* s. 59
- But by 23 Hen. 8. c. 15. and 4 Jac. 1. c. 3. if the action be for some personal injury, or if the plaintiff is intitled to costs, he shall pay them, on a verdict of nonsuit, to the defendant. *ib.*
- If judgment be given against an informer because the Court had no jurisdiction, because the statute on which he sues is discontinued, yet

yet he shall pay costs within the 18 Eliz. c. 5. 381. s. 59

In an action *qui tam* on 5 Eliz. c. 4. the plaintiff shall pay costs. 382

Determination on this statute. *ib.*

OF PLEADING TO AN INFORMATION QUI TAM. 383. s. 62

The defendant must answer the whole time laid; if he have any special matter in justification, it must be alleged with certainty; but if he plead the general issue, he cannot also plead a special plea. *ib.*

A penal suit actually depending, may be pleaded in abatement to a subsequent prosecution, it being averred to be for the same offence. *ib.* s. 63

It is no objection to such a plea, that the offence in the subsequent suit is laid on a different day. 384

A mistake of the day is not material on *nul tiel record*, if the prior suit appear to have been really first commenced. *ib.*

Two informations exhibited on the same day may mutually abate each other; for there is no priority. *ib.*

The king may totally bar a suit on a penal statute, by a pardon or release before its commencement; but if the informer actually commence before the king, he hath such an interest in his part of the penalty, that the king can no way discharge it. *ib.*

The king can in no case bar the suit of the party grieved, nor proceed in it after the death of the plaintiff. *ib.*

A conviction or acquittal, or release *bonâ fide*, whether by a party grieved or a common informer, is a good bar to any subsequent prosecution for the same offence. *ib.*

By 4 Hen. 7. c. 20. if any defendant shall be found pleading any recovery, &c. or bar to a popular action, &c. which in fact has been obtained by fraud or covin, the plaintiff, if he sue with good faith, shall recover, and the defendant shall suffer two years' imprisonment. 385

Upon this statute the plaintiff may aver covin generally, without shewing wherein the covin consisted. *ib.* s. 65

But the plea must state, that the plaintiff in the other action had priority of suit, or on demurrer it will be bad. *ib.* (N. 1)

The record of the former recovery cannot be given in evidence on *nil debet*; it must be pleaded specially; and then the plaintiff may reply *nul tiel record*, or that it was a recovery by covin to defeat a real prosecutor, which the plaintiff could not be prepared to shew on the general issue. *ib.*

OF THE GENERAL ISSUE. *ib.* s. 66

If the defendant plead *nil debet*, it is safest to say, that he owes nothing to the informer nor to the king; the reason of this caution. *ib.*

Several defendants cannot plead jointly *not guilty*, but they should plead severally, that neither they nor any of them are guilty. 386. s. 67

If the offence be alleged from matter in pais, the

defendant may plead that he owes nothing, or that he is not guilty; but if it be alleged from matter of record, such a plea is not good. 386. s. 68

If the defendant be within the proviso of the statute, he may give it in evidence on the general issue; but if he have matter in discharge depending on a subsequent statute, he must plead it specially. *ib.*

But by 21 Jac. 1. c. 4. defendants to any suit for any offence against any penal law, may plead the general issue, and give the special matter in evidence. *ib.*

And if the plaintiff shall not prove the offence to have been committed in the county in which it is laid, the defendant shall be found not guilty. *ib.* s. 70

Whether the last words of the proviso of this act do not restrain the exception respecting recusancy, champerty, &c. to that part of the statute which relates to laying the offence in a proper county. *ib.* s. 71

OF THE REPLICATION. 387

A replication to a special plea to an information in the courts at Westminster, shall be made by the attorney-general only. *ib.* s. 72

Such a replication in a suit before justices of assize, shall be made by the clerk of the assizes only. *ib.*

A replication to a general issue in an information *qui tam* in the king's bench or exchequer, may be made in the name of the attorney-general only. *ib.*

In actions *qui tam*, the replication is to be made by the plaintiff only. *ib.*

A demurrer may be made by an informer *qui tam*, without mentioning the attorney-general. *ib.*

If the attorney-general refuse to reply, the informer may make the replication himself. *ib.*

The time which is allowed for pleading. *ib.* *notis.*

OF JOINING ISSUE AND TRIAL. *ib.*

Where the king is to have no part of the thing demanded, but only a fine or amercement, there is no necessity either in the issue or *venire facias* to use the words *qui tam pro domino*, &c. but the party may be simply named, as in actions at common law; but it is no fault to use them. *ib.* s. 73

If the king be to have part of the penalty, it is fatal, and not amendable, after verdict, not to mention that the plaintiff sues *tam pro domino*, &c. in the joining of the issue, *sed quare*. *ib.*

By 18 Eliz. c. 5. no jury shall be compelled to appear at Westminster to try any issue by a common informer on a penal statute committed thirty miles from Westminster, except the attorney-general require it to be tried at bar, which request shall be on the back of the *distringas*. 388

By 24 Geo. 2. c. 18. every *venire facias* upon a penal statute, in Westminster, Lancaster, Chester, Durham, and Wales, shall be awarded of the body of the proper county where such issue is triable. *ib.*

OF THE VERDICT IN QUI TAM. *ib.*

If an offence against a penal statute be in its nature

nature single, and several persons be jointly charged, yet one of them only may be found guilty, and the rest acquitted. 388. s. 75

So also, if a person be charged on a penal statute for offending oftener, or in a higher degree than can be proved, yet he may be found guilty as far as the evidence goes. *ib.*

But if the offence consist in making a contract contrary to the statute, as usury, and it be alleged to be made by two, it must be proved as laid; for if *contracts be not proved as laid, they shall be taken not to be the same.* *ib.*

Where an offence made penal by statute is in its nature single, one single penalty only can be recovered, though several join in committing it; but if it be several, each defendant is liable for the penalty. *ib.* (N. 1.)

OF JUDGMENT IN QUI TAM. 389

Where the statute ordains that the penalty shall be forfeited, one third to the king, one third to the informer, and one third to the poor, &c. and that if the offender do not pay, he shall be committed, &c. the judgment may be general, that the king and the informer shall recover the whole, &c. *ib.* s. 76

But if the judgment on such a statute give the whole to the king, it is erroneous. 389

If the judgment be one moiety to the king, and the other to the informer, upon a statute which gives the king the whole, it is erroneous only as to the latter part. *ib.*

If there be no clause at all concerning the forfeiture in a Conviction on a penal statute, but only a judgment *quod convictus est*, it is sufficient, for the forfeiture is implied. *ib.*

Wherever the act expresses the amount of the penalty, or leaves it to the discretion of the magistrates, there must be a judgment of forfeiture as well as a conviction. *ib.*

But where the act inflicts a penalty in a multiplied value, all the judgment the court can give is *quod convictus est*, and a new action must be brought on that judgment for the forfeiture. *ib.*

One who is convicted of a penalty on a penal statute, cannot be apprehended on a Sunday for the forfeiture. *ib.*

OF COMPOUNDING PENALTIES. 390

By 18 Eliz. c. 5. no informer or plaintiff on a penal statute shall compound with the defendant till after answer made in and with the leave of the court. *ib.* s. 77

This statute extends only to suits by common informers, and not to those by a party grieved. *ib.* s. 78

But it extends to *qui tam* informers, as well as to those who sue for the whole penalty. *ib.*

It extends as well to subsequent statutes as to those in being at the time it was made. *ib.* s. 79

It extends to the compounding of suits in courts which have no jurisdiction, as much as to those which have. *ib.*

It does not extend to compounding informations laid before magistrates. 390

By 21 Jac. 1. c. 3. all grants and dispensations

from the penalties of statutes, &c. &c. are void. 390. s. 79.

But this shall not prevent the courts from granting leave to compound for the forfeitures on penal statutes, after plea pleaded. 391

The above act shall not extend to compositions for licenses to keep taverns, &c. &c. *ib.*

What is the proper process on an information (*See PROCESS*). ch. 27. s. 12 to 14

It is questioned whether there can be any process against jurors by *proviso* in *qui tam* informations. c. 41. s. 10

INQUEST OF OFFICE.

See CORONER.

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For the offence of taking insufficient bail, *see BAIL.*

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IRONS.

A prisoner ought not to be brought to the bar in irons, unless there is danger of an escape. 434

ISSUE.

See GENERAL ISSUE. CHALLENGE. JURORS. INFORMATION QUI TAM.

JUDGE.

See COURTS. ATTACHMENT. BAIL. OYER AND TERMINER. GAOL-DELIVERY. ASSIZE.

JUDGMENT.

See JURATION.

In what cases judgment may be saved by an award of transportation. (*See TRANSPORTATION.*)

What judgment is good on an action or information *qui tam*. 389

Judgment in high treason, not being for counterfeiting the coin and seal, &c. shall not be arrested for miswriting, mis-spelling, or false or improper *Latin*. 624

In the king's bench, upon every conviction, whether by verdict or confession, the party is to have four days to move in arrest of judgment, if there be so many days remaining of the term, if not, then the longest time that can be had in the term. *ib.*

On a conviction of homicide *sc defendendo* or *per infortunium*, no judgment at all is given. *ib.*

Hale refused to hear a motion in arrest of judgment, of a scandalous conspiracy. *ib.* (N)

The court has refused to give judgment on a misdemeanour, because there were not four days left of the term. *ib.* (notes in marg.)

OF STATED JUDGMENTS. *ib.* s. 2

The law makes no distinction between a peer and a commoner; or between an ordinary case and one attended with extraordinary circumstances. 625

Judgment for high treason not *going to the coin*, is, that the prisoner shall be *called back to*

to the place from whence he came, and from thence be drawn to the place of execution, and be there hanged by the neck, cut down alive, his entrails burnt before his face, his head cut off, and his body divided into four quarters, to be disposed of at the king's pleasure. 625. s. 3
 But the part of the judgment as to the cutting down alive altered by 54 Geo. 3. c. 146. 625. (N)
 The proper judgment at common law for high treason in counterfeiting, &c. is, to be drawn to the place of execution and there hanged by the neck till he be dead. 626. s. 4
Sed quare, if the judgment for clipping and other offences against the coin, &c. is not, to be drawn, hanged, and quartered, as for other high treasons. *ib.*
 It seems settled, that the judgment for treason against the coin shall only be drawing and hanging without the quartering: the reason of it. *ib.*
 The judgment for petit treason is, that the prisoner shall be drawn to the place of execution, and there hanged by the neck till he be dead. *ib.* s. 5
 The judgment against a woman in all cases of treason is, that she shall be drawn to the place of execution and there burnt. *ib.* s. 6
 But this judgment of burning is abolished by 30 Geo. 3. c. 48. *ib.*
 The judgment against a man or woman for a capital felony, is to be hanged by the neck till dead: which is entered on the roll, *sus. per coll.* 627. s. 7
 But this judgment may be recorded without being pronounced in certain cases by 4 Geo. 4. c. 48. *ib.*
 For judgment in the case of murder, *see* EXECUTION.
 The judgment of *prine forte et dure*, upon standing mute. 461
 Judgment in *præmunire*. 630
 Judgment for misprision of treason, is imprisonment during life, forfeiture of all goods, and the profit of lands during life. *ib.* s. 10
 The judgment against a man for drawing a sword on a judge, or striking in the superior courts, is the same as misprision, and that his right hand shall be cut off. 630. s. 11
 The judgment for striking in the king's palace, rescuing a prisoner from the superior courts for perjury, or forgery of the statute, and the villainous judgment in conspiracy. 631. s. 12
 In what manner judgment for the defendant upon an acquittal, by verdict, or upon a plea of pardon, is entered. *ib.* s. 13
 The judgments for crimes of an infamous nature, against the first principles of natural justice and common honesty, are discretionary, and left in a great measure to the prudence of the court to inflict such corporal punishment, and also such fine and lien to the good behaviour as shall appear proportionate to the enormity of the offence. *ib.*
 The judgment upon a conviction of larceny, may in discretion award the offender to the house

of correction, or inflict fine and whipping. 506. 632
 The judgment of whipping females is abolished by stat. 1 Geo. 4. c. 57. 631. (N)
 The judgment of pillory abolished excepting perjury or subornation thereof, by 57 Geo. 3. c. 75. *ib.*
 By 63 Geo. 3. c. 162. in convictions of felony the court may add hard labour to the sentence of imprisonment. 506. 632
 By 3 Geo. 4. c. 94. they may do the same in certain cases of misdemeanor. 632
 Clergy restored in several enumerated instances. 633
 Judgment in manslaughter. 634
 Servants stealing their master's goods. *ib.*
 The court may assess a fine, but cannot award any corporal punishment unless the defendant be actually present in court. *ib.* s. 17
 Where there are several defendants, a joint award of one fine against them all is erroneous. 635. s. 18
 The distinction between *fine* and ransom. *ib.*
 A fine is under the power of the court during the term in which it is set, not afterwards. *ib.* s. 20
 Judgment of outlawry. (*See* OUTLAWRY.) *ib.* s. 21
 There never shall be two judgments for the same offence. 636
 Whether judgment at common law can be given on an indictment concluding *contra formam statuti*. c. 25. s. 115. 116

JURISDICTION.

See JUSTICES OF PEACE. COURT. KING'S BENCH.

If a man have a house which stands upon the precincts of two leets, he shall do suit for that within the jurisdiction of which his bed-chamber lies. 92. s. 12

JURORS.

If the king grant a special commission for the trial of indictments in one county which have been found in another, yet the trial must be by jurors of the proper county. 25. s. 19
 FROM WHAT COUNTY THE JURY ARE TO BE RETURNED. 558
 By the common law, they must in all cases be returned from the same county wherein the fact was committed. 559. s. 1
 In murder, where the wound is given in one county, and the death shall happen in another, the jurors shall come from the county where the death shall happen. *ib.*
 By 33 Hen. 8. c. 23. if treason, misprision, or murder, be examined by three of the privy council, and the party *vehemently suspected*, the king may grant a special commission to try the offenders by jurors from the county named in the commission, notwithstanding the fact was committed in a different county. *ib.* s. 2
 This statute, as far it relates to treason done within the realm, is repealed by 1 & 2 Philip and Mary, c. 10. but as to murder and misprision of treason, it seems still in force.

- For the trial of treasons done out of the realm (See Indictment).
- The statute 33 Hen. 8. c. 23. does not extend to an *accessary* in murder, examined before the council; for murder is one offence, and being *accessary* to it is another, and the statute shall be strictly taken. 559. s. 4
- If goods are stolen in one county and carried into another, or if a nuisance be done in one county which proves a nuisance in another, the jurors may come from either of the counties in which it is tried. *ib.* s. 5
- For felonies in *Wales* the jurors may come from the next *English county*, where it may be tried by 26 Hen. 8. c. 6. (Indictment.) 560
- For treason upon the sea, or in a foreign county, or for felonies or piracies upon the sea (See Indictment).
- From what county the jury shall be returned for the trial of a Foreign Plea. 560. s. 6
- By the common law, such pleas can only be tried by juries returned from the counties wherein they are alleged. *ib.*
- By 23 Hen. 8. c. 14. all foreign pleas triable by the county upon indictments for petit treason, murder, or felony, shall be tried by jurors from the county where the offender is arraigned, in whatever county the matter of the plea may be supposed. *ib.* s. 7
- This statute extends neither to indictments of high treason, nor to appeals. *ib.* s. 8
- PROCESS AGAINST JURORS. ch. 41
- Justices of gaol-delivery may have a panel returned by the sheriff, without any precept, by a bare award: the reason of it. 561. s. 1
- A jury may be so returned before justices of the peace at their sessions; *quare*, whether this does not rather depend on practice than on principle. *ib.*
- Justices of gaol-delivery cannot have a jury by force of a bare award, but they ought to make a particular precept to the sheriff for that purpose under their seals. *ib.*
- No jury can be returned into the king's bench from a foreign county without proper process under the seal of the Chief Justice. 562 s. 2
- But *quare*, if the return for the trial of an indictment, &c. in the same county where the court sits, may not be made by a bare *preceptum est*, &c. *ib.*
- Process against jurors may be returnable immediately into the king's bench for trial, in the county where it sits, &c. but for an indictment, &c. removed by *certiorari*, there must be fifteen days between the *teste* and the return. *ib.* s. 3
- Justices of *gaol* or gaol-delivery may order a jury to be returned immediately for the trial of a prisoner arraigned before them. *ib.* s. 4
- Justices of *gaol* and *terminer* may award a *venire* returnable the same day on which the party is arraigned. *ib.*
- Quere*, if justices of the peace can do the like, unless for felony, or the prisoner consent to be tried immediately. *ib.*
- But it seems necessary, by force of 4 & 5 Will. and Mary, c. 24. and 7 & 8 Will. 3. c. 32. that every *venire*, &c. should have six days between its *teste* and return. 562. s. 5
- A *venire* before justices of *oyer* and *terminer*, returnable at a day certain, is erroneous, unless the session be adjourned the same day. *ib.*
- A *venire* before justices of *oyer* and *terminer* may be made returnable at the next assizes. *ib.*
- Quere*, if a *venire* awarded by justices of *oyer*, &c. returnable at a certain day, need shew before what justices it is returnable. 563. s. 7
- Where several are arraigned on one indictment, and severally plead not guilty, it is in the election of the prosecutor, &c. either to take out joint or several *venires*. *ib.* s. 8
- In an appeal, if one plead not guilty, and the other plead a release, there must be several *venires*. *ib.*
- Where there are three defendants, the plaintiff may join two in one *venire*, and take out another against the third. *ib.* (N)
- Where the same jury is returned on a joint process against several, if a juror be challenged by any one defendant, he is by necessary consequence drawn as to all the others. *ib.* s. 9
- But where one jury is jointly returned before justices of gaol-delivery, for the trial of several defendants, they may sever the panel. *ib.*
- If an appellant take out a joint *venire* against all the appellees, he cannot afterwards take out several ones. *ib.*
- If no judgment be given that the juror who is challenged shall be drawn, but only that he shall stand aside for a time, he may try those who do not actually challenge him. *ib.* (N)
- Where process may be taken out by the defendant in criminal cases by *proviso*; that is, with a clause, that if two writs come to the sheriff, he shall execute one of them only. *ib.*
- IN WHAT MANNER A TALES IS GRANTABLE. 564. s. 11
- In an appeal, if a full jury do not appear, or so many be challenged and drawn that sufficient jurors do not remain, the appellant may pray a *tales*. *ib.*
- If a full jury do not appear, and the plaintiff pray a *distringus* without praying a *tales*, the court ought to grant it at the prayer of the defendant. *ib.* (N)
- In capital cases a *tales* may be granted for a larger *eren* and certain number than the first process; but in all other cases the *tales* must be less. 565. s. 12
- A *tales de circumstantibus* may be of any uncertain number. *ib.* (N)
- But every subsequent *tales*, in capital, as well as other cases, must be for a less number than the former, except the former *tales* were quashed. *ib.* s. 13
- The quashing the *array* of the principal panel doth not quash the *tales*, but the inquest shall be taken of those returned on the *tales* if there be enough, and if not, others shall be added by a new *tales*. *ib.* s. 14
- If all the persons returned on a *habeas corpus* be challenged and drawn, there shall not be a *tales*, but a new *venire facias* shall be awarded. *ib.*

If the first *habeas corpora* be quashed, the *tales* is quashed with it, and the party must proceed as if the *venire* only had been returned. 565

A *tales* is not grantable upon the return of a *venire*, but only upon the return of a *habeas corpora* or *distringas*. *ib. s. 15*

The *distringas* or *habeas corpora*, with a clause to add those on the *venire*, is the first process against a *tales*, but it cannot be granted with a *nisi prius*, unless previously returned. *ib. s. 16*

Whether a subsequent *tales* shall take notice of the jurors returned on a former *tales de circumstantibus*. *ib. s. 17*

The statutes which authorise a *tales* extend to all capital cases; but such a *tales* cannot be prayed for the king without a warrant from the attorney-general, or order of the court. 566. s. 18

Tales is not grantable by justices of *gaol-delivery*, and *quare* if by *oyer* and *terminer*; therefore such courts order a *larger panel*, and not a *tales*. *Sed quare. ib.*

If but one juror appears, and he is challenged, there may be twelve talesmen sworn to try the cause. *ib. note in marg.*

By 42 Edw. 3. c. 11. no inquest shall be by writ of *nisi prius*, before the names of jurors impanelled be returned into court. *ib. s. 20*

This statute extends as well to criminal as to civil cases, and to jurors on a *tales* as well as to those on the principal panel. *ib. s. 21*

But it is the practice of justices of *oyer* and *terminer* for treason, to proceed on the *venire*, and not to award any *habeas corpora*. *ib. s. 22*

By 7 & 8 Will. 3. c. 3. persons indicted for high treason, &c. shall have a copy of the panel of the jurors two days before the trial. 567. s. 23

By 7 Ann. c. 21. a list of the jury, mentioning the name and place of abode, shall be delivered ten days before the trial, in the presence of two witnesses. 557

The mode of complying with the directions of this act, is by motion to the king's bench for a rule upon the sheriff to deliver to the prosecutor a list of the jurors he intends to return upon the panel. 558. *notis.*

A *tales de circumstantibus* may be awarded upon a trial *de medietatem lingue*. 580

BEFORE WHAT COURT THE JURY IS TO BE RETURNED. *ch. 42.*

By the common law it is returnable only in the court where the prosecution is depending. 567

But the *stat. West. 2. c. 30.* having ordained that "all pleas of easy examination shall be determined in the country by *nisi prius*," an issue joined in the king's bench for an offence committed in a different county may be tried in the proper county by writ of *nisi prius. ib.*

This statute does not extend to the king, and in cases where he is a party the writ *ought* to be granted by his special warrant, or by the assent of the attorney-general. *ib. s. 3*

And the court has refused a *nisi prius* to the attorney-general, till the king's warrant was procured; because the case seemed to require great examination. 568. (N)

How jurors may be challenged on the part of the

king, and how on the part of the prisoner. (See CHALLENGE.) 568. 578

OF QUALIFICATION OF JURORS. 573. 576

At common law there was no necessity that jurors should have any freehold, before justices in *cyre*, or in cities or burghs. 572. s. 12

Neither was a freehold to a certain value in any case necessary. *ib.*

The want of a freehold is a good challenge to a juror in all cases not otherwise provided for by statute. 573

For issues are to be returned upon jurors, which implies that they ought to have land; *sed quare*, if by the common law the want of it was not a challenge to the favour only. *ib. (N)*

The use of a freehold in his own or his wife's right, whether absolute upon condition of inheritance, or for life, is sufficient if it be in the county, and in possession at the time the juror is sworn. *ib.*

By 21 Edw. 1. c. 38. jurors, except in cities, burghs, or trading towns, shall have tenements of 40s. yearly. *ib. s. 14*

Whether the want of this qualification be a cause of challenge. *ib.*

By 2 Hen. 5. c. 3. none shall be upon the inquest for the death of a man, &c. unless he have land of 40s. a-year clear of all charges: the want of this shall be good cause of challenge. *ib. s. 15*

In capital crimes this statute extends as well to the collateral issue as to the general issue. *ib. s. 16*

A *cestuy que trust* of a freehold of 40s. yearly in the same county, is a competent juror within statute. 574. s. 17

But a *feoffee* in trust, or a remainder man, &c. is not within the act. *ib.*

This statute is repealed as to treasons. *ib. s. 18*

By 23 Hen. 8. c. 13. jurors in cities, boroughs, and towns corporate, who are worth 40l. in goods, shall not be challenged for defect of freehold on the trial of murders and felonies at their sessions of *gaol delivery*. *ib. s. 19*

This act shall not extend to any knight or esquire dwelling in such city, &c. &c. *ib. s. 20*

By 11 Hen. 7. c. 21. and 4 Hen. 8. c. 3. provision is made for the qualification of jurors in London. *ib. s. 21*

By 4 and 5 Will. & Mary, c. 25. all jurors, other than in trials *per medietatem lingue*, shall have 10l. a year, above reprises, of freehold, copyhold, or ancient demesne lands, or in rents, &c. &c. in England. In Wales every such juror shall have 6l. a-year. *ib.*

And any person who has 5l. in England, and 3l. in Wales, may be returned on a *tales*. 575. s. 23

By 3 Geo. 2. c. 24. persons having 20l. a-year in land in possession, &c. may be put in the freeholders' book, and serve on juries as freeholders. *ib.*

By 3 Geo. 2. c. 25. jurors in London shall be householders, and have a personal estate of 100l. or they may be challenged. *ib.*

In other counties, cities, or places, none shall be summoned to serve any jury for the trial of any capital offence, who are not therein qualified. *ib.*

Set to serve as jurors in civil causes, and they may be challenged for that cause in *voir dire*. 576

By 4 Geo. 2. c. 7. in *Middlesex*, leaseholders of 50l. a-year may be summoned, and may serve on juries. *ib.*

For trials in *London* for high treason, every juror ought to have such freehold or copyhold as required by 4 and 5 Will. & Mary. 575. s. 24

In what manner the process against the jury must be continued. 417

It is no objection against a person's giving evidence that he is one of the jurors; but *quære*, if he ought to go to his companions afterwards. 601. s. 80

A jury sworn and charged in a capital case cannot be discharged till they have given their verdict; but in certain cases there may be an exception to this general rule. 619. s. 1. *et notis*

JUSTICES.

See Oyer AND TERMINER. COURTS. BAIL. PROCESS. GAOL-DELIVERY. ASSIZE.

JUSTICES OF THE PEACE.

See CONSERVATOR. CORONER. ATTACHMENT. SESSIONS. ESCAPE. CONSTABLE. EXAMINATION. BAIL. COMMITMENT. ARREST.

JUSTICES OF PEACE are of three descriptions, viz. 1. By statute. 2. By charter or grant. 3. By commission. 40

HOW JUSTICES OF THE PEACE ARE ORDAINED.

By 2 Edw. 3. c. 16. it is ordained, that in every county, good and lawful men, &c. shall be assigned to keep the peace. 41. s. 1

By 4 Edw. 3. c. 2. justices assigned to keep the peace shall not bail those who are not mainpernable, and they shall transmit their indictments to the justices of gaol-delivery. *ib.* s. 2

By 18 Edw. 3. c. 2. they shall, with others learned in the law, be assigned by the king's commission to hear and determine felonies and trespasses in the same counties, and to inflict reasonable punishment. *ib.* s. 3

By 34 Edw. 3. c. 1. they shall restrain barrators, &c. and inquire of pillers and robbers, and arrest such as they find by indictment or suspicion, and put them in prison, and take all that be not of good fame, &c. &c. *ib.* s. 4.

By 17 Rich. 2. c. 10. in every commission of the peace two men of the law shall be assigned to deliver thieves and felons. 42. s. 5

By 3 Hen. 5. c. 4. the justices named of the quorum except, &c. shall be resident in the shire, &c. make their sessions four times a-year. *ib.* s. 6

HOW JUSTICES OF THE PEACE ARE COMMISSIONED.

The commission of the peace, after having been altered during several reigns, was settled in the reign of Queen Elizabeth in its present form. 42

The substance of the commission of the peace stated. *ib.*

All commissions of the peace must be in the king's name. 51. s. 53

In what manner the king may grant commissions to the mayors of a town to be perpetual justices of the peace. 52. s. 53

HOW JUSTICES OF THE PEACE ARE TO BE QUALIFIED.

By 5 Geo. 2. c. 18. and 18 Geo. 2. c. 20. no person shall act as a justice of peace who has not an estate, freehold, copyhold, or for years determinable upon life, of the clear yearly value of 100l. in England or Wales; or the immediate reversion or remainder in lands, tenements, or hereditaments leased for one, two, or three lives, or for term of years, determinable upon one, two, or three lives, upon reserved rents of the clear yearly value of 300l. 43. s. 14

By 18 Geo. 2. c. 20. no person shall act as a justice of the peace until he has taken the oath as therein described. 44

A copy of which oath shall be given from the records of the sessions, and such copy be admitted as evidence. *ib.* s. 15

By 18 Geo. 2. c. 20. s. 3. persons acting as justices of peace without having taken the oath, or being qualified, shall forfeit 100l. to be recovered by action, and the proof of the qualification to lie upon the defendant. *ib.* s. 16

HOW JUSTICES ARE TO TAKE OATH OF OFFICE.

On renewing the commission of the peace a writ of *dedimus potestatem* issues out of CHANCERY. directed to some ancient justice or other person, authorising them to take the oath of the person appointed, and to return the same into the court of chancery; to which oath of office are severally annexed the oaths of *supremacy* and *allegiance*. 45. s. 29

The form of the oath of office stated. *ib.* s. 30

By 1 Geo. 3. c. 13. justices of peace who have taken the oath of office under one reign, and are re-appointed by the successor to the crown, may act without taking the oath again. *ib.*

By 1 Geo. 3. c. 13. s. 2. the oath shall be registered by the clerk of the peace, &c. *ib.*

By 7 Geo. 3. c. 9. persons who have once taken the oath, shall not incur the penalty by omitting to take it again on being re-appointed. 46

Justices of the peace are in general indemnified for not having taken the oaths, provided they have properly qualified themselves to act as justices. *ib.* *notis*

WHO ARE EXCLUDED FROM BEING JUSTICES OF PEACE.

No coroner or sheriff shall be a justice of the peace during his continuance in office. 46

But a justice of peace being created a peer, whether temporal or spiritual, a knight, a judge, or a serjeant, will not take away his authority. *ib.*

By 5 Geo. 2. c. 18. no attorney, solicitor, or proctor, shall be a justice of peace for a county during his practice. *ib.*

By

By 9 Geo. 3. c. 30. commissioners of the navy may act as justices of the peace in all places whatsoever respecting persons charged with forging seamen's wills, tickets, letters of attorney, &c. 47

WHAT STATUTES MAY BE EXECUTED BY A JUSTICE OF THE PEACE.

Justices of the peace may, by virtue of their commission, execute all statutes whatsoever made for the preservation of the peace. *ib.*

But justices of the peace cannot execute a statute in the case of a new-created offence, unless authority be given to them for such purpose in express words. *ib.*

Instances of statutes which they cannot execute. *ib.*

HOW JUSTICES FOR A COUNTY MAY ACT WITHIN A LIBERTY.

Justices of peace for a county have no coercive power out of the county, and therefore orders of bastardy, &c. made out of the county are not binding; but recognizances and informations taken by them in any place are good. 47

By 9 Geo. 1. c. 7. s. 3. if a justice of the peace for a county dwell in any city or other precinct that is a county of itself, situate within the county for which he is appointed, he may grant warrants, take examinations, make orders, although such dwelling be out of the county. 48

By 28 Geo. 3. c. 49. any justice acting for a county, may act as such in any place within a city, town, or precinct which is a county of itself, and situated within, or surrounded by, or adjoining to any such county; but they cannot intermeddle in any motion arising within such city, town, or precinct. *ib.*

Justices of peace also may, by the special words of their commission, act as well within liberties as without. *ib.*

Justices of the peace may execute their office within a town which has a special commission of the peace for its own limits, unless specially excluded. 49

If therefore the crown grant to any city to have justices of its own within itself, excluding the county justices from intermeddling therein in the ordinary business of a justice of the peace, the acts of a county justice therein are void. *ib.*

But if a statute give jurisdiction to justices of the peace residing near the place where offences shall be committed, the justices of the place and the county justices have concurrent jurisdiction. *ib.*

So a charter granting jurisdiction to borough magistrates does not exclude the county justices from having concurrent authority, except there be express words to that effect in the charter. *ib.*

By 15 Geo. 2. c. 24. city justices may commit persons apprehended within their limits to the house of correction for the county in which such city or liberty is situated, if the inhabitants thereof contribute to the support of such house of correction. *ib.*

By 24 Geo. 2. c. 55. justices of peace for one

county may endorse warrants issued by justices of the peace for another county, for the apprehending of felons who have escaped from the county where the offence was committed, and admit the party to bail when apprehended, if the offence be bailable. 50

By 28 Geo. 3. c. 49. any justice of the peace acting for two or more adjoining counties may act for each county respectively, although the justice do not reside in the county. 51

HOW FAR JUSTICES OF PEACE MAY PROCEED ON INDICTMENTS TAKEN BEFORE THEMSELVES.

Subsequent justices of the peace may proceed on indictments taken before their predecessors. 52

Justices of peace cannot proceed on an indictment taken before a coroner or justices of oyer and terminer and goal-delivery. *ib.*

BY WHAT NAME JUSTICES OF PEACE ARE TO BE DESCRIBED.

They may be named "keepers of the peace," although they are expressly commissioned by the name of "justices of the peace." 52

The description of justices of the peace by the name of "justices of our Lord the King to preserve the peace," &c. is good, without saying "the King's peace." *ib.*

By 26 Geo. 2. c. 17. the acts of justices of the peace shall be good, though they are not therein described to be of the *quorum*. *ib.*

OF THE JUSTICES' AUTHORITY IN FELONY.

Justices have herein no power unless their commission authorises them to *hear and determine felonies*, which in general is given to those of the *quorum* only, and a *certiorari* has been quashed because it only mentioned justices of the peace, without adding they were assigned to *hear and determine felonies*; *sed quare*. 53

The clause in the commission, to hear and determine felonies, gives justices no jurisdiction over an offence which by statute is specially appointed to justices of oyer and terminer. 54

Justices of the peace have no power to take an indictment on 5 Eliz. c. 14. concerning forgery. *ib.*

Nor on 2 & 3 Edw. 6. c. 24. concerning accessories in one county to felonies in another. *ib.*

Yet by force of 2 & 3 Philip and Mary, c. 10. and as all felonies include breach of the peace, justices of the peace may take examinations for any kind of felony, and commit the offenders, &c. &c. *ib.*

But as the 2 & 3 Ph. and Mary, c. 10. and 1 & 2 Ph. and Mary, c. 13. direct justices to certify their examinations in homages, they seldom proceed further in relation to felonies, though within their commission they take only petty larcenies. *ib.*

Justices of the peace in England may commit an offender against the Irish law for felony, in order to be sent to Ireland, the offence being committed there. 54. (N)

Two justices may take a recognizance for felony on the high seas, &c. &c. *ib.*

Justices may take an inquisition of murder if the body cannot be found. *ib.*

THE POWER OF JUSTICES IN TREASON, PRAEMUNIAL, AND MISPRISION.

None of these offences are within their commission, yet, being against the peace, any justice may apprehend the offender. 54

They may also take the examination of such offenders, and the information of witnesses, and bind them over, &c. pursuant to the statutes of Phil. and Mary. 55

By 3 Hen. 5. c. 7. justices of the peace shall have power by the king's commission to inquire of false money, &c. *ib.*

By 5 Eliz. c. 1. they may inquire of the offence of maintaining the pope's power. *ib.*

By 23 Edw. 1. c. 8. they may inquire of offences touching the supremacy, &c. *ib.*

OF THE POWER OF JUSTICES OF PEACE IN INFERIOR OFFENCES.

Justices of the peace are empowered to hear and determine all trespasses; which comprehend all inferior offences against the peace. *ib.*

By the common law justices of the peace have no jurisdiction over forgery and perjury; the reason of it. 55

Libels are indictable before justices of the peace. 56

A person may be indicted before justices of the peace for being an extortioner or a night-walker, and haunter of bawdy-houses. *ib.*

Justices of peace have jurisdiction over all inferior crimes whether mentioned in their commission or not, as being against the peace. *ib.*

IN WHAT CASES JUSTICES OF THE PEACE MAY ACT THOUGH INTERESTED.

Justices of the peace cannot, by the general rule of law, execute their office in their own case. 56

By 16 Geo. 2. c. 18. Justices may act in matters relating to the relief, settlement, and maintenance of the poor; to passing and punishing of vagrants; to the highways, and to parochial assessments, although rated to the charges of the parish in which they act. *ib.*

But on an appeal against an order of removal those justices who are rated to the relief of the poor in either of the contending parishes, have no right to vote by virtue of this statute. 57

HOW FAR JUSTICES OF THE PEACE MAY ACT THOUGH NOT OF THE QUORUM.

By 7 Geo. 3. c. 21. all acts to be done by two justices in such places where there is only one justice of the quorum, shall be good, though neither of the justices who do the act is of the quorum. 57

HOW FAR JUSTICES OF THE PEACE ARE PROTECTED.

It is actionable to call a justice "rascal," "villain," "liar," or any other opprobrious name, while in the execution of his office. *ib.*

Justices of the peace are not punishable civilly for acts done by them in their judicial capacities; but if they abuse their authority, they may be punished criminally by information. *ib.*

An information will not be granted against a justice for an act done by him judicially, though such act be illegal, if he acted fairly, and without corrupt motive. 57

By 1 Jac. 1. c. 5. justices of peace shall have double costs in actions brought against them in which the plaintiff is nonsuited, &c. 58

By 21 Jac. 1. c. 12. actions against justices of the peace must be laid in the proper county. *ib.*

By 24 Geo. 2. c. 44. no writ or process shall be sued out or served on a justice until notice thereof has been delivered to him at least one month before the same is sued out, in which notice the cause of action shall be stated. *ib.*

By 24 Geo. 2. c. 44. s. 2. the justice may tender amends within a month after such notice. *ib.*

By 24 Geo. 2. c. 44. s. 3. if the plaintiff, on the trial of such action, do not prove that he gave such notice, the justice shall have a verdict. *ib.*

By 24 Geo. 2. c. 44. s. 4. if the justice shall not have tendered amends, he may, on leave, pay money into court. *ib.*

By 24 Geo. 2. c. 44. s. 5. no evidence shall be received of any other cause of action than that which is contained in the notice. 59

By 24 Geo. 2. c. 44. s. 6. no action shall be brought against any peace officer for any thing done under a justice's warrant, until a copy of such warrant has been demanded in writing and refused. *ib.*

By 24 Geo. 2. c. 44. s. 6. if after such copy any action is brought, the justice who signed the warrant must be made a defendant, and the jury, on producing and proving the warrant, shall give a verdict for the defendants, notwithstanding any defect of jurisdiction in the justice. *ib.*

In what cases the defective warrant of the justice shall justify the officer. 60

By 24 Geo. 2. c. 44. s. 7. If in any action on this statute the plaintiff obtain a verdict, and the judge certify that the injury for which the action was brought was wilful and malicious, the plaintiff shall have double costs. *ib.*

All actions must be brought against a justice of the peace within six calendar months. *ib.*

Where there is a special verdict found in any action brought on this statute, and it appears, from the facts found, that the act was done by a justice of the peace, the master, on verdict for the plaintiff, must tax double costs, though no certificate be made. *ib.*

Secretaries of state and privy councillors are not magistrates, nor king's messengers officers within the meaning of this statute. *ib.*

On an action against a justice, on a conviction, the defendant must shew that his proceedings were regular. 60

An action of *trespass* will not lie against a justice of the peace for making a warrant to distrain for the poor's rate, if the rate have not been appealed from. 61

If a justice issue a warrant that is totally illegal, he is liable to an action of *false imprisonment*, though he did not act intentionally wrong. *ib.*

How

HOW FAR JUSTICES OF PEACE MAY AWARD COSTS.

By 18 Geo. 3. c. 19. when a justice hears a complaint, on any warrant or summons issued, he may award costs to be paid by either party, as he shall think fit, to be levied by distress. 61
Upon a conviction on a penal statute, where the penalty shall not exceed *five pounds*, the costs may be deducted from the penalty, provided they do not exceed a *fifth part* of such penalty. *ib.*

JUSTICIER.

See KING'S BENCH.

JUSTIFICATION.

See JUSTICES OF PEACE. ARRESTS. PLEADING.

KING.

See INDICTMENT. PARDON. CHALLENGE. COURTS.

How far the king's pardon will bar a *qui tam*. 384. s. 64

Sanctuary could only be claimed by grant from the king, made or allowed in *eyre* since the time of memory. 469. s. 3

The king may sue in what ~~case~~ *the* pleas. *ib.* ch. 27. s. 27

Wherever the king appears to have been deceived in his grant, it is void. 547. s. 46

Where the king is a party there can be no process by *proviso*. 564

The king shall not be bound by a statute which does not expressly name him. 567. s. 3

The king is a party in every indictment, and also, in some sort, in appeals. 571. s. 10

The king is the supreme magistrate of the kingdom, and *intrusted* with the whole executive power of the law. 1. s. 1

No court can have any jurisdiction, unless it some way or other derive it from the king. *ib.*

The king cannot sit in judgment upon any indictment, because he is a party, and has delegated all his power to his judges. *ib.* s. 2

The king cannot alter the certain and established rules of court, or add to the jurisdiction of an ancient court. 2

The king's grant of a judicial office for life which has been usually granted at will, is void. *ib.* s. 5

The king cannot grant even a *mere* spiritual jurisdiction. *ib.* note in *marg.*

The king cannot grant any new commission whatsoever that is not warranted by ancient precedents, however necessary or conducive to the ~~public~~ *the* good. *ib.* s. 8

Before the *Rev. of West*, he could ~~not~~ *not* authorise persons to take care of rivers, and the fishing therein. *ib.*

The king's demise does not determine commissions, &c. &c. 9. s. 11

The king still continues the principal conservator of the peace; but he cannot take a recognition of it. 38. s. 1

The king, by his commission, may authorise whom he pleases to execute an act of parliament. 47. s. 37

The king's lands, while they continue in his possession, are wholly out of the jurisdiction of the sheriff's torn, and of all such courts. 96. s. 26

Whether those who are taken by the commandment of the king are replevisable. See BAIL.

KING'S BENCH.

See BAIL. APPEAL. CERTIORARI.

The king's bench retains all the power which remained in the court of the high justicier, after the courts of exchequer and common pleas were separated from it, especially the supreme jurisdiction in all criminal matters. 6. ch. 3

The king's bench is intrusted with the highest jurisdiction over all capital offences, misdemeanours, public breaches of the peace, oppressions of the subject, and all factions, controversies, debates, misgovernment, or other crime, manifestly against the public good. 7. s. 3

This court is empowered to find redress for every injury. *ib.*

It is not necessary to shew a precedent for the remedial interposition of this court; for, being the *custos morum* of the realm, wherever it meets with an offence contrary to the first principles of common justice, and of dangerous public consequence, it will adapt a punishment proportioned to the enormity of the offence. *ib.* s. 4

It is in the discretion of the king's bench to inflict such fine and imprisonment, and even infamous punishment on offenders, as the nature of the crime requires. *ib.* s. 5

This court is not confined to make use of their own prison, but may commit to any prison in the kingdom, and no other court can bail a prisoner committed by this court. *ib.*

The king's bench may proceed on indictments found before any other courts, and removed into it by *certiorari*, as well as on indictments and informations originally commenced in it, &c. *ib.* s. 6

A statute which appoints that crimes of a certain denomination shall be tried before certain judges, does not exclude the jurisdiction of the king's bench without express negative words. 8. s. 6

Where a statute creates a *new offence*, and creates a new jurisdiction, prescribing a certain mode of proceeding for the punishment of it, it is questionable whether the king's bench has concurrent jurisdiction. *ib.*

A record removed into the king's bench cannot regularly be remanded after the Term; but the judges, to prevent a delay of justice, may refuse to receive it, &c. *ib.* s. 7

The king's bench may grant a *nisi prius*, as well in cases of treason and felony as in other cases; and in such case the transcript of the record only is sent down to trial. *ib.*

By 6 Hen. 8. c. 6. the king's bench may remand and send down, as well the bodies of all felons and murderers brought before them as their indictments, into the counties where the offence shall have been committed, and may command the justices to proceed in the trial there.

- of, as if the same had never been removed. 8. s. 8
- This statute shall not extend to high treason. 9. s. 9
- The king's bench is the highest court of common law, and hath power to reverse erroneous judgments of all inferior courts, and to punish all inferior magistrates, and all officers of justice for corrupt abuses of their authority, but not for mere mistakes, &c. *ib.* s. 10
- The king's bench, being the supreme court of oyer and terminer, gaol-delivery, and eyre, suspends the power of all other courts of this kind in the county wherein it sits, during the time of its sitting, and renders all their proceedings void. *ib.* s. 11
- But such justices may proceed upon indictments taken in a foreign county, and removed before them, or if taken before the term; *sed quere*, if it is not safest to have a special commission for this purpose. *ib.*
- By 25 Geo. 3. c. 18. the session of oyer and terminer, and gaol-delivery of Newgate in *Middlesex*, if begun before the essoin day of any term shall not be suspended, &c. by the sitting of the king's bench on the commencement of any term. *ib.* s. 12
- By 22 Geo. 3. c. 48. the same enacted with respect to the sessions held in *Middlesex*. 10. s. 13
- All process upon writs of appeal or indictments removed into the king's bench by *certiorari* ought to be made returnable *coram nobis ubicunque fuerimus*. *ib.* s. 14
- All process upon bills of appeal of one in *custodia marshalli*, and upon indictments commenced in the king's bench, ought to be returnable *coram nobis apud Westmonasterium*. *ib.*
- Where the king's bench proceeds on an offence committed in the same county wherein it sits, the process may be made returnable immediately. *ib.*
- Process on an offence removed into the king's bench by *certiorari* from a different county must have fifteen days between the *teste* and the return. *ib.*
- Where proceedings are limited to judges of gaol-delivery and oyer and terminer, the court of king's bench has an implied jurisdiction. 10. (N)
- The justices in the king's bench are conservators of the peace throughout the realm, and supreme coroners over all *England*. *ib.*
- This court during term, and any judge of it during vacation, may admit persons to bail for any crime whatsoever, except persons committed for contempt. *ib.* (N)
- Where the body of an offender attainted in the county is removed by *habeas corpus*, and the indictment by *certiorari* into the king's bench, the court may award execution to be done by the marshal. *ib.*
- Where persons put in feigned bail so as not to be reached by 21 Jac. 1. this court may order the parties to be set on the pillory. *ib.*
- The king's bench may compel the production of examinations, books, papers, &c. *ib.*
- The proceedings before justices of oyer and terminer, after the oyer determined, ought to remain in the king's bench. 32. s. 18
- Whether a pardon of a person condemned before justices of gaol-delivery may be allowed in the king's bench, after the session is determined. *ib.*
- A statute which appoints that crimes of a certain denomination shall be tried before certain judges, does not exclude the jurisdiction of the king's bench without express negative words. 374. s. 30
- The king's bench may grant a *nisi prius*, as well in cases of treason and felony as in other cases; and in such case the transcript of the record only is sent down to trial. 567. s. 2
- The king's bench is the highest court of common law, and hath power to reverse erroneous judgments of all inferior courts, and to punish all inferior magistrates, and all officers of justice for corrupt abuses of their authority, but not for mere mistakes, &c. 399. s. 22
- Process on an offence removed into the king's bench by *certiorari* from a different county must have fifteen-days between the *teste* and the return. 562. s. 8
- An appeal in the king's bench ought to be arraigned on the crown side, unless it comes in by *certiorari*. 434. s. 4
- The king's bench is within 2 and 3 Edw. 6. c. 24. which authorises justices to proceed against accessaries, in the county wherein they are necessary. 456. s. 52
- After an amercement hath been *estreated* into the exchequer, and a pardon been there produced and denied, the party, by *habeas corpus cum causa*, may have it allowed in the king's bench. 532. s. 69
- No jury can be returned into the king's bench from a foreign county, without proper process under the hand of the chief justice; if for an indictment in same county, *quere*, if a jury may not be returned by a bare *preceptum est*, &c. returnable immediately. 569. s. 2, 3
- A writ of error lies in the king's bench of an attainer before the lord high steward. 655. s. 17
- The king's bench may not only award execution against persons attainted there, but also against persons attainted in parliament, or any other court of record. *ib.*
- In what manner the body, &c. must be removed. *ib.*
- If a peer be convicted in parliament, and the day of execution elapse before execution done, the king's bench may award a new time of execution, the parliament not sitting. 656. (N)
- How far the king's bench may proceed in the trial of a peer. 583
- The king's bench may award process into any county in *England*. 392
- ### KNIGHT.
- By stat. West. the most loyal and wise knights are ordered to be chosen coroners; but at this day it is no good cause to remove a coroner that he is not a knight.
- By 24 Geo. 2. c. 18. no peer shall challenge for want of a knight being returned. 569

LACHES.

No laches is imputable to the king. 564

LARCENY.

See COUNTY.

In what cases larceny is bailable. (See BAIL.)

In what cases larceny is excluded from clergy. (See CLERGY.)

If a man appear obstinately mute on an arraignment for petit larceny, he shall have the like judgment as if he had confessed the indictment. 461. s. 10

Persons convicted of larceny may be sent to the house of correction, or transported. (See CLERGY, TRANSPORTATION.)

Where an acquittal or conviction of larceny is pleadable to a second prosecution. (See AUTREFOIS ACQUIT.)

Where accomplices discovering and giving evidence against persons guilty of larceny are intitled to a pardon. (See PARDON.)

On an indictment for grand larceny, the jury may find the prisoner guilty of petty larceny only. 621. s. 6

So also where the larceny is coustod of clergy, and laid capitally, the jury may find him guilty, but not of the capital part. (See VIEN DIET.) 621

The goods of a person guilty of petit larceny become forfeited on a *fugam fecit*, or default to the *exigent*. (See FORFEITURE.)

LEET.

See COURT-LEET. TORN. AFFRAY.

A court-leet is a court of record having the same jurisdiction within some particular precinct which the sheriff's torn has in the county. (See SHERIFF'S TORN.) 112. c. 11

The end of instituting a court leet. *ib.* s. 2

How far it exempts those who live within its precincts from the torn. 113. s. 3

How far the leet is subject to the torn. *ib.* s. 4

For what causes a court leet may be forfeited. *ib.* s. 5

What ought to be the form of the caption of an indictment in the court leet. 114. s. 6

LIBERTY.

See PARISH. WARD.

LONDON.

An alderman of London is not compellable to be a constable; for his exemption is necessary for the good government of the city. 100. s. 10

Formerly only the London surgeons were exempted from the office of constable, *sed vide* 18 Geo. 2, c. 15, s. 10. 101

No *visne* can come from the city of London generally by reason of its extent; and the constant usage is to shew in what ward and parish in London a fact is done. 255

But it is a sufficient addition to name a defendant generally "of London, &c." without more. 263. s. 120

The justices of peace and coroners within the city of London and county of Middlesex, &c. shall have the same authority to let to bail felons and prisoners as before 1 & 2 Phil. & Mary, c. 1. 159

Whether a *certiorari* will lie to the courts of London. 401

A return of the tenor of an indictment from London is good on a *certiorari* to return the indictment itself. 13. s. 71

London cannot join with other counties in taking an inquest. 454

The want of freehold is a good challenge in cases of high treason to a juror in London, &c. 573

For high treason every juror in London ought to have such freehold or copyhold as is required by 4 & 5 Will. & Mary. 575

By 3 Geo. 2, c. 25, jurors for the trial of any issue in London shall be householders, and be worth £100 personal property. 576

By 4 Geo. 2, c. 7, leaseholders of £50 a-year over and above the ground-rents, may be jurors in Middlesex. *ib.*

By 11 Hen. 7, c. 21, and 4 Hen. 8, c. 3, jurors in London in real and personal actions, shall have the value of forty marks. 574. s. 21

The citizens of London have a special privilege by charter, that in appeals brought by any of them there shall be no wager of battle. 588. s. 6

MAIM.

See APPEAL.

No appeal of maim can be good without the word "*mayhemavit*." 249

There are no accessories after the fact in maim. 438

MAINOUR.

Those who are taken with the *mainour*, that is with the thing stolen as it were in their hands, are excluded from the benefit of a *replevin* by the stat. of West. 151

Anciently persons taken with the *mainour* might be tried without the formality of an indictment. 290. s. 5. 301. s. 34

By 28 Edw. 3, c. 3, 42 Edw. 3, c. 3, and 25 Eliz. c. 4, proceedings upon the *mainour* are said to be taken away. 291. note

MAINPRIZE.

See APPEAL & BAIL.

MALICE.

See HOMICIDE. MURDER.

How far an appeal must be malicious, to intitle the appellee to a recovery of damages. 274

MALUM.

Whether a pardon of "all offences, &c." will pardon offences *malum in se*. 540

MANDAMUS.

In what case the king's bench will grant a *preemptory mandamus*, to discharge or to appoint a person from or to the office of constable. 278. s. 47

The

The Court will refuse an application for an information *quo warranto*, if the defendant can shew the right in question had been determined on a *mandamus*. 366

MANSLAUGHTER.

See AUTREFOIS ACQUIT. PARDON.

Where the principal in murder is found guilty of manslaughter, those who are charged as accessories before shall be discharged. 444

By the 1 Jac. 1, c. 8, manslaughter by stabbing, &c. shall be deemed murder. 485

Whether by 3 Hen. 7, c. 1, a clerk convicted of manslaughter shall be committed, or bailed at discretion till the year be passed 502. s. 121

A person convicted of manslaughter may be transported. 518

MARGENT.

If the county in which the fact to be tried was committed, be alleged in the *margent* of the indictment, the particular vill in which the offence is laid shall be intended within the county. 301

Sed quere, except such vill be expressly alleged to be in the county named in the *margent*, or in the county aforesaid. *ib.*

MARKET OVERT.

See APPEAL.

Restitution in an appeal, or on an indictment of larceny, is not barred by sale in market overt. 241

By 31 Eliz. c. 12, stolen horses shall be restored without prosecution, if claimed in six months, although *bonâ fide* sold in market overt. 242. (N) 3

MARSHAL.

See CONSTABLE & MARSHAL.

MEASURES.

False measures are indictable in the sheriff's torn. 106. s. 58.

MELIUS INQUIRENDUM.

See CORONER.

MESSINGER.

Practice has authorised the commitment of an offender to the custody of a messenger, but it shall be intended to be for the purpose of carrying the prisoner to gaol. 177. s. 9

A prisoner brought to the king's bench in the custody of a messenger to be bailed, shall not be re-committed to the custody of the messenger, if he has not his bail ready, but to the marshal of the court. 174. (N) 1

The king's messengers are not officers within the protection of the statutes of 7 Jac. 1, c. 5, 21 Jac. 1, c. 12, and the 24 Geo. 2, c. 44. 60. s. 83

MIDDLESEX.

See LONDON.

By 25 Geo. 3, c. 18, the sessions of gaol deliv-

ry, &c. of Newgate in Middlesex, shall not be suspended by the intervening sitting of the court of king's bench, between its commencement and conclusion. 9. s. 12.

By 32 Geo. 3, c. 48, the same is enacted with respect to the sessions in Middlesex. 10. s. 13

Justices of peace and coroners for Middlesex shall have their accustomed power to bail felons and prisoners, notwithstanding the statutes of Philip and Mary. 159. s. 61

A *certiorari* may be granted to remove an indictment from Middlesex, on giving three days notice. 401. s. 26.

By 4 Geo. 2, c. 7, all leaseholders of £50 a-year improved rents in the county of Middlesex, shall be liable to serve on juries. 576

MISNOMER.

See ABATEMENT. ADDITION. NAME.

In what cases a writ of appeal may be abated for a *misnomer*. 259. s. 103

No *indictée* can take any advantage of a mistaken surname in an indictment, as an appellee may do in an appeal. 317. s. 69

But every other *misnomer* of the defendant, except that of the surname, is equally fatal in an indictment as in an appeal. *ib.*

A *misnomer* of the defendant's name of baptism may be pleaded in abatement. 318

Outlawry may be avoided, upon the defendant's coming in upon the *capias utlagatum* and pleading a *misnomer*, either of the name or addition, in the writ. 653. s. 10

MISPRISION.

An officer who has suffered a felon to escape may be tried for the misprision, although the party escaping is not convicted of the felony. 197

In a trial for misprision of high treason within 7 Will. 3, there must be two witnesses to prove the indictment. 354. s. 143

An information will not lie for misprision of high treason. 357. s. 3

By 33 Hen. 8, c. 23, misprision of treason being confessed or examined by the privy council, may be tried in any county. 559

Whether a peremptory challenge is allowed in misprision of treason. 570

The judgment in misprision of high treason, is imprisonment during life, forfeiture of all goods, and the profits of lands. 630. s. 10

MISRECITAL.

What misrecitals of a statute upon which an indictment is founded are fatal. (See INDICTMENT).

MITTIMUS.

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MONOPOLY.

Where a dispensation was introductive of a monopoly, it was unlawful. 541

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Mortmain and *purprestures*, as being offences

ces of a public nature, are inquirable of at the sheriff's torn. 105
 The statutes of mortmain give a duty to the next immediate lord for an alienation to a corporation; which being a gift of a particular interest to the party, can never be prejudiced by any prerogative of the king. 343
 But it is said that the king might, before 1 Will. and Mary, c. 2. have dispensed with the statutes of mortmain; *sed quære.* *ib.*

MURDER.

Whether the sheriff in his torn may inquire of the death of a man. *ib.*
 If an indictment or appeal be made to allege that the party was murdered at the time only when he received the wound, it is repugnant and void. 253
 An appeal of death cannot amount to murder, without the word *murdravit.* 249
 If a murder be not expressly laid and proved to have been done of *malice prepense*, &c. the offender shall have his clergy. 476
 In what cases murder is excluded from clergy. *ib.*
 An acquittal of murder will be a good bar to a subsequent indictment of petty treason. 518
 What is particularly required in a pardon of murder (*See PARDON*).
 Murder is one offence, and being accessory to it is another; therefore the word *murder* in 33 Hen. 8, c. 23, which authorises murder, when confessed or examined before the privy council, to be tried in a foreign county, shall not extend to accessories. 559. s. 4
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 The declarations of the deceased after the mortal wound given, and while he is *in extremis*, are, on a trial for the murder, admissible evidence. 597. s. 47
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Whether the recognizance of bail for felony be forfeited by the prisoner's standing mute. 172
 To answer impertinently, ineffectually, or not to comply with the rules of law when put upon trial, are as much a standing mute in construction of law, as if no answer be made at all. 458. s. 1
 Insisting upon some frivolous defence, refusing to plead in chief, or the general issue, or even to plead a good dilatory plea, and refuse to plead over to the felony, are instances of standing mute. 458. s. 1
 If a prisoner refuses to put himself upon God and his country, or by God and his peers, or to wage battle where such trial is allowed, after having pleaded, it is a standing mute. *ib.*
 The opinions of crown lawyers whether a prisoner who peremptorily challenged above

the number allowed by law, was to be dealt with as with one that stands mute, or to be hanged. *ib.* s. 2.
 A prisoner who thus perversely and obstinately offends in high treason is *ipso facto* attainted; and in felony the challenge shall be overruled. 459. (N)
 He who demurs in law to an indictment or appeal shall not be esteemed to stand mute. *ib.*
 After a prisoner hath confessed, or pleaded, and put himself on his country, he shall not be considered to stand mute in respect to his subsequent silence. *ib.* s. 4.
Sed quære, where a man does not confess, but pleads not guilty, and afterwards stands mute, whether he shall not be put to his penance. *ib.* s. 4. *note in marg.*
 Where a prisoner makes no answer at all, the Court shall take an inquest of office, by the oath of any twelve persons that happen to be present, whether he do so of malice or by the act of God. *ib.* s. 5.
 If after issue joined, and the jury are charged, the standing mute shall be tried by the jury, and not by an inquest of office. *ib.*
 If a man answer, but not effectually, no inquest is necessary, for his malice is apparent. *ib.* s. 6.
 Where the prisoner is found to stand mute by the act of God, the Court shall cause the felony to be inquired of, and whether the prisoner be the same person, and shall go into whatever may be necessary for his defence. *ib.* s. 7
 Such inquiry shall not be made by an inquest of office, but by a jury returned by the sheriff, in the same manner as if the defendant had pleaded. 460. s. 7
 Wherever a person attainted stands mute to the demand of execution, he shall not be sentenced to penance, but to execution. *ib.* s. 8
 If such an offender hath always continued in prison after his attainder, no inquest is necessary to prove his identity; but where a person attainted be retaken after an escape, and stand mute to the demand of execution, it shall be inquired whether it is of malice or by the act of God; and in the latter finding, then whether he be the same person or not. 461
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 If a man appear to stand obstinately mute on an arraignment for petit larceny, he shall have the like judgment, &c. as if he had confessed the indictment. *ib.* s. 10
 By 33 Hen. 8. c. 12. any person standing obstinately mute upon an arraignment for any of the offences mentioned in the act, shall have the like judgment, &c. as if he were found guilty. *ib.* s. 11
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The opinion of the writers upon crown law upon this statute. *ib.* s. 14

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Women upon standing mute are liable to such penance as well as men. 464

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On standing mute in high treason, petit treason, or felony, a prisoner forfeits both lands and goods, in the same manner as if he had been attainted any other way. - *ib.* s. 19

But where a person was adjudged to his penance for standing mute, and thereby prevented attainer, he forfeits his chattels only, and not his lands. *ib.*

How such forfeited goods may be granted. *ib.* s. 20, 21.

Whether the prosecutor of an indictment or appeal of larceny be entitled to a restitution of the goods stolen, upon the defendant's standing mute. *ib.*

Wherever a prisoner shall be allowed clergy upon a conviction by verdict or confession, he shall be allowed it on standing mute. 463. s. 24. 477. s. 27

A statute taking away clergy from those who shall be convicted of a crime, doth thereby take it away from those who shall stand mute. 463

By 3 and 4 Will. and Mary, c. 9. if any person is excluded from clergy by any former statute, on conviction, by verdict or confession, he shall not be admitted to it on standing mute. *ib.*

By 12 Geo. 3. c. 20. prisoners who shall stand mute in felony or piracy, shall, on conviction, be liable to the same consequences as if convicted by verdict or confession. *ib.*

NAME.

See ABATEMENT. DIGNITY. MISNOMER.

It is safest in setting forth a presentment, or an afferment, or an action of debt, to shew the names of the presenters. 96. s. 23

In an appeal, a mistake of the christian or surname of the *appellant*, or where he is named with an addition to which he is not entitled, or where a peer who has more than one name is not named of the most noble, it may be pleaded in abatement. 260. s. 103

It is a good reply to a plea of a misnomer of the surname, that the party is as well known by one name as by the other. 239

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A variance between a record of acquittal and that to which it is pleaded as to the name of the party, may be helped by an averment, that the same person was intended in both. 317

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NISI PRIUS.

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Where a trial of *nisi prius* is granted, a transcript only of the record is sent down. *ib.*

What power and jurisdiction justices of *nisi prius* have in criminal matters. See ASSIZE and NISI PRIUS. 37. c. 7

Justices of *nisi prius* have no power by *stat. West.* c. 12. to give judgment of imprisonment and damages in appeal upon an acquittal before them. 277

But by 14 Hen. 6. justices of *nisi prius* may in an appeal give the principal judgment. 278

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A person is not liable to attachment for disobedience of a rule at *nisi prius* unless it be made a rule of court. 222. s. 37

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In what cases justices of assize may grant a *tales de circumstantibus*. *ib.*

By *stat. West.* c. 30. all pleas in either bench which require an easy examination may be tried by writ of *nisi prius*. 567. s. 2

An issue joined in the king's bench, whether for treason, felony, or other crime, committed in a different county, may, by virtue of the above

above statute, be tried in the proper county, by writ of *nisi prius*, 567. s. 2
Wherever the king is a party, it is irregular to grant a *nisi prius* without his special warrant, or the assent of the attorney general. 568. s. 3

In an appeal the Court may grant it as in common cases. *ib.*

The court of king's bench may refuse a *nisi prius*, even on the motion of the attorney-general, if the cause require great examination, except the king by letters signify his pleasure to have a *nisi prius*. 568. *notis*

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The king's pardon of murder, rape, or treason, cannot be good without a *non obstante* of 13 Rich. 2. unless the crime be specified in the pardon. *ib.*

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If a fact done in one county prove a nuisance in another, it may be indicted in either. 302. s. 37

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clude to the nuisance of all the king's subjects, to the nuisance of divers is enough. 315
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By 33 Hen. 8. c. 20. forfeitures by attainders for high treason shall be vested in the king without office found. 641

A right of action or entry into lands forfeited by an attainder shall not be adjudged in the possession of the king without an office, and *scire facias*, and seizure of such office. 642. s. 23

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 In what manner the judges used to deliver clerks to the ordinaries in order to make purgation. *ib.*
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 But the Court might allow the clergy without such demand. 500
 If the criminal had broke the prison of the ordinary, the allowance of clergy was in the ordinary's discretion. *ib.*
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By 39 Eliz. c. 15. larceny to the value of 5s. in the day-time from any dwelling or out house thereto belonging, by breaking the same, is excluded from clergy; but *accessaries* are not within this statute. 495. s. 95
 An assistant who does not enter the place where the larceny is committed, is not within the act. 496
 By 3 & 4 Will. and Mary, c. 9. aiders and abettors to any larceny to the value of 5s. by breaking any dwelling, shop, or warehouse thereto belonging, are excluded from clergy. *ib.* s. 99
 An assistant to such a felony in an out house, not being a shop, or warehouse belonging to a dwelling, without entering it, is clearly entitled to clergy. 497. s. 100
 Accessaries before to such a felony in any out-house, not being a shop or warehouse, are also still entitled to their clergy. *ib.* s. 101

OUTLAWRY.

Process of outlawry upon an appeal may be awarded in the county court till the *exigent* 85. s. 41.
 And *quare*, if the coroner may not award it even to an outlawry, on the appeal of an approver. *ib.*
 A person outlawed in a personal action cannot bring an appeal until the outlawry be reversed. 232
 A *quare*, if a person outlawed in a personal action can be an approver. 282. s. 4
 Justices of gaol delivery may award execution against such prisoners as have been outlawed before justices of the peace. 30. s. 7
 Persons outlawed for felony are excluded from *replevin* by the statute of Westminster. 150. s. 40
 It is said a person outlawed in a personal action cannot be a grand juror. 293. s. 16

Whether one outlawed on an indictment of felony may plead in avoidance of it, that one of the *indicters* was outlawed for felony. 296. s. 18

An outlaw may, in avoidance of the outlawry, shew that the indictment was found contrary to the 11 Hen. 4. c. 9. respecting the return of grand jurors. 299. s. 37

Quare, Whether outlawry in a personal action be within the exceptions of 11 Hen. 4. c. 9. ? 300. s. 31

OF PROCESS OF OUTLAWRY.

Process of outlawry lies in all crimes of a higher nature than trespass with force and arms, but not on any indictment for a crime of an inferior nature. 423. s. 109

Outlawry does not lie upon a statute, unless it be either expressly or impliedly given by it. *ib.* s. 110

Several statutes enumerated on which it has been adjudged not to lie. *ib.* s. 110

In process of outlawry for any crime not capital, there must be three *capias's* to the sheriff of the county where the prosecution is commenced, before the *exigent* shall be awarded, unless after judgment, and then one *capias* is sufficient. *ib.* s. 111

Quare, If the three *capias's* be not still necessary in rape ? *ib.*

In high treason and murder, one *capias* before the *exigent* is sufficient. *ib.* s. 112

By 25 Edw. 3. c. 14. after indictment found, the Court shall award a *capias*, and upon non est inventus returned another *capias* shall issue, returnable in three weeks, commanding the sheriff to seize the chattels of the offender; and if he then return that the body is not to be found, the *exigent* shall be awarded, and the chattels forfeited: but if he appear before the return of the second *capias*, the goods shall be saved. 424. s. 113

After *capi* returned, the Court will not award the *exigent* upon the suggestion of an escape; the sheriff must return one. 424. s. 117

Of several defendants, if some plead in abatement, the suit shall be continued against those who make default by *capias* only, and no *exigent* shall issue till such plea be determined. *ib.* s. 118

An *exigent* shall never be awarded but into the county where the offence is laid. *ib.* s. 119

By 6 Hen. 6. c. 1. before *exigent* shall be awarded for treason or felony in the king's bench, writs of *capias* shall be directed to the sheriffs of the county where the party is indicted, and, where he is named in the indictment, returnable in six weeks or more, and any *exigent* awarded or outlawry pronounced before the return of such *capias*, shall be void. 425. s. 120

By 8 Hen. 6. c. 10. where the offender dwells in a different county from that in which the indictment is found, after the first *capias* is returned, another *capias* shall issue to the county where the offender dwells, returnable in three months where the counties are holden

- holden from mouth to mouth, or in four months where they are holden by six weeks, commanding the sheriff to take his body, or to make two proclamations, and if the offender do not appear at the return, *the exigent* shall be awarded. 425. s. 121
- This statute does not alter the 6 Hen. 6. c. 1. concerning the process of king's bench, &c. 426
- By 10 Hen. 6. c. 6. the second *capias* required by 8 Hen. 6. c. 10. shall be awarded upon indictment removed by *certiorari*. *ib.* s. 123
- Observations upon these statutes. 427. s. 124
- A *capias*, directed to and returned by the chancellor of such county, shall be awarded into a county palatine, when the defendant is named of any place in such county. 448 s. 125
- What shall be done if the chancellor does not return such writ. 429. s. 125
- If a defendant be named both of the county in which the indictment is found and in which he dwells, there is no need of a *capias* with proclamation according to 8 Hen. 6. *ib.* s. 126
- No *capias* need be awarded to the county of which it is stated the defendant *lately* was. *ib.*
- But if a defendant be named late of *B.* late of *C.* &c. a *capias* shall go to each county, different from that in which the prosecution is commenced. *ib.*
- An outlawry contrary to the statutes above mentioned is not void, but voidable by writ of error. *ib.* s. 127
- By 31 Eliz. c. 3. three proclamations shall be made. 449
- By 4 & 5 Will. & Mary, c. 22. a proclamation shall be made when the *exigent* issues. *ib.*
- Decisions on these statutes. 450
- By *stat. West.* which extends to indictments as well as appeals, none shall be outlawed as accessory unless the principal be attainted, but the *exigent* shall continue till the principal be attainted. 431. s. 128
- Where some of the defendants are charged as principals, and others as accessories, before the award of this *exigent*, the outlawry of the accessories is reversible. 432. s. 130
- Quære*, Whether if an appellant take out the *exigent* at the same time against all the defendants, he must not, when they appear, count against them as principals? *ib.*
- If when he comes to the *exigent* he counts against some as principals and others as accessories (which is the safest way), he must take out the *exigent* only against the principals, and a *capias* against the accessories. *ib.*
- Where there is more than one principal, the *exigent* ought not to issue till all of them are attainted. 433. s. 132
- A person outlawed shall have his clergy in the same manner as if he had been otherwise convicted. 477
- A statute taking clergy from those who shall be found *guilty*, does not take it from those who are outlawed. *ib.* s. 28
- Whether persons outlawed for horse-stealing be ousted of their clergy. 486. s. 61, 62
- It is a good cause of challenge to a juror that he is outlawed. 576
- If a peer absent himself, and cannot be found, he may be outlawed *per judicium coronatorum*, &c. 585. s. 16
- Outlawry in a personal action is not a good exception against a witness as it is against a juror. 604. s. 107
- Judgment of outlawry is given by the coroner at the fifth county court, upon the parties not appearing to the *exigent*. 635. s. 21
- The *exigent* is a writ commanding the sheriff to cause the defendant to be demanded from county court to county court, till he be outlawed. *ib.*
- How such judgment shall be entered on the record. *ib.*
- If the judgment appear not to have been given by the coroner, it is erroneous. *ib. Notes in Mary.*
- In London, judgment of outlawry is given by the recorder. *ib.* (N)
- When a judgment of outlawry for treason or felony appears of record by the sheriff's return of the *exigent*, the party is as much attainted, and shall forfeit and lose as if he had received sentence upon verdict or confession. *ib.* s. 22
- And *quære*, If the party is not equally attainted by the coroner's return of a *certiorari* directed to the sheriff to certify whether he were outlawed or no? 635. s. 22
- Any one as *amicus curie* may inform the court of error in process of outlawry. *ib.* s. 23
- The party shall have counsel assigned to take advantage of error in outlawry. *ib.*
- But if the outlawry be only voidable, and the party will take no advantage of error, execution shall be awarded, but no judgment pronounced. 636
- Whether an outlawry may be reversed, upon a defendant coming in upon the *capias utlagatum* the same Term the *exigent* is returnable, without a writ of error for faults apparent on the record. 650
- The purchaser of land of a person afterwards outlawed for felony may falsify the record both as to the time and nature of the offence. 651
- At common law, in *favorem vite*, an outlawry of treason or felony might be avoided by plea of some fact which rendered his appearance impossible; but no outlawry for any other crime, against a party rightly described, can be avoided by any plea of fact. 652. s. 6
- By 16. Hen. 8. c. 13. and 5. & 6. Edw. 6. c. 11. judgment of outlawry for treason against persons abroad at the time it is pronounced shall be good, but the party within a year may appear in the king's bench, and traverse the indictment, &c. 652
- These statutes extend to treason, subsequent to the 25 Edw. 3. *ib.* s. 8
- Any outlawry may be avoided by the defendant coming in upon the *capias utlagatum* and pleading a nonmoner, &c. &c. &c. 653

OYER & TERMINER.

By the common law as well as 27 Hen. 8. c. 24. none shall create justices of *oyer* and *terminer*, &c. &c. except the king. 17. s. 1

By what kind of instruments such justices must be constituted. (*See Commissions.*) 18

How the authority of such justices may be suspended, revived, or determined. 19

Their power is wholly suspended by the court of king's bench sitting in the same county for which they are commissioned; but it revives without *procedendo* upon the absence of the king's bench. 20. s. 3.

Their authority may be suspended by *superseas* on proof that their commission was unduly granted, but it may be again revived by *procedendo*. *ib.*

A commission once determined cannot be revived without a new commission. *ib.*

Commission of *oyer* and *terminer*, &c. was, before 7 and 8 Will. 3. c. 27. and 1 Ann. c. 8. impliedly determined by the demise of the king, and before 1 Edw. 6. c. 7. by the justice's acceptance of a new name of dignity. *ib.* s. 5, 6

The authority of such justices is also impliedly determined by holding a session without adjourning it, &c. *ib.* s. 7

So also by granting a new commission to other persons of the same nature. *ib.*

In what manner notice of such new commission shall be said to be given. 21. s. 9, 10

By 1 Edw. 6. c. 7. the process made by the old commissioners shall be continued by new ones. *ib.*

By 2 & 3 Phil. and Mary, c. 18. commissions of *oyer* and *terminer*, &c. &c. shall not invalidate commissions of the peace. *ib.* s. 13

How far the precise letter of commissions of *oyer* and *terminer*, &c. &c. must be observed by the justices. 22. s. 14

What form is to be observed in the adjournment of such commissions. *ib.* s. 15

How far the power given by commissions of *oyer* and *terminer* may be altered, enlarged, abridged, or divided. *ib.*

Whether justices of *oyer* and *terminer*, &c. may sit in one county to try offences committed in another. 23

By 9 Edw. 3. c. 5. justices of *oyer* and *terminer*, &c. &c. shall send their records, &c. into the exchequer every *Michaelmas*. *ib.* s. 20

Justices of *oyer* and *terminer* and *gaol-delivery* may proceed in the execution of both commissions at the same time. 24. s. 21

Commissions of *oyer* and *terminer* are either general or special. *ib.*

The form of a general commission of *oyer* and *terminer*. *ib.* s. 22

Whether it extends to suits between party and party. *ib.* s. 23

An enumeration of special commissions of *oyer* and *terminer*. *ib.*

Justices of *oyer* and *terminer* have no power to

proceed against any persons but those who are indicted before themselves. 25. s. 31

But they may be authorized by the wording of their commission to hear and determine indictments found elsewhere. *ib.*

Where a statute prohibits a thing, and does not appoint in what court it shall be punished, the offender may be indicted before justices of *oyer* and *terminer*. *ib.* s. 33

To what persons and on what occasions commissions of *oyer* and *terminer* are grantable. 26. s. 34

By *stat. West.* no writ of *trespass ad audiendum et terminandum* shall be granted, except to the justices of either bench, or *justices in eyre*, &c. *ib.* s. 34

By 2 Edw. 3. c. 2. *oyers* and *terminers* shall not be granted but before justices of the one bench or the other, or justices *itinerant*. 27

By 34 Edw. 3. c. 1. justices of *oyer* and *terminer* shall be named by the court and not by the party. *ib.* s. 36

These statutes only relate to special commissions granted upon particular occasions at the request of the party, and not to the king's general commission of *oyer* and *terminer*. 27

Justices of *oyer* and *terminer* cannot assign a coroner, and therefore they cannot receive the appeal of an approver. 285. s. 16

Quære, If justices of *oyer* and *terminer* may award a *venire* for the trial of an issue joined before them, returnable the day on which the party is arraigned, unless the crime amount to felony, or the party consent to be tried immediately. 302. s. 4

A *venire* before justices of *oyer* and *terminer*, returnable at a day certain, is erroneous, unless the session appear to have been adjourned to the same day. 362

The award of a *venire* returnable before justices of *oyer* and *terminer*, &c. need not expressly mention before what justices it shall be returnable. 363. s. 7

Justices of *oyer* and *terminer* cannot have a jury returned for the trial of any issue joined before them by force of a bare award: they ought to make a particular precept to the sheriff for that purpose under their seals. 361

In what cases they may award a *tales*. (*Vide Junos.*)

By 5 Edw. 3. c. 11. justices of *oyer* and *terminer* may award process into any county of England in relation to persons indicted or appealed before them of felony. 392. s. 1,

PAIN FORT ET DURE.

The nature of the judgment. 463. s. 16

Judgment of *pain fort et dure* in one felony, is no bar to a prosecution for another. 526

PALATINE.

By 23 Hen. 6. c. 24. process for treason, felony, or trespass, in every county palatine, shall be in the name of the king only, constituted in the name of him who hath the franchise. 394. s. 7

A certiorari lies to a county palatine. 400
A certiorari to remove an indictment at an assize in a county palatine shall be directed to the chancellor of such county, who shall send for it to the justices of assize. 404. s. 38
 The provisions of 5 & 6 Will. & Mary, c. 11. concerning the removal of indictments by *certiorari*, are extended to the counties palatine of *Chester, Lancaster, and Durham*. 406
A capias shall be awarded into a county palatine, where the defendant in an indictment or appeal is named of any place in such county. 428. s. 125
 The 34 and 35 Hen. 8. c. 14. respecting the clerks of assize, &c. certifying transcripts of records of attainder, does not extend to the counties palatine. 474

PARDON.

In what manner an approver who convicts the appellee is entitled to a pardon. 286
 If petit treason be pardoned by parliament, the heir can bring no appeal; for the pardon of the petit treason pardons the murder also. 235
 Though an appeal be determined by the marriage of the widow, the appellee shall not be discharged without the king's pardon. 234. s. 38
 If the king pardon the approver hanging the appeal, the appellee shall be discharged. 286. s. 25
 Anciently the right of pardoning was claimed by certain lords; but by 27 Hen. 8. c. 24. no person whatsoever shall have power to pardon treason and felony except the king. 529

WHERE A PARDON IS MATTER OF RIGHT. 530

By *stat. Gloucester*, c. 9. where persons are indicted for murder, and the jury find it *per infortunium* or *se defendendo*, upon the report of the justices the king shall pardon him if it please him. *ib.*

The words *if it please the king*, are only spoken out of reverence to him, and do not render the right of the subject to a pardon precarious. *ib.*

The forfeiture of goods by such homicide is saved by pardon. *ib.*

A pardon is as necessary for one who is indicted of homicide *se defendendo*, and confesses it, as for one who is found guilty *se defendendo* on an indictment for murder. 531

Quære, if the person convicted be found to have fled, whether a pardon will save the forfeiture. *ib.*

By 4 & 5 Will. & Mary, c. 8. robbers out of prison who shall discover two offenders so as they be convicted, shall be entitled to a pardon. 531. s. 3

By 6 & 7 Will. 3. c. 17. clippers, coiners, &c. discovering and convicting two offenders, are entitled to a pardon for all such crimes committed before the discovery. *ib.* s. 4

By 10 and 11 Will. 3. c. 23. burglars, house-

breakers, horsestealers, shoplifters, who shall discover two or more offenders, shall be entitled to a pardon. *ib.* s. 5

By 5 Ann. c. 31. burglars or housebreakers who shall convict two or more offenders, shall have 40l. and a pardon of all felonies except treason and murder. 532. s. 6

By 8 Geo. 1. c. 18. any smuggler discovering and convicting two or more of his accomplices, so as the value of the goods recovered by such discovery exceed 50l. shall receive 40l. and be entitled to a pardon. *ib.*

By 25 Geo. 3. c. 57. accomplices discovering an offender in counterfeiting lottery orders, are entitled to a pardon. 532. notes in marg.

Persons to whom the king has by special proclamation in the Gazette or otherwise promised his pardon are entitled to it of legal right. *ib.* (N)

In what manner an approver who convicts the appellee is entitled to a pardon. 532

An accomplice who makes a full and fair discovery, and gives evidence of all he knows, may, by analogy to the law of approvement, entitle himself to a recommendation to the king's mercy, but not to a pardon of legal right. *ib.* (N) 3

A justice of the peace cannot pardon an offender, and tell him he shall be admitted a witness for the king. *ib.* (N) 4

The king's bench will bail an accomplice who has entitiled himself to the hope of mercy by the fairness of his discovery, in order that he may apply for the king's pardon. *ib.*

THE NATURE OF A PARDON OF GRACE. 532

Wherever it may be reasonably intended that the king, when he granted the pardon, was not fully apprized of the heinousness of the crime, or the nature of the conviction for it, the pardon is void as being gained by imposition on the king. 533. s. 8

The law has intrusted the king with the high prerogative of pardoning, upon a special confidence that he will spare those only who ought, by the peculiar circumstances of their case, to be exempted from the general rules of the law. *ib.*

Instances of pardons being void on the ground of the king being unacquainted with the true state of the case. *ib.*

Anciently a pardon of all felonies included a pardon of all treasons. 531. s. 9

But a pardon of all felonies will not now pardon any felony coming within the general limitations of the pardon; and murder and rape are expressly excluded by 13 Rich. 2.:—the reason of it. *ib.*

It must appear by the pardon of a person attainted, that the king was acquainted with the attainer. *ib.*

General pardons are usually made by act of parliament, and have of late very rarely been granted by the crown without a particular description of the offence intended to be pardoned. *ib.*

In what manner the precedents of pardons which

- which do not particularize the offence are to be understood. 535
- By 27 Edw. 3. c. 2. in every pardon of felony, the suggestion on which it is made, and the name of the person making the suggestion, shall be comprised; and if the suggestion be after found untrue, the pardon shall not be allowed. 535. s. 10
- By 5 Hen. 4. c. 2. if an approver become a felon again after a pardon, he who procured the pardon shall forfeit 100l. 535
- A general pardon of felonies extends not to piracy. 535. s. 11
- No pardon of felony shall be carried further than the express purport of it. 535. s. 12
- Where a general act of pardon excepts some particular kinds of felony, such exception extends to persons attainted of them. *ib.* s. 13
- By 2 Edw. 3. c. 2. a pardon of manslaughter shall only be granted when a man slayeth another in his own defence, or by misfortune. 536. s. 14
- But it seems the king's pardon of any other homicide is good without a *non obstante* of this statute. *ib.*
- An outlawry in an appeal of death may be pardoned so far as the public justice is concerned in it. *ib.* note in marg.
- By 15 Rich. 2. c. 1. no pardon shall be allowed for treason, murder, or rape, unless the same treason, murder, or rape, be specified in the same charter. *ib.*
- This statute was meant to prevent the abuse of the prerogative; and no pardon of murder, rape, or treason, without a *non obstante*, could be good; but by 1 Will. & Mary, c. 2. no dispensation of any statute, by *non obstante*, shall be allowed. 537. s. 17
- Pardons of manslaughter, or any other felony, remain as they were at common law. *ib.*
- The pardon of a felonious killing may be well pleaded to an indictment of manslaughter for the same homicide. *ib.*
- If such a pardon be pleaded to the finding of manslaughter upon the coroner's inquest, the Court will not allow it, until manslaughter only has been found on the indictment. 538
- Where a general pardon of all *petit treasons* excepts murder, it cannot be avoided by indicting one for murder who is guilty of *petit treason*. 538. s. 19
- A general pardon of all felonies, &c. except murder, shall extend to a *fel de se*, and not be considered within the exception. 538 s. 20
- If a general act of pardon extend to all felonies, offences, injuries, misdemeanors, and other things done before such a day, it pardons a homicide from a wound given before the day of which the party died not till after. *ib.* s. 21
- But it seems that this rule of law must be understood to pardon such offences only as are not within any of the exceptions of the pardon, although they may not be completed till after the day mentioned. *ib.* (N)
- The pardon of a principal allowed before his conviction, is thereby in effect a pardon of the accessory. *ib.*
- If a man be bound as surety for another to the king for the payment of a debt, the pardon of the principal is also a pardon of the surety, even if the time of performance be not arrived at the time of the pardon. 539. s. 23
- A pardon to several, of all felonies done by them, without adding or any of them, is void; the reason of it. *ib.* s. 24
- The king's grant of a protection, &c. to a felon, shall not operate as a pardon. *ib.*
- The law will not suffer a pardon to be carried beyond the express purport of it. *ib.*
- A pardon of all misprisions, trespasses, offences, and contempts, will pardon a contempt, a false return, striking in Westminster Hall, barratry, praemunire, and perhaps all offences not capital. 540. s. 26
- It is questionable, whether a general pardon of all trespasses extends to champerty or confederacy. *ib.* s. 27
- The king cannot pardon any offence, so far against the public good as to be indictable at common law, before it happens; and *quare*, if he can so pardon an offence made punishable by statute. *ib.* s. 28
- The king's grant to the keeper of a prison that he shall go free from all escapes, has been adjudged to discharge a fine for a subsequent negligent escape: *sed quare*, but it will not pardon a voluntary escape. *ib.* s. 29
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- The king may extend his mercy on what terms he pleases, and may annex a condition, either precedent or subsequent, on the performance of which the validity of the pardon depends. *ib.* s. 45
- If the king pardons a man for felony *whereof he stands indicted*, &c. &c. and the man in fact never was indicted, the pardon is void, for the king appears to have been deceived. *ib.* s. 46
- A pardon gives the subject of it a new capacity and credit; clears him from the infamy of his conviction; makes him a good witness; and enables him to maintain an action for calling him felon, &c. *ib.*
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- The arrest of a person pardoned without notice is excusable, because arrests are for the public good. *ib.* s. 51
- By 4 Geo. 1. c. 11. completely serving the term for which a convict may be transported shall have the effect of a pardon. *ib.*
- Quære*, whether a pardon of a conviction of perjury, will enable the person pardoned to be a competent witness. *ib.* s. 52
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- In what manner those who plead a general pardon must shew they are not within the exceptions. *ib.*
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- Articles of surrender cannot be pleaded as amounting to a pardon. 551. s. 64 (N)
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- No pardon under the great seal can be pleaded together with or after the general issue, unless it be dated subsequent to the issue. *ib.*
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- A person apprehended upon an estreated recognizance may plead a pardon in the king's bench, and have a supersedeas to the exchequer. *ib.* s. 69
- Formerly no pardon was allowed without a writ for that purpose (except for treason) out of chancery, and surety taken for the good behaviour. *ib.* s. 70
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Where a peer is to be tried by his peers, the king, by commission, constitutes some peer high steward *pro hac vice*, which reciting the indictment authorises him to receive and proceed upon the same, and require the peers to attend him, and the Lieutenant of the Tower to bring up his prisoner. 581. s. 1

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The steward by precept under seal directs a certain day and place at which it shall be certified. *ib.*

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By 7 Will. 3, c. 3, all peers who have a right to sit and vote shall be summoned twenty days before the trial, and take the oaths, &c. *ib.*

No lord of any other country, or of Ireland, nor the son or heir of any peer, hath a right to such a trial. *ib.* s. 9

By 20 Hen. 6, c. 9, duchesses, countesses, baronesses, indicted of treason or felony, whether married or sole, shall be tried as peers of the realm would be tried for the offence of which they shall be indicted. *ib.* s. 10

A queen, consort or dowager, sole or married to a second husband, be he a peer or commoner; and all peeresses by birth, sole or married to peers or commoners; all marchionesses and viscountesses are entitled to a trial by peers. 584

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On a trial by commissioners, the lords triers cannot separate after evidence given; but must continue together till verdict given. *ib.*

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- Process on an indictment before justices of the peace must be under the hands of two of them, and that sitting the court in the sessions. *ib.*
- A *venire facias* is the proper process to be first awarded on an indictment for any crime under the degree of treason, felony, or mayhem, except where other process is directed by some statute. 395. s. 9
- A *venire facias* is the first proper process on an information in the crown office for a debt claimed by the king, as having been forfeited by a *felo de se*. *ib.*
- If, on such *venire*, the defendant cannot be found, a *distress infinite* shall go, if he have lands, &c. But if a *nihil* be returned, a *capias alias* & *pluries* shall issue. 395. s. 10
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- At common law an *attachment* or *subpoena* at the election of the informer were the proper process in *qui tam* on popular statutes. *ib.*
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- Therefore the process in all such suits must now be by *attachment* or *pone per rados*, &c. and after by *distress infinite*, where by the return the party appears sufficient, or otherwise by *capias*. *ib. s. 13*
- The practice on a criminal information is first to award a *subpoena*, and on no appearance, &c. in four days, a *capias* of course; but if the defendant be a corporation aggregate, a *distingas*. *ib. s. 14*
- A *capias* is the first process on all indictments or appeals of treason, felony, and mayhem. *ib. s. 15*
- There ought to be fifteen days between the *tests* and the return of process issued from the king's bench into a foreign county. But this is not necessary in the county where the Court sits. *ib. s. 16*
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- How far and in what manner process is necessary in outlawry. (See OUTLAWRY.)
- In what manner process shall be issued against jurors. 561, 567
- In what manner process shall issue to compel the attendance of witnesses. (See EVIDENCE.)

PROFERT.

The plea of *autrefois acquit* being a plea in bar and the record not in the pleader's custody, there is no need to plead it with a *profert sub pede sigilli*. 516

Whoever pleads a pardon under the great seal ought to produce it *sub pede sigilli*. 551. s. 65

PROHIBITION.

The court of the constable and marshal, being holden before the marshal only, may be prohibited if it exceed its jurisdiction. 16. s. 13

The king's bench usually awards a writ of prohibition to an inferior court which exceeds its jurisdiction; and if it proceeds after the service of the writ, will grant an attachment, &c. 217

Peers as well as commoners liable to an attachment for disobeying a writ of prohibition, &c. 230

PREROGATION.

PROROGATION.

See PARLIAMENT. BAIL. COMMITMENT.

PURCHASER.

Where an heir takes lands under the forfeiture given by 6 Rich. 2, c. 6, against such women as consent to the ravisher, he shall not be divested by any *ex post facto* heir, because they are vested in such first heir as a purchaser.

245

A person attainted may be a purchaser of land, but he cannot hold it: the king shall have it on office found.

619. s. 50

PURPRESTURE.

See SHERIFF'S TORN.

QUARTER SESSIONS.

See SESSIONS.

QUORUM.

See JUSTICES. SESSIONS. INDICTMENT.

RANSOM.

See FINE.

RAPE.

Whether the sheriff in his torn has jurisdiction over this offence.

105

It is said, that the coroner may enquire of rape.

83. s. 35

The word "*rapuit*" is necessary in all indictments and appeals of rape.

210. s. 77. 258. s. 97

"*Felonice rapuit*" are sufficient, without the words "*carnditer cognovit*."

219

RECOGNIZANCE.

The king cannot take a recognizance for the keeping of the peace.

38. s. 1

No one can take a recognizance who is not either a justice of record or by commission.

ib.

The master of the rolls may take a recognizance of the peace by virtue of his office.

ib. s. 2

The security for the peace taken by the sheriff is considered as a recognizance, and not as a common obligation.

39

But such security taken by a coroner is only a common obligation, and not a recognizance, except it be taken in his court.

ib. s. 5

Neither the sheriff nor constable could take bail of persons indicted of larceny in the last, accessories to felony, or persons appealed by proverbs by recognizance, but only by obligation.

145. s. 26

The practice of the king's bench in admitting a person to bail who is present in court, for felony, &c. is to take a several recognizance in a certain sum from each of the bail to appear, &c. and that the bail shall be liable on non-appearance *body for body*.

172. s. 83

Justices of the peace may take the recognizance in a certain sum, or *body for body*, in their discretion.

ib.

Where the king's bench take bail before the return of a *capias*, the recognizance ought to

be only in a certain sum, and not *body for body*.

ib.

Persons bound *body for body* are only liable to *fine* on forfeiture of the recognizance.

ib.

WHAT SHALL FORFEIT A RECOGNIZANCE.

ib. s. 84

Quere, if in felony the usual form *ad standum recto de feloniam predicta et respondendum domino regi*, be used, and at the trial the party stand obstinately mute, it shall be considered as a forfeiture of the recognizance.

ib.

If the recognizance be "to appear in the king's bench on the first day of Term, and not depart till discharged by the court," and on a *nolle prosequi* entered and a new information filed, the defendant, after personal notice, refuses to appear, it is a forfeiture of the recognizance.

173

Such a recognizance is not forfeited by non-appearance on the first day of every Term after he hath pleaded.

ib.

By 4 Geo. 3, c. 10, upon estreated recognizances, the barons may, upon affidavit and petition of any person imprisoned, or liable so to be for the forfeiture, discharge such person without *quidus*, excepting the offence concerned the crown.

ib.

On a recognizance estreated, if the party take his trial at the next session, the court of exchequer will allow him to compound the penalty for a very small matter.

ib. *notis*

If the penalty be paid, the court will order the prosecutor's costs to be paid and the surplus to be returned, provided the recognizance has ultimately been complied with.

ib. *notis*

Recognizances in cases of felony are to be certified to the next gaol delivery.

173 *notis*

If a defendant be acquitted of perjury, the recognizance shall be discharged on motion, though the acquittal is not entered on record.

ib. *notis*

Neither the bail nor the defendant can be called on their recognizances without notice, except on the day of appearance.

ib. *notis*

On non-appearance the recognizance may be respited on cause shewn; but the court will not discharge, even on the consent of the attorney general.

ib. *notis*

The court is the proper judge whether recognizances ought to be estreated or spared.

105. s. 33

What recognizance shall be taken by the master previous to issuing process on an information. (See INFORMATION.)

What recognizance is to be given before the allowance of a *certiorari*.

405 to 407

The removal of a recognizance by *certiorari* does not supersede its obligation.

407

How a recognizance shall be certified.

409

The king cannot discharge a recognizance of the peace, before it is forfeited.

544. s. 34

RECORD.

See CERTIORARI. LONDON.

By 9 Edw. 3, c. 5, justices of assize, gaol delivery, and *oyer*, &c. shall send their records into

into

into the exchequer every *Mikaelmas*.

23. s. 20

Whether an offence made cognizable by the king's courts of record extends to a court of *oyer and terminer*.

25

A gaoler, in case of escape, is concluded from denying the prisoner was in his custody by the record of commitment.

195

RELEASE.

See APPEAL.

REMAINDER.

Whether a remainder, expectant on a lease for years, will qualify a man to be a juror.

574

REPRIEVE.

Every court which has power to award an execution has also of common right a discretionary power of granting a reprieve, even after the commission is determined.

657. s. 8

Causes for which a reprieve may be granted.

ib. s. 9

By 8 Geo. 3, c. 15, judges may reprieve a convict for the purpose of obtaining a pardon.

ib. Note

The court may reprieve a convict for murder.

629

REPUGNANCY.

In murder, if the assault and stroke be alleged in the premises on the tenth, and the subsequent death on the twentieth of any month, and then the conclusion allege that the defendant in such manner murdered the party on the 10th aforesaid, the whole is naught for the repugnancy, for he could not be murdered till he was dead.

258

If an indictment allege a party to have been present aiding and abetting the murder *the day of the death*, instead of the day when the stroke was given, provided they were on different days, it is repugnant.

254

A defendant in felony may use any number of pleas in abatement, and take advantage of them all, except they are repugnant to one another.

266

What pleas in bar are repugnant to the general issue.

272

Where one material part of an indictment is repugnant to another, the whole is void.

315

If an indictment charge the defendant with having forged a certain writing by which A. was bound to B. it is repugnant, for it is impossible he should be so bound by a forgery.

ib.

If an indictment allege that the defendant *disseised* another of lands, and it appear *by the indictment* that he had no freehold; or that the defendant entered peaceably and then *disseised* the prosecutor; or that he *disseised* of land then being, and ever since continuing his freehold; such indictment is void for repugnancy.

ib.

An indictment for selling iron with false weights and measures is void; for it is inconsistent it should be sold by both *weight* and *measure* at the same time.

ib.

If an indictment at a session the 15th, find that the defendant was absent from church six months from the first of the same month, it is void.

ib.

An indictment charging a fact as felony which on the face of it is trespass only, as cutting down and carrying away trees, is void.

316

But an indictment for having mowed *unam acram feni*, shall be intended to be *hay*, though in fact it was only *grass* when it was mowed.

316. s. 46

A verdict which is repugnant is void.

622

REPUTATION.

See BAIL.

RESCOUS.

See BREAKING PRISON.

A rescue by *enemies* will not make the gaoler liable as for an escape, as a rescue by *subjects* will do.

192. s. 9

Rescous is, a stranger forcibly freeing another from an arrest.

201

A prison which it is felony to break, is such a prison as will make a stranger guilty of felony by rescuing a prisoner from.

ib. s. 1

But where the prisoner is not capitally guilty in breaking prison, a stranger who rescues him shall be, in like manner, excused.

ib. s. 2

A stranger is not guilty unless the prisoner actually goes out of the prison.

202. s. 3

The sheriff's return of a rescous is not a good ground to arraign the rescuer upon, unless he be also indicted.

ib. s. 4

An indictment for rescous must specially set forth the nature and cause of the imprisonment and the circumstances of the fact in question.

ib. s. 5

A rescuer of a prisoner who would not be capitally guilty if he had broken the prison may be punished for a high misprision.

ib.

A stranger who knowingly rescues a person committed for and guilty of high treason, is in all cases guilty of high treason.

ib. s. 7

Whoever rescues one imprisoned for felony cannot be arraigned for such offence as for felony, till the principal offender be first attainted.

202. s. 8

But he may be immediately proceeded against for a misprision only.

ib.

By 16 Geo. 2, c. 31, to assist a prisoner to escape, though no escape be actually made, in case such prisoner was convicted or attainted of high treason or any felony, except petty larceny, or lawfully detained for such crimes expressed in the warrant, he shall be transported for seven years.

203. s. 9.

If such prisoner was in gaol for petty larceny, or for any debt or damages exceeding £100, every person assisting his escape shall be guilty of a misdemeanor.

ib.

To deliver *into* any gaol or prison, any visor, disguise, instrument, or arms, to facilitate an escape of any prisoner, attainted, convicted, or detained for treason, felony, or other crime, except petty larceny, is transportation for seven years.

ib.

The indictment must state, that the instruments were conveyed with a design to effectuate an escape. *ib.*

No indictment can be maintained on this act for contributing to the escape of a prisoner committed on suspicion only. 203. notes

To deliver into any gaol or prison any disguise or instruments to facilitate the escape of a prisoner confined for petty larceny or for debt, &c. above £100, is a misdemeanor. 204. s. 12

To assist any prisoner to make his escape from the constable carrying him to gaol by virtue of a warrant for treason or felony (except petty larceny) expressed in the warrant, or from any ship or vessel for transportation, is felony and transportation for seven years. *ib.* s. 13

All prosecution for any of the said offences must be commenced within one year after the offence committed. 204. s. 15

By the 1 & 2 Geo. 4, c. 88, s. 1, to rescue any person from the custody of any officer charged with or suspected of felony, liable to transportation for seven years, or to imprisonment, &c. 204

By 25 Geo. 2, c. 37, to rescue or attempt to rescue any person committed for murder, or any person convicted of murder going to or during execution, is felony without benefit of clergy. 205. s. 16

By force to rescue or attempt to rescue, after execution, the dead body of any person convicted of murder, is transportation for seven years. *ib.* s. 17

By 11 Geo. 2, c. 26, if five persons or more shall tumultuously assemble to rescue any offender against the 9 Geo. 2, c. 23, for the better apprehending smugglers, their aiders, &c. they shall be guilty of felony, and be transported seven years. *ib.* s. 18

By 9 Geo. 1, c. 22, forcibly to rescue any person in lawful custody for any of the offences in the *black act*, is death without clergy. 206. s. 19

Peers as well as commoners are liable to an attachment for a rescous. *ch.* 22. s. 33.

Whether such attachment shall be granted on an affidavit of a rescous where the officer will not return one. 221. s. 34

The sheriff's return of a rescous, without shewing the year and the day, is insufficient. 324. s. 77

Process of outlawry lies on the return of a rescous. *ch.* 27. s. 113 (N)

RESIDENCE.

No man can be obliged to do suit at the sheriff's torn in respect to lands, if he do not reside within the precinct. 92. s. 12.

If a man have a house within two leets, he shall do suit to that within the jurisdiction of which his bed-chamber shall lie. *ib.*

RESISTANCE.

See ARREST.

RESTITUTION.

See APPEAL.

RE-SUMMONS AND RE-ATTACHMENT.

How an appellant might sue out a re-attachment on the demise of the king before 1 Edw. 6, c. 7. 233.

RETRAXIT.

See APPEAL.

REWARDS.

Certain rewards given by former acts of Parliament abolished by act of 58 Geo. 3, c. 70. 126

By 9 Geo. 1, c. 22, a reward of £50 is given for any injury received in apprehending any offender against the *black act*, &c. &c. 123. s. 28

By 8 Geo. 2, c. 16, if such offender shall be apprehended so as the hundred be thereby discharged, the person apprehending shall have £10. *ib.* s. 29

By 10 Geo. 2, c. 32, the provisions of 9 Geo. 1, c. 22, are extended to the apprehending of destroyers of sea banks, cutters of hop-bines, firing colliers, &c. &c. 123. note in *marg.*

By 16 Geo. 2, c. 15, &c. a reward of £20 is given to those who shall prosecute to conviction such as return from transportation. 124. s. 31

By 19 Geo. 2, c. 34, rewards are given to such as shall be wounded, &c. &c. in apprehending smugglers. *ib.* s. 32

If two accomplices in smuggling discover and convict two or more offenders, they shall receive £50 for every offender. 125

By 6 Geo. 1, c. 28, a reward of £50 is given to such as shall convict another of theft-bote. 126. s. 37

RIOT.

On an indictment for a riot, if a verdict acquit all but two, it is repugnant, unless it charge them with having made such riot, *simul cum aliis juratoribus ignotis*. 622. s. 8

If twenty persons are indicted for a riot, and any three found guilty, the verdict is good. *ib.*

Where only two are found guilty of a riot, they having been indicted with others, judgment shall be given against them, even though the others do not come in to trial. *ib.* (N) 1

Six were indicted for a riot; two of them died before trial: two were acquitted; and two only found guilty; and judgment was given against the two found guilty. *ib.*

ROBBERY.

Justices of assize have jurisdiction in an appeal of robbery by the commission of gaol delivery implicitly given to them by the statute *de Finibus*. 35. s. 9

If a robbery be committed in one county, and the goods carried into another, the offender may be indicted of the robbery in the first county, and of larceny in the second county. 238. s. 47

If one man carry another into a different county, and there rob him, the appeal must be in

the county where the robbery was committed. *ib.*

Quare, if goods be taken in one county from a menace given in another county, in which county the offender shall be tried. *ib.* s. 47

The manner in which robbers may be apprehended upon hue and cry. See HUE AND CRY. 115.

An indictment of robbery in *qualam via regia pedestri ducent. de L. ad I.* shall not oust the defendant of clergy; for the words of the statute are, "in, or about, or near, the highway." 476

By 5 and 6 Edw. 6, c. 10, those who are found guilty in one county of an offence amounting to robbery in another, are ousted of their clergy. 490

By 23 and 25 Hen. 8, c. 3, &c. &c. all persons indicted of robbing any person in or near the highways, are excluded from clergy. 490

No robbery is within these statutes, but such as is laid in the indictment to have been committed in or near the highway, and to have put the person robbed in fear. 490

By 3 and 4 Phil. and Mary, accessaries before the fact in robbery are excluded from clergy. 492. s. 84

Robbery in a dwelling-house. See CLERGY. If any accomplice out of prison shall discover and convict two or more highway robbers, he shall be entitled to a pardon. 531. s. 3

SACRILEGE.

Sacrilege was considered as a crime of such signal enormity by the common law, that the offender was denied the privilege of sanctuary. 86. s. 44. 469. s. 4

Persons guilty of sacrilege were denied the benefit of clergy. 471

By 23 Hen. 8, c. 1, 25 Hen. 8, c. 3, and 3 and 4 Will. and Mary, c. 9, robbing any church, chapel, or other holy place, is excluded from clergy. 489 s. 72

But no sacrilege is within these statutes which is not accompanied with an actual breaking. *ib.* s. 73

By 1 Edw. 6, c. 12, all persons are ousted of clergy for felonious taking goods out of any parish church, or other church or chapel. *ib.* s. 74.

But accessaries to such a robbery are not excluded by any statute; *sed quare*, if accessaries to sacrilege are not excluded by the common law. *ib.* s. 75, 76

SALE.

Whether goods distrained for an amercement may be sold. (See TOWN). 96. s. 29

SANCTUARY.

The privilege of sanctuary, what, and how pleaded. 468. ch. 32

SCIRE FACIAS.

Where two *nilis* are returned upon two writs of *scire facias* awarded against a prosecutor in a cause removed by *certiorari*, and the pri-

soner hath been long confined, the king's bench will admit to bail. 170

Scire facias is the proper process after the removal of a cause by *certiorari*. 416

A person pardoned on an appeal by the party must sue out a *scire facias* to the appellant before it shall be allowed, unless he appear gratis. 544. s. 85

If the sheriff return two *nilis* to such *scire facias*, the appellee shall be discharged. 544. s. 36

If the appeal be of death, and the sheriff return that the appellant is dead; *quare*, if a *scire facias* should not issue to the heir. *ib.*

A *scire facias* need not go to the lords intitled to the *escheat*, because the pardon no way reverses the attainder. *ib.* s. 37

One appellee cannot take advantage of the appellant's default on a *scire facias* by another appellee. *ib.*

SCOLD.

Common scolds may be indicted at the sheriff's town. 106. s. 58

SEA.

A special commission of *oyer* may issue for inquiring into the repairs of sea-walls. 25. s. 28

The coroner may inquire of a felony committed on the arms of the sea. 76. s. 14

But he has no jurisdiction of offences committed in open sea between high and low water mark when the tide is in. *ib.*

SEAL.

By *stat. West.* the sheriff shall take no inquest but by a jury of twelve men, who shall put their seals thereto. 108. s. 64

This act relates to such inquisitions only as are a foundation for imprisonment, and not to inquisitions for offences where the party cannot be apprehended. *ib.* (N) 7

If the jury consist of more than twelve, it is sufficient if twelve put their seals. *ib.* s. 65

SEARCH WARRANT.

See WARRANT.

SECRETARY OF STATE.

A secretary of state is not a magistrate within the protection of 7 Jac. 1. c. 5. 21 Jac. 1. c. 12. and 24 Geo. 2. c. 44. 61. (N) 1

A secretary of state, as such, is no conservator of the peace; the office neither implies nor requires the authority of a magistrate; and the law of England knows of no such committing magistrate. 175. *notis*

But a secretary of state may lawfully commit persons for treasons and for other offences against the state. 175. s. 4

All the cases in which commitments have been made by secretaries of state enumerated. See p. 175. (N) 4

SERVANT.

Either master or servant may have an appeal for a robbery done to the servant. 237

Servant

Servant is not a good addition of the state or degree of either man or woman. 262. s. 112
If a servant receive a master, or a master a servant, they are accessaries as much as if they had been mere strangers. 448. s. 34

SESSIONS.

THE COURT OF JUSTICES OF THE PEACE IN SESSIONS is an assembly of two or more such justices, whereof one is of the *quorum*, at a certain day and place before appointed, in order to enquire, hear, and determine, in pursuance of their commission, of any causes or matters therein contained. 61

This court, when legally convened, is a court of record. 62

AT WHAT TIMES THIS COURT IS TO BE HELD.

By 12 Rich. 2. c. 10. the session shall be kept every quarter. 62. s. 1

By 2 Hen. 5. c. 4. the quarters in the first week after *Michaelmas*, *Epiphany*, *Easter*, and *St. Thomas*, or oftener, if need be. 62. s. 2

The *Michaelmas* Sessions by stat. 54. Geo. 3. c. 84. is directed to be held in the first week after the eleventh of October (except in London and Middlesex). 65. (N).

By 14 Hen. 6. c. 1. the sessions in the county of *Middlesex* shall only be held twice a year; but they now hold four *general*, and four *general quarter* sessions in the year. 62. s. 3

By 33 Hen. 8. c. 10. the *Tuesday* after *Easter* week is expounded to be in the week after *clausum Pasche*. ib. s. 4

If *Michaelmas* fall on a *Sunday* or *Monday*, the *quarter sessions* should, in strictness, be held in the ensuing week, and not in the same week. ib. s. 5

But the *quarter sessions* are variously held in several counties, some at one day, some at another. 63. s. 5

BY WHOM THE SESSION IS TO BE SUMMONED AND APPOINTED.

This court cannot be held by fewer than two justices, one of whom must be of the *quorum*. ib. s. 6

The *sheriff* is bound to return proper juries to this court. ib. s. 6

The *custos rotulorum* ought to bring to the sessions the rolls of the peace. ib.

Any two justices may direct their precept, tested under their hands and seals, to the *sheriff* of the county, ordering him to summon the session, to return a *GRAND JURY*, and to give notice to all stewards, constables, bailiffs, &c. to attend. 63. s. 7

The precept to summon a session ought to bear teste fifteen days before the return, and to be delivered to the *sheriff* immediately. ib. s. 8

And this precept can only be superseded by a writ of *superedeas* out of chancery. ib. s. 9

The *custos rotulorum* alone cannot issue this precept. ib. s. 10

Where the business of the session does not require the attendance of a *GRAND JURY* or other officers, it may be convened without a summons. ib. s. 11

If a sufficient number of justices do not meet at the day appointed, yet any two justices may, in the week after any of the holidays mentioned in the 2 Hen. 5. c. 4. meet and open the session, and adjourn it, and issue their precept to the *sheriff*, to summons the jurors and officers on the day, to which it is adjourned. 64. s. 12

Where two sets of magistrates have a concurrent jurisdiction, and one set appoints a session, the jurisdiction of that set attaches so as to exclude the other set from appointing another session. ib. s. 13

HOW THE SESSION SHALL BE ADJOURNED.

The court of session, when regularly opened, can only be continued by adjournment; and in the entry of such adjournment the time at which the original session commenced must appear. ib. s. 14

Instances in which matters transacted at session are erroneous for want of a proper entry of the adjournment. ib. s. 14

If a session be once dropped it cannot be renewed. ib. s. 14

The same number of justices are required to adjourn as to open and hold a session. 65

WHO ARE BOUND TO ATTEND THE SESSION.

The *sheriff* must attend to return the precept, and to take charge of the prisoners. ib. s. 15

The constables of hundreds must attend to make their presentments. ib.

The bailiffs of franchises ought to attend. ib.

The jurors who are summoned are bound to attend on pain of being amerced. ib.

The keeper of the house of correction must attend. ib.

And justices of the peace for the county ought to attend, and give their assistance to open the session and administer justice. ib. s. 16

THE POWER OF THE SESSION OVER ITS OWN MEMBERS.

This court has no authority to amerce any justice of peace for non-attendance. ib. s. 17

The court cannot commit a justice of the peace for a contempt of court, or for using actionable expressions to a fellow justice of the *quorum*. ib.

Nor can they bind him to good behaviour. ib. s. 17

But if a justice of the peace give just cause to any person to demand surety of the peace against him, he may be compelled by any other justice to find such security. ib.

OF A GENERAL, SPECIAL, AND QUARTER SESSIONS.

A general quarter sessions is one of those sessions which are holden in the four quarters of the year, pursuant to the statute of 2 Hen. 5. c. 4. ib. s. 19

The quarter sessions are only a species of the general sessions. 66

A special sessions is that which is holden on a special occasion for the execution of some particular branch of the justices' authority. ib.

Who

WHO MAY PRACTISE AT SESSIONS.

By 22 Geo. 2. c. 46. no person shall act as a solicitor, attorney, or agent, at any general quarter sessions, unless regularly admitted, pursuant to the 2 Geo. 2. c. 23. 66. s. 19.

By 22 Geo. 2. c. 45. no attorney shall permit any person not so admitted to practise at sessions in his name. *ib.* s. 20

The bill of an attorney for business done at sessions may be taxed in the king's bench. *ib.* s. 21

By 22 Geo. 2. c. 46. no clerk of the peace, or sheriff, or either of their deputies, shall practise at sessions. *ib.* s. 22

In what manner the clerk of the peace is to be appointed. *ib.* (N)

OF THE JURISDICTION OF THE SESSIONS.

The sessions may proceed by *presentment*, by *information*, and by *indictment*. *ib.* s. 23

The justices in sessions have authority by the commission of the peace to hear and determine on felonies and trespasses. *ib.* s. 24

If a statute, giving the sessions jurisdiction, be repealed between the first hearing and the final determination, it is an abolition of the authority of the sessions. 67. s. 25

Where an authority is given to two justices of the peace to do any act, the sessions have a concurrent jurisdiction, except an appeal be given therein to the sessions. *ib.* s. 26

If a statute direct a proceeding at a *special sessions*, an original order made at a *general quarter sessions* is bad. *ib.* s. 27

The quarter sessions may proceed by *information* on 5 Eliz. c. 4. s. 39. *ib.* s. 28

If a statute authorize the sessions to "hear and determine," without saying by *information*, they must proceed by *indictment*. *ib.*

The sessions have no power to judge of the validity of a deed. 67. s. 29

The sessions have no jurisdiction over new-created offences which are not against the peace, unless the statute give them such jurisdiction in express terms. *ib.* s. 30

Instances given. *ib.*

The sessions are bound to make a direct and final judgment, and cannot refer the determination of any matter that comes before them to other persons. *ib.* s. 31

But the sessions may, by the consent of the parties, refer a thing to another to examine, and may report to the court to determine upon. *ib.* s. 31

The sessions may, by the common law, proceed to outlawry on indictments found at sessions. *ib.* s. 32

By 21 Jac. 1. c. 4. the like process may be commenced and prosecuted at sessions, on any penal statute on which a common informer may proceed, as in an action of trespass *vi et armis* at the common law. 68. s. 32

The sessions cannot award an *attachment* for a contempt in not obeying its orders, but must proceed against the party by *indictment*. *ib.*

IN WHAT CASE THE SESSIONS MAY AMEND PROCEEDINGS.

Geo. 2. c. 19. the sessions, upon all ap-

peals against *judgments* or *orders*, may cause any defect of form in such original judgments or orders to be amended. *ib.* s. 34

IN WHAT CASE THE SESSIONS MAY AWARD COSTS.

By 8 & 9 Will. 3. c. 30. s. 3. the quarter sessions may, on any appeal concerning *settlements*, award such *costs* and *charges* as they think reasonable to be paid by the party against whom the appeal is determined. 68. s. 35

By 8 & 9 Will. 3. c. 30. s. 6. the appeal may be heard at a general or quarter sessions. 68. s. 36

By 9 Geo. 1. c. 7. s. 9. the justices at the quarter sessions at which the appeal is determined, may award to the appellant parish, if the appeal is determined in favour of such parish, so much money as shall appear to be reasonable, to be paid by the respondents, &c. 69. s. 37

By 17 Geo. 2. c. 38. the sessions may order the party in whose favour an appeal against a poor's-rate is determined, reasonable costs, &c. 69. s. 38

By 13 Geo. 3. c. 78 s. 30. on appeal against any order made under the *highway act*, the sessions may award costs *ib.* s. 39

By 18 Geo. 3. c. 19. s. 5. on appeal by overseers against *constables' accounts*, the sessions may award costs. 70. s. 41

And if the party do not pay such costs as the sessions award, an indictment will lie for disobeying the order. 71. s. 42

A *mandamus* lies to the sessions to allow *costs* and *charges*, as directed by the above statute. *ib.* s. 43

The sessions need not state in an order for costs and charges, the particular items of expense on which they are allowed. *ib.* s. 44

The sessions cannot order costs on the mere adjournment of an appeal. *ib.* s. 45

WHEN THE SESSIONS MAY MAKE ORDER RESPECTING THE COUNTY.

By 9. Geo. 3. c. 20. the sessions, on presentment by a grand jury of the state of the shire-hall, may order it to be repaired, &c. *ib.* s. 46

By 14 Geo. 3. c. 59. the sessions may once a-year order the county gaol to be cleaned, and better regulated. 71. s. 47

By 14 Geo. 3. c. 59. the quarter sessions may order the several courts of justice in the county to be properly ventilated, the prisoners to be clothed, the cells to be made commodious, &c. 72. s. 48

By 14 Geo. 3. c. 59. s. 3. the sessions may order the expenses respecting the county gaols, prisons, and courts of justice, to be levied by rates, &c. *ib.* s. 49

If a fine be imposed on a county which the sessions think illegal, they may order the treasurer to pay the expense of trying the question at law, out of the county stock. 72. s. 50

The sessions also may order the treasurer of the county to pay the expense of litigating any question respecting the repair of highways, bridges, &c. *ib.*

SEWERS.

SEWERS.

A special commission of *oyer and terminer* may be granted for inquiring of sewers, &c. 25. s. 28

A *certiorari* lies from king's bench to commissioners of sewers, notwithstanding 13 Eliz. c. 9. says, they shall not be compelled to make certificate of their proceedings. 400

But the Court, before they will suffer the return to be filed, will hear affidavits concerning the facts. 403. s. 34

SHERIFF.

See TORN.

Every sheriff is a principal conservator of the peace within his county, and may award process of the peace. 53. s. 4

The sheriff is bound to return proper juries to the sessions of the peace. 63. s. 7

By *stat. West.* the sheriff shall have counter rolls with the coroner, and attend with him to take appeals. 84

The sheriff having a justice's warrant directed to him, may authorise others to execute it. 135. s. 29

Justices of assize may punish sheriffs for letting persons to bail who are not bailable. 140. s. 8, 9

By 4 Edw. 3. c. 2. sheriffs shall not let to mainprize those who are indicted or taken before justices of the peace. See BAIL. 140

By 14 Edw. 3. c. 10. the sheriffs shall have the custody of gaols. 176. s. 6

In what cases the court may proceed by attachment against sheriffs for not executing a writ. 208

Where the court may proceed by attachment against a sheriff for *oppressive practice.* *ib.*

Where the court may proceed by attachment against a sheriff for *not executing a writ effectually.* 209. s. 4

Where the court may proceed by attachment against a sheriff for *making a false return to a writ.* *ib.*

In all suits where the king is a party, as in indictments and informations, the process ought to be executed by the sheriff, and not by the bailiff of any franchise, whether it have the clause of *non omittas* or not. 396

The statute 23 Hen. 6. c. 8. which enacts, "that sheriffs shall continue in their office no longer than one year," cannot be dispensed with. 542

SIGN MANUAL.

The sign manual importing a pardon cannot be pleaded as a pardon, neither will it restore the competency of a witness. 551. (N.)

The sign manual is usually the first progress to a pardon, upon the circuits and at the Old Bailey. 552

SIMILITUDE.

Although similitude of hands was admitted as good evidence in *Sidney's case*, and the propriety of such evidence was only doubted in the *case of the Seven Bishops*, yet it is

held that similitude of hands is not evidence in any criminal case. 597. s. 50

SIMONY.

How far a *simonist* may take advantage of a pardon for *simony.* 549. s. 56

Quære, whether a pardon of all misprisions, &c. &c. will extend to *simony.* 540. s. 26

SMUGGLERS.

See REWARD.

SOJOURNER.

A sojourner being in the house at the time of the robbery, doth not bring the case within the 5 & 6 Edw. 6. c. 9. which excludes robbery from clergy committed in any dwelling-house, *the owner, his wife, children, or servants, being therein.* 494

SON ASSAULT.

Where pleadable in *bar* to an appeal of *mayhem.* 228

SPECIAL HEIR.

No special heir by custom of *Borough English*, or otherwise, can bring an appeal of death. 235

SPINSTER.

Where a gentleman or gentlewoman is named *spinster*, the wrong addition may be pleaded in abatement. 259. s. 103

"Spinster" is a good addition for the estate and degree of a woman, and *perhaps* also for that of a man. 262. s. 111

STAR-CHAMBER.

Whether the star-chamber had a general superintendency over other courts. 408

STATUTES.

A statute making a new law concerning an old offence, appointing certain justices to execute it, does not exclude the jurisdiction of the king's bench. 7

A statute which appoints that all crimes of a certain denomination shall be tried before certain judges, does not exclude the jurisdiction of the king's bench without express negative words. 8

Where a statute creates a new offence, and erects a new jurisdiction for the punishment of it, and prescribes a certain method of proceeding, it is questionable whether the king's bench hath jurisdiction. *ib.*

Affirmative statutes shall not, without express words, be construed to take away the jurisdiction of an ancient court. 12

Whether the statute *de officio coronatoris*, being directory and in affirmance of the common law, leave the power of the coroner as it found it. 79, 80

Wherever a statute gives to any one justice of peace a jurisdiction over any offence, or a power to require a person to do a certain thing, it impliedly gives a power to such justice to issue a warrant for the purpose. 133

- All statutes are to be construed strictly in favour of life, and no parallel case which comes within the same mischief shall be construed to be within the purview of them, unless it can be brought within the meaning of the words. 188. s. 16. 482
- Wherever a statute *prohibits* a matter of public grievance, or commands a matter of public convenience, an offender is punishable at the suit of the party grieved, and by way of indictment, unless such proceeding be expressly excluded. 289
- A statute which extends to private persons, or to matters of a private nature, will not bear an indictment. *ib.*
- Where a statute makes a new offence which was no way prohibited by the common law, and appoints a particular manner of proceeding, without mentioning indictment, no indictment can be maintained. 4
- If a statute give a recovery by action of debt, bill, plaint or information, or otherwise, it authorises a proceeding by indictment. 290
- Where a statute adds a further penalty to an offence prohibited by the common law, the offender, at the election of the prosecutor, may be indicted at common law. *ib.*
- If such indictment conclude *contra formam statuti*, and cannot be made good upon the statute, it may be maintained as at common law, and the words *contra formam statuti* rejected. 290
- Where new created offences are only prohibited by a general prohibitory clause of a statute, an indictment will lie. *ib.* (N) 2
- Where there is a prohibitory particular clause specifying only particular remedies, there such particular remedy must be pursued. *ib.*
- Where an offence, not so at common law, is made an offence by statute, an indictment will lie where there is a substantive prohibitory clause, though there be afterwards a particular provision and remedy given. *ib.*
- No indictment will lie where the statute is not *prohibitory*, but only inflicts the forfeiture, and specifies the remedy. *ib.*
- Where the offence was punishable before the statute which prescribes a particular method of punishing it, there such particular method is *cumulative*. *ib.*
- But where a statute appoints a particular mode of punishment for an offence which was not punishable before, there the *particular mode* must be pursued, and not the common-law mode of indictment. *ib.*
- An information may be brought for offences against statutes unless a different mode is prescribed. *ib.*
- What ought to be the form of the body of an indictment on a statute. See INDICTMENT.
- Where an offence is made felony by statute, it shall have the benefit of clergy, unless it be expressly excluded from it. 476
- Where a person is denied clergy by a statute excluding it from the crime, the indictment and evidence must expressly bring the case within the words. 476
- Where a statute makes an offence treason or felony, it gives it the like incidents that belong to a treason or felony at common law. *ib.*
- Whether a statute may be dispensed with. (See PARDON, DISPENSATION).
- How the words "*such offences*" and "*such offenders*" in a statute, shall be construed to mean "*such in mischief*" and "*such in inconvenience*." 481. s. 43.
- STEWARD.
- See PEERS.
- The nature of the office of lord high steward. 5
- None under the degree of nobility can be appointed lord high steward. 6
- The high steward, in the court of the high steward, is sole judge in matters of law. 6. *notis.*
- The lord high steward is, by virtue of his office, a conservator of the peace. 38. s. 2
- In what manner a lord high steward is to be created for the trial of a peer, and the proceedings therein. 581
- In what manner the peers may require the opinion of the high steward, or of the judges. 585
- Whether the court of the high steward may be adjourned. 586
- A writ of error lies in the king's bench of an attainder before the lord high steward. 502. s. 17
- An indictment before J. S. steward, must shew to whom he is steward. ch. 25. s. 119
- STOCKS.
- See TORN.
- STROKE.
- In what manner the death must be laid in an indictment or appeal where the party dies on one day of a stroke given on another. (See APPEAL.)
- Whether it be necessary to shew the time of the stroke as well as the death. 254. s. 90
- The word *percussit* necessary in an appeal of death where the fact will bear it. 250. s. 82
- SUBPENA.
- In prosecutions for misdemeanors the defendant may take out *subpna's* of course. 612. s. 165
- And since the statute 1 Anne 9. which ordains that the witnesses for the prisoner shall be sworn, process may be taken out against them in any case. 612
- SUMMONS.
- Whether a sessions of the peace may be holden without summons. (See SESSIONS.) ch. 8. s. 44
- SUNDAY.
- An indictment cannot be well taken on a Sunday. 92. s. 9
- SUPERSEDEAS.
- See SESSIONS.
- The authority of justices of *oyer and terminer* may

may be suspended by writ of *supersedeas*, on proof that the commission was unduly granted. 20. s. 8

A precept by two justices for the summon of a session of the peace cannot be *supereded* but by writ out of chancery. 63

How far a *certiorari* shall be a *supersedeas* to the Court below (See *CERTIORARI*). 63

On a pardon allowed in the king's bench, the party may have a *supersedeas* to the exchequer to stop the process there on an estreated amercement. 552. s. 69

How far a defendant coming in by *capias utlagatum* may avoid an outlawry in the common pleas by shewing that he purchased a *supersedeas*, and delivered it before the *quinto extractus*. 630

SURETY.

In what case the pardon of the principal will operate as a discharge of the surety. 539. s. 23

SURGEONS.

Surgeons are exempted, during the time they practise, from serving the office of constable. 101

SURNAME.

See *ABATEMENT. NAME. MISNOMER.*

If a writ of appeal omit the appellant's surname, being under the degree of nobility, it may be abated by the court *ex officio*. 259. s. 101

If there be a mistake of the surname of an appellant, the writ may be abated upon the exception or plea of the party. *ib.* s. 101

SURPLUSAGE.

Where there is a *sufficient certainty*, the addition of a farther uncertain or unintelligible description will do no hurt, but shall be rejected as superabundant and surplusage. 200

Where a special verdict is perfect, without certain words therein inserted, they may be rejected as surplus. 623. s. 10

SURVIVOR.

Where two joint owners of goods are robbed, the survivor may bring an appeal. 237

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See *BAIL. ARREST.*

TAIL.

In what cases an estate in tail is forfeited by an attainder of treason or felony. 637—639

TAVERNS.

Inordinate haunters of taverns are indictable at the torn. 106

TAXATION.

It is a contempt not to pay costs after taxation by the master. 222. s. 37

TENOR.

By the charter of the city of London, only the tenor of a record can be removed from thence. 356

And it is said, this extends to *Middlesex* as well as *London*. *ib.* note in *margin*.

How far a *variance* is fatal when an instrument is set out in an indictment *secundum tenorem sequentem*. 615. s. 180

TENURE.

Who may be conservators of the peace by tenure. *ch.* 8. s. 7

TESTE.

Where the king's bench proceeds on an offence removed by *certiorari*, there must be fifteen days between the *teste* and return of every process. 10. s. 14

The precept for a session of the peace must be tested by two justices. 63. s. 7

Process for treason, felony, or trespass, from a county palatine, shall be tested in the name of him who hath the franchise. 394. s. 7.

Process from the king's bench ought to be under the *teste* of the chief justice. *ib.* s. 8

Process ought to be under the *teste* of the first in a commission. *ib.*

What shall be removed by a writ of error, or *recordare*, between the *teste* and return. 414. s. 73

Where a Term intervenes between the *teste* and return of a *capias*, it is discontinuance. 417. s. 88

If process be tested after the day of the return of the first process, it is discontinuance. *ib.* s. 85

TITLES.

See *CERTIORARI.*

TORN.

The sheriff's torn is the king's court of record, for redressing *common grievances* within the county. 90

The sheriff ought to make his torn or circuit throughout every hundred in his county twice in the year. *ib.* s. 2

All the inhabitants of each hundred above the age of twelve years, unless specially exempted, are bound to attend the torn, and take the oath of allegiance, &c. *ib.*

The words *frank pledge* or *tything* explained. *ib.*

The style of the sheriff's torn. *ib.* s. 3

By *MAGNA CHARTA*, the torn shall be held only twice a year in every hundred, at the accustomed place. 91. s. 4

By 31 Edw. 3. c. 15. the torn is to be held within a month after *Easter* and *Michaelmas*. *ib.*

The sheriff is indictable for holding his torn at another time, or at an unusual place, and an indictment found thereon is void. *ib.* s. 6

Quare, if these statutes extend to the court-leet. *ib.* s. 8

Every caption of an indictment at the torn ought to set forth the day whereon it was taken. 92. s. 9

All persons who are bound to appear at the torn are not within the *stat. Merton*, which allows *suit service* to be performed by attorney. *ib.* s. 10

All servants as well as masters are bound to pay such suit; and if a master suffered a servant

- servant to continue a year and a day without being enrolled in a *decennary*, he was *amerciable*. *ib.*
- But *tenants* in *ancient demesne*, parsons, peers, and women, are exempted from attending the *torn*. *ib.* s. 11
- No man can belong to two leets, and therefore he shall do service at that only within the precincts of which *he resides or sleeps*. *ib.* s. 12
- The sheriff or his steward may *hear and determine* any offence within his jurisdiction, being indicted before him, except **PLEAS OF THE CROWN**. 93. s. 13
- This exception does not restrain the power of *taking* indictments or presentments. *ib.* s. 14
- The sheriff in his *torn*, being a judge of record, may fine an offender for a contempt of court, or for a non-compliance with that which the jurisdiction requires. *ib.*
- Such fines must be several, and not joint, except a whole vill be fined. *ib.* s. 16
- The sheriff may award a fine or amercement for contempts, &c. and amerce any person *indicted* for an offence not capital within his jurisdiction without any farther proceeding or trial. 94. s. 17
- An amercement being a judgment, that the party shall be *in misericordia domini regis*, and a judicial act, does not require the assent of a jury. *ib.* s. 18
- The award of a *misericordia* is only to authorise others, *viz.* assessors, to fix the sum which the party is to pay to the king; and therefore there is no necessity to mention a sum certain. 94
- If the amercement be for a contempt of court, it may be settled by the judge himself, and needs no other *assessment*. 95. s. 19
- No fine for a contempt is within the statutes which require an amercement to be *assessed*. *ib.*
- The king or lord have an election of common right either to distrain or to bring an action of debt for such fines and amercements. *ib.* s. 20
- Every *arowry* of this kind ought expressly to shew that the offence was committed within the jurisdiction of the court. *ib.* s. 21
- It is not necessary to allege it in the presentment itself, but such an allegation will perhaps supply the want of the averment of jurisdiction in the pleadings. *ib.*
- Quare*, if it be necessary expressly to allege that the offence was committed as well as that it was presented, &c. *ib.*
- It is safest in setting forth a presentment, or an assessment of an amercement, to shew the names of the presentors and assessorers. *Sed quare*, if the names of the presentors are necessary in replevin. 96. s. 23
- Notice of the holding of the court need not be shewn, for, being of record, all persons within the jurisdiction shall be intended to have notice of it. *ib.* s. 24
- It is not necessary in an *arowry* for a distress for a fine or amercement to shew that the party had previous notice what it was. *ib.*
- Distress is incident of common right to the sheriff's *torn*, if the offence be incidental to the jurisdiction. *ib.*
- But for a duty of a private nature no distress can be made without a special custom. *ib.*
- The sheriff may distrain any lands of the offender within the county or precinct, except lands in the king's possession, for they are wholly out of the jurisdiction of the court. 96. s. 26
- The sheriff may distrain in the highway notwithstanding the *stat. Marlebridge*. *ib.* s. 27
- Fines and amercements being for a personal offence, no stranger's beasts can lawfully be distrained for them, although they have been *levant et couchant* on the lands of the offender. *ib.* s. 28
- The goods distrained may be sold within a reasonable time after the distress. 97. s. 29
- No bailiff can distrain without a special warrant for so doing, and in justification of such distress the warrant must be set forth in the *arowry*. *ib.* s. 30
- In *replevin*, it must be averred that the defendant was guilty. In trespass the conviction is sufficient to justify the officer: but the amercement must appear to have been by the court, and not by the jury. *ib.* *notis.*
- In *nusance*, the sheriff may amerce the person presented, or order an abatement without any amercement, and if he disobey such order he shall forfeit without further proceeding. *ib.* s. 33.
- No such pain can be *afforded* for any less sum than what is at first set. *ib.*
- The authority of the sheriff in his *torn* in relation to the appointment of constables, and the nature and antiquity of that office. (*See CONSTABLES*) 97—103
- The sheriff in his *torn* may inquire of **ALL TREASONS**, except such as are created by statute. 105
- The sheriff may also enquire of all **FELONIES** at common law, except *rape*, which being an offence made felony by statute, though originally a felony at common law, he can enquire of it as a *trespass* only. *ib.* s. 52
- An assault and battery, *if there be bloodshed*, is inquirable in the *torn*; for otherwise it is not a common grievance, but a private injury only. 105
- The common breaking of fences and pound breaches are within the cognizance of the *torn*. 106. s. 55. 56
- Purprestures, mortmains, *treasure trove*, waifs, strays, wrecks, &c. belonging to the king are inquirable at the *torn*. *Sed Quare* as to the seizure of such things as belong to the lord. *ib.* s. 57
- All common nuisances, annoyances, bawdy-houses, victuallers, assize of beer and ale (*but not the assize of bread*), neglecting to hold fairs, false weights and measures, common barrators, scolds, eaves-droppers, &c. &c.

See are within the jurisdiction of the torn. *ib.*

Every vill within the precinct of a torn shall have a pair of stocks on pain of 5*l.* *ib.* s. 59

A man cannot be amerced in a court leet for surcharging a common. 107. s. 61

Quere, whether a matter concerning the private interest of the lord, or of the inhabitants of a leet, can be brought within the jurisdiction of the torn by custom. *ib.* s. 62.

The offence need not arise within the particular hundred; it is triable if it arise within the county; but *presentations* must be of offences within the hundred. *ib.*

The inhabitants of one bailiwick shall not be compellable to serve as jurors for another. *ib.*

No offence arising within the precincts of a leet is enquirable at the torn, unless on the default of the leet, which neglect must be alleged in the pleadings. *ib.*

By *Stat. West.* 2, c. 18. the sheriff shall take no inquest but by twelve lawful men at least, who shall put their seals to such inquisitions. 108. s. 64

This act respects such inquisitions only as are a foundation for imprisonment, and not inquisitions for offences for which the party cannot be apprehended. 108. *Note (7)*

If there be more than twelve jurors, the seals of any twelve of them are sufficient. *ib.* s. 65

By 1 *Rich.* 3, c. 4. jurors at the torn shall have yearly 20*s.* freehold, or 26*s.* 8*d.* copyhold, on pain of 40*s.* and rendering their indictments void. *ib.* s. 66

Quere, If courts leet are within these statutes. *ib.*

By 1 *Edw.* 3, c. 17. indictments taken at the torn shall be by roll indented; one part to remain with the indictors, and the other with the Court, so that one part may be delivered to the justices of assize. *ib.* s. 68

Presentments, not being necessary to be presented to the justices, are not within these statutes: they need neither to be indented nor sealed. *ib.* *Note (9)*

This statute extends to courts leet. *ib.* s. 69

The general practice of the torn was to impanel both a grand and petty jury. —Presentments were made by the headborough, affirmed by the petty jury, and then confirmed by the grand jury. 109. s. 70

By 28 *Edw.* 3, c. 9. the sheriff is restrained from taking indictments by commission or writ. *ib.* s. 71.

By 1 *Edw.* 4, c. 2. all sheriffs in their torns, except in London, are restrained from awarding process to levy fines and amercedments on indictments or presentments found before them, and are ordered to deliver such indictments, &c. to the justices of the peace at their next sessions, who shall have power to award process thereon, &c. &c. *ib.*

Not only the judge of the torn, by this statute, is punishable for awarding such forbidden process, but also the officer for denying it. 110. s. 74

In what manner indictments in the sheriff's torn may be traversed, tried, and determined. 111

The torn has no power to try a traverse. *ib.*

TRANSPORTATION.

See BURNING IN THE HAND.

Transportation is a species of punishment unknown to the common law. 507

The origin of this punishment. 508

By 4 *Geo.* 1, c. 11. an offender convicted of grand or petit larceny, or other offence within the benefit of clergy, and liable only to burning in the hand, or whipping, may be transported to *America* for seven years. *ib.*

Where an offender is convicted of any offence excluded from the benefit of clergy, and the king shall extend his mercy on condition of transportation to *America*, and such intention shall be signified by a secretary of state, a court of competent authority may allow such offender the benefit of a pardon under the great seal. *ib.* s. 139

Buyers or receivers of stolen goods *knowingly* shall be transported to *America* for fourteen years, &c. &c. *ib.* s. 140

The king may at any time *dispense* with any such transportation, and allow the return of the offender. *ib.* s. 141

Offenders transported, who shall serve the term of transportation, shall be considered as pardoned of the crime for which they were transported. *ib.* s. 142

By 6 *Geo.* 1, c. 23. the powers of 4 *Geo.* 1, c. 11. are given to any subsequent court of like authority, notwithstanding such subsequent court may be held at a different place from that in which the offender was tried and convicted. 509

By 5 *Geo.* 4, ch. 84. the laws respecting transportation reduced into one act. *Addenda.*

TRAVERSE

See ESCAPE, APPEAL, BREAKING PRISON, CORONER, TORN.

TREASON.

Justices of gaol-delivery have power to deliver the gaol of persons, committed for high treason. 29. s. 4. 34. s. 4

Treason being against the peace of the king, any justice of the peace, either on his own knowledge, or the complaint of others, may cause any person to be apprehended for this offence; and may take the examination of such offender, and the information of the witnesses pursuant to the statute of Philip and Mary. 54

The statute of 6 *Hen.* 8, c. 6, which authorises the king's bench to send down the bodies of felons and murderers, together with their indictments, to be tried in the counties where the offences were committed, shall not be extended to high treason. 9. s. 9

Persons apprehended of dangerous riots *savouri*

- swearing* of high treason are excluded from *reprieve* by the sheriff by the *stat. West* 152. s. 45.
- The king's bench may bail a person committed for high treason. 170. *notis*
- Quere*, Whether one who knowingly opposes the arrest of a person *guilty* of high treason be therefore guilty of high treason himself. 182. s. 1
- Whether the offence of breaking prison can ever amount to the crime of high treason. (See *BREAKING PRISON*). 183, 184
- In escape, if the prisoner committed were guilty of high treason, it is high treason whether the party be ever convicted or not. 197
- A stranger who knowingly *rescues* a person committed for and guilty of high treason, is in all cases guilty of high treason. 202
- The offender may be *immediately* arraigned for the high treason, or for the misprision. *ib.*
- Standing mute upon an arraignment of high treason is equivalent to a conviction. 461
- The privilege of sanctuary never extended to high treason. 469
- There are no accessaries in high treason. 437. s. 2
- Whatever will make an accessory before in felony, will make him a principal in high treason. *ib.*
- A distinction applied to this rule between treasons touching the king's death and other inferior species of treason, respecting the mode of trial. *ib.* (N) 1
- The same receipt of an offender, which will make the receiver an accessory after the fact in felony, will make him a principal in high treason. *ib.* s. 3
- In what manner treason is excluded from the benefit of clergy (See *CLERGY*).
- By 7. Will. 3. c. 3. persons indicted of high treason shall make full defence by two counsel. 556
- In what manner a person indicted of high treason shall have a copy of his indictment, &c. &c. (See *COPY OF INDICTMENT*).
- What evidence is necessary to support an indictment of high treason. 599
- What forfeiture ensues upon an attainder of high treason (See *FORFEITURE*). ch. 49
- For the trial of treasons beyond the sea (See *COUNTY INDICTMENT*).
- The judgment in high treason. 625.
- properly and directly against *the peace*, but also all others which are only so by construction. 55. s. 63
- There can be no accessaries in trespass. 437. s. 2
- Whatsoever will make a man an accessory before in felony, will make him a principal in trespass. *ib.*
- Wherever a man commands another to commit a trespass, and he does it, the person commanding is equally guilty as if he had done it himself. *ib.*
- Whoever agrees to a trespass on *lands or goods*, thereby becomes a principal: but not in a trespass on *the person*. *ib.* s. 4
- No one shall be adjudged a principal in any common trespass, for barely receiving, &c. the offender. 438.
- What offences shall be included under a general pardon of *all* trespasses. 540. s. 26
- On an indictment for felony, if the offence amount only to trespass, the offender cannot be found guilty of the trespass on that indictment. *Sed Quere*, if the special circumstances of the trespass be set forth. 621.
- If a jury find a special verdict for felony, and it be adjudged only trespass, *quere*, if judgment may be given on it for trespass only. *ib.*
- On an indictment for trespass, if the fact appear felonious, judgment may be given for trespass, for it is in the election of the king to proceed either for the trespass or the felony. *ib.*
- Whether a former recovery or acquittal may be pleaded in bar of trespass (See *AUTREFOIS AQUIT*).

TRIAL.

See *COUNTY*.

- Stewards of leets cannot try any person indicted before them, but must refer the trial to the gaol-delivery. 92. s. 13
- In what manner indictments in the sheriff's torn are to be tried. 111. s. 75
- Neither the torn nor the leet have any power to try a traverse. *ib.* s. 76
- Justices of peace may try a man indicted before the sheriff in his torn. *ib.*
- By 1 & 2 Phil. and Mary, c. 10. all trials of treason shall be according to the common law: constructions on this statute. 353
- In what manner the *accessary* shall be tried where the offence arises in a different county from that of the *principal* (See *ACCESSARY*).
- In what cases and in what manner it shall be tried, whether one who stands mute do so of malice or of the act of God. 459
- In what places treasons and murders, examined by the privy council shall be tried. 569
- Of trial by peers (See *PEERS*). ch. 44
- Of trial by battle (See *BATTLE*). ch. 45
- Of trial by jury. ch. 40
- Of trial by certificate (See *CERTIFICATE*). 466

TUMBREL.

TREASURE TROVE.

See *CORONER*. *TORN*.

TRESPASS.

- A court which is not of record cannot even hold plea of a common trespass *vi et armis*. 4. s. 14
- The word "*trespass*," is of a very general extent, and in a large sense not only comprehends all inferior offences which are

TUMBREL.

Whether every *vill* be bound by prescription to keep a TUMBREL. 113. s. 5

VACATION.

By the *habeas corpus act*, the lord chancellor, lord keeper, any justice of either bench, or baron of the exchequer, may grant a *habeas corpus* in Vacation-time. 142

And this writ does not expire with the Vacation; but the prisoner may be brought into court upon it, in full Term. 144. s. 52. note

By 5 & 6 Will. & Mary. c. 11. a writ of *certiorari* may be granted in Vacation-time, by any of the justices of the king's bench, to remove an indictment or presentment from any general quarter-sessions. 403

VAGABONDS.

Vagabonds were indictable at the torn. 106

VANQUISHMENT.

See APPEAL. APPROVER.

VARIANCE.

In appeal, if the declaration lay the offence in the reign of a present king where the writ supposed it to have been in the reign of a former king, it is such a variance, that it ought to be abated by the court *ex officio*. 258. s. 98

So also where the defendant is mis-named; or the fact not set forth with sufficient certainty; or the offence be laid in a different county; or, &c. &c. *ib.* s. 99. 101

What is such a variance between the *certiorari* and the return, as shall prevent the removal of the record. 414, 415

What is such a variance between the original and the process as shall cause a discontinuance. 118

Where a variance between the record of the former acquittal and the indictment or appeal to which it is pleaded, may be helped. 516

If there be a variance between the record on which a man is convicted or attainted, and his charter of pardon; yet if there be no repugnancy to intend that the same person or thing are meant in both, it may be supplied by proper averments: instances given. 551

Where the time proved varies from that laid in the indictment, the jury may find the defendant guilty generally, or they may find him guilty specially on the day proved. 451. s. 180

Where a certain place is made part of the description of the fact charged, the least variation as to such place between the evidence and the indictment is fatal. 614. s. 181

Where one is indicted for writing a libel *secundum tenorem sequentem*, or for forging a deed so and so described, any the least variation between the libel recited or the

deed described, and those given in evidence, is fatal. 615. s. 180

A variance between an indictment and appeal of death, as to the instrumental cause, is no way material, so that the party be proved to have died by the same kind of death. 616. s. 182

Whatever variance is material with respect to the principal, is equally so with respect to the accessory. 616

Where an indictment sets forth all the special matter in respect whereof the law implies malice, a variance between the indictment and the evidence as to the circumstances do no hurt, so that the substance of the matter be found. 616. s. 183

How far a variance in the recital of a statute upon which an indictment is founded will be fatal. (See INDICTMENT.)

VENDITIONI EXPONAS.

In what case a sheriff may be authorised by *venditioni exponas* to sell the goods after the delivery of a *certiorari*. 411

VERDICT.

A jury sworn and charged in a capital case cannot be discharged till they have given a verdict; *quare*, if the prisoner consent (See *vide Foster* 29 to 39). 619. s. 1

In all capital cases the jury must give their verdict openly in court; they cannot give a privy verdict. 619. s. 2

The jury may give a special verdict in any criminal case, whether capital or not capital. 620. s. 3

In murder, on not guilty, the jury are not bound to enquire whether the prisoner be guilty of manslaughter. 620. s. 4

On an indictment of murder, the verdict may find generally manslaughter *se defendendo*, or *per infortunium*; but it must also say, not guilty of the murder. *ib.*

On an indictment for grand larceny, the verdict may find it petty larceny only. *ib.* s. 6

On an indictment for robbery and putting in fear, the jury may find guilty of the felony, not guilty of the robbery. *ib.*

So on the 8 Eliz. c. 4. the jury may find, guilty of *stealing*, but not *privately*. *ib.*

On an indictment for petty treason, the verdict may find murder or manslaughter, as the case may be. *ib.*

In burglary, where a *cepit et asportavit* is also laid, the prisoner may be acquitted of the burglary and found guilty of the felony. *ib.*

But he cannot, on a charge so laid, be acquitted of the felony, and found guilty of the burglary; because such a verdict acquits him of the *intention to commit felony*, in which the crime of burglary consists. *ib.* 620

A verdict found the prisoner "guilty of stealing in the dwelling-house, not guilty of the burglary," and it was held, that the acquittal of the burglary was an acquittal of stealing in the dwelling-house. 621. (N) "Not

- "Not guilty of breaking," but "guilty of stealing in the dwelling-house," is a good verdict in burglary to oust the offender of clergy on the 12 Ann. 621. (N)
- On the 10 and 11 Will. 3, c. 23. for *privately* stealing to the value of 5s. in a shop, the verdict may reduce the value under the sum laid. *ib.*
- On an indictment for felony *generally*, if it appears to be only a trespass, yet the offender cannot, on such indictment, be found guilty of the trespass. *Sed quare*, if the special circumstances be set forth. *ib.*
- On a special verdict for felony, judgment may be given for trespass. *ib.*
- On an indictment for trespass, if the fact appear to have been felony, the prisoner may be found guilty of the trespass; for it is in the election of the king to proceed either for the trespass or the felony. *Sed quare.* *ib.*
- A verdict of acquittal on the coroner's inquest ought to shew what other person did the fact. *ib.* s. 7
- Where two only are found guilty of a riot, or only one of a conspiracy, they having been indicted *with others*, judgment shall be given. 622. s. 8. & (N)
- Six were indicted for a riot; two died before trial; two were acquitted; and two found guilty; and judgment was given on this verdict. 622. (N)
- On an indictment against several for an offence which may be done as well by one as by more, the verdict may find one only guilty, and acquit the rest. *ib.*
- So where defendants are jointly charged, some may be acquitted, and others found guilty. *ib.*
- Unless an offence consist in doing some entire thing, the defendant may be found guilty for a less time and degree than is laid. *ib.*
- The Court in judging of a special verdict is confined to the facts found; and cannot supply any defect by implication, &c. 622. s. 9
- The precision with which a special verdict must find the fact. *ib.*
- If the special verdict do not sufficiently ascertain the fact, *a venire facias de novo* shall issue. *ib.* (N) 2
- A special verdict cannot be amended in capital cases. *Sed quare*, if there are notes to amend it by. *ib.*
- A special verdict amended in forgery, because the fault was committed by the defendant. *ib.*
- If the imperfection of a special verdict be such as that judgment cannot be given on it, it is bad. *ib.* (N). 2
- If there be several issues, and the jury only find some of them, yet judgment may be given; for in a general verdict upon several counts, if any one of them is good, it is sufficient in criminal cases. *ib.*
- Words repugnant, in a verdict which would be complete without them, shall be rejected as surplusage. 623. s. 10
- On an acquittal against manifest evidence, the Court may, before the verdict is recorded, but not after, order the jury to reconsider it. 623. s. 11
- Instances of surety for the good behaviour after verdict of acquittal, and of commitment for contempt of court during trial. *ib.*
- The Court cannot set aside a verdict which acquits a defendant of a prosecution properly criminal. *ib.*
- A verdict which convicts a prisoner may be set aside, as against evidence or the direction of the judge, or for mis-trial. *ib.*
- By 14 Geo. 3, c. 20. prisoners acquitted shall be discharged without paying any fees. *ib.* s. 13
- In what cases a person may be tried upon a verdict found without an indictment. (*See INDICTMENT*).

VERGE.

Before what coroners offences within the verge are indictable. (*See CORONER*). 76

VI ET ARMIS.

The words "*vi et armis*" are not necessary in an appeal of death. 252. s. 8

By 37 Hen. 8, c. 8. the words *vi et armis* are not necessary in indictments. 332

But indictments of *trespass*, and such like, are still held insufficient, without the words *vi et armis*. 333

VIEW.

See CORONER.

VILL.

See PARISH AND WARD.

Wherever a place is generally alleged in pleading, the law will intend it to be a vill, unless it be mentioned with some addition which shews the contrary. 256

VILLEIN.

A *villain* cannot have an appeal of larceny against his lord. 237

The plea of *villinage*, and the general issue, not to be pleaded by the lord at the same time. 273

VISNE.

In an appeal, the fact must be laid in some place from whence a *visne* may come. 255. s. 8

A *visne* may come from any place which is of so small a compass that all who live in or near it may reasonably be presumed to have some knowledge of the persons living in it. *ib.*

A *visne* may come not only from a town, but from a ward, parish, hamlet, burgh, manor, castle, or even from a forest or other place out of a town. 256

A *visne* may well come *de vicineto civitatis*, &c. &c. 256

No *visne* can come from London, or the *Wolds of Sussex*, on account of their largeness. *ib.*

A visne may come from a park. 256
Quere, whether a *visne* may not come from a
 heath in a forest. *ib.*
 No *visne* can come from a liberty. *ib.*

VOID.

If it do not appear, upon the face of an indictment, that the party had authority to take it, it is void. 77

USURY.

An indictment on the statute of usury, setting forth, that the defendant took more than five in the hundred, is not good with out shewing in particular how much. 343

He who hath borrowed money upon an usurious contract is not a competent witness to prove the usury, unless he hath repaid the money borrowed. 607

WAGER or LAW.

In actions grounded on an act of a court of record, the defendant shall not be suffered to wage his law. 97

WAGES.

For what time and in what cases an *approver* is entitled to his wages. 285. s. 19. 286. s. 27

WALF.

All *walfs*, estrays, goods wrecked, &c. belonging to the king, may be inquired of at the sheriff's torn. 106. s. 57

An appellant's title to restitution in an appeal of larceny, shall not be barred by the goods being seized as *walfs*, &c. 241. s. 54

WALES.

Whether a *certiorari* lie to the courts in *Wales*. 401

In what manner indictments removed from *Wales* are to be proceeded on. *ib.*

By 26 Hen. 8, c. 6. justices of gaol-delivery, and of the peace, in the counties of *England* where the king's writ runneth next adjoining to *Wales*, may try, &c. petty treasons, felonies, murders, accessories, &c. done and committed in *Wales*. 304

This statute is not repealed by 34 and 35 Hen. 8, c. 26. but an acquittal at the grand sessions is a good bar of an indictment for the same crime in an English county. *ib.* s. 42

By 34 and 35 Hen. 8, c. 26. the transcripts of attainder, which are ordered to be certified to justices of gaol-delivery, &c. shall not extend to *Wales*. 474. s. 17

By this statute, the justices of the grand session in *Wales* are empowered to take indictments for the offences mentioned in 26 Hen. 8. c. 6. 304

WALK.

See VISNE.

WARD.

See PARISH.

WARRANT.

Warrants issued by a justice ought to be executed by the constable, as the proper officer for this purpose. 98. s. 35

A constable is indictable for refusing to execute a warrant directed to him by a justice. *ib.*

Where the law authorises a justice to direct a warrant to a private person, it implicitly authorises such person to execute it. 121. s. 21

An arrest unlawfully made by a constable without warrant cannot be made good by a warrant taken out afterwards. 129. s. 9

After an escape, the party cannot be again arrested by virtue of the first warrant; but if he surrender, he may be carried to the justice under it. *ib.*

A constable cannot justify an arrest by force of a warrant which expressly appears on the face of it to be for an offence of which the justice had no jurisdiction. 130. s. 10

But by 24 Geo. 2. c. 44. a warrant properly penned (even though the magistrate who issues it should exceed his jurisdiction) will at all events indemnify the officer who executes it ministerially. 132. note

And the constable is bound to execute the justice's warrant; for unless the contrary plainly appear, the officer ought to presume that the justice hath jurisdiction. 130. s. 10

All general warrants, except in the cases specially authorised by acts of parliament, are declared illegal. The question of general warrants stated. *ib.* (N) 2

A justice cannot grant a blank warrant; and a *fortiori* he cannot legally grant a general warrant to search for felons or stolen goods. *ib.*

The person to whom a warrant is directed, if it be within the jurisdiction of the justice granting it, may lawfully execute it. 131. s. 11

The justice alone is punishable for granting a warrant without sufficient grounds. 131. Practice has authorized the making out of warrants on the suspicion of felony before indictment found, which practice is countenanced by the statutes of Phil. & Mary. *ib.*

The propriety of this practice examined. *ib.* A warrant to apprehend all persons guilty of a crime therein specified will not justify the officer who acts under it. 132. note

In what manner an officer might justify an arrest under a warrant at common law. *ib.* For what offences a warrant may be granted. 133.

Whether a justice can justify a general warrant to search all suspected houses for stolen goods. 134. s. 17.

A warrant to seize and carry away papers in

in the case of a libel is illegal and void. 133. (N) 6
 Upon what evidence a warrant shall be granted. 134.
 In what form the warrant of a justice of the peace must be made. 134.
 In what manner such warrant is to be executed. (See ARREST.) 135.
 Whether a commitment can be justified without a warrant in writing. 174. s. 3
 In cases where the justice hath jurisdiction, the legality of his warrant will never depend on the truth of the information upon which it is granted. 179. *notis*
 What conclusion every warrant of commitment must contain. 180. s. 18.
 The want of form in a warrant will not excuse the officer or gaoler for suffering the prisoner to escape. 197. s. 24
 No fine or amercement by the sheriff's torn can be distrained for without a special warrant. 97. s. 30.

WASTE.

At common law, the king, upon an attainder of felony, had a right utterly to waste the lands of the offender. 638. s. 8
 In what cases the king is intitled to the year, day, and waste. *ib.*

WATCH.

By *stat. Winchester*, c. 4. from *Ascension* to *Michaelmas-day*, every city shall be kept by six men at each gate; every borough by twelve men; every town by six or four men; who shall watch continually every night, from sun-setting to sun-rising. 128.
 By 5. Hen. 4. c. 3. watch shall be kept on the sea-coast, and justices of the peace shall, by their commission, have authority to see the *statute of Winchester* performed in their behalf. *ib.* s. 3
 A stranger who is not an inhabitant of a town cannot be compelled to keep watch in it. *ib.* s. 4
 Every inhabitant is bound to keep watch in his turn, or to find another sufficient person to keep it for him. *ib.*
 An inhabitant is indictable for refusing to keep watch. *ib.*
Quere, whether he may be committed by the constable till he consent to do his duty. *ib.*
 By *stat. Winchester*, if any stranger do pass by the watch, he shall be arrested till the morning; and if no suspicion be found, he shall go quit; but if suspicion be found, he shall be delivered to the sheriff. *ib.* s. 5
 Persons not yielding to the watch may be arrested on a hue and cry. 128. s. 5
 How such HUE AND CRY shall be made, and the watchmen indemnified. *ib.*

WEIGHTS.

Keeping false weights or measures was indictable at the sheriff's torn. 106. s. 58

WHITEHALL.

How a larceny in lodgings, being parcel of *Whitehall*, must be laid in the indictment, to bring the offence within 5 and 6 Edw. 6. c. 9. or 39 Eliz. c. 15. 495.

WOMAN.

Women are privileged from doing *suit and service* at the sheriff's torn. 92. s. 11.
Quere, if a woman by custom may serve the office of constable by finding a deputy. 99. s. 37
 In what cases a woman may bring an appeal for the death of her husband. (See APPEAL.)
 No woman can be an approver; *sed quere*. 282. s. 6
 Women standing mute were liable to *penance* as well as men. 464. s. 17
 By 3 and 4 Will. and Mary, c. 9. where in any felony a man is entitled to clergy, a woman shall be also allowed it, and liable to similar punishment. 472. s. 8
 The judgment against a woman in all cases of treason was to be drawn to the place of execution, and there burnt: but now, by 30 Geo. 3. c. 48. they shall be hanged. 626. s. 6
 Whipping women, abolished 1 Geo. 4, c. 57. 631

WOOLLEN.

By 22 Car. 2. c. 5. stealing woollen manufactures from the rack or tenters in the night-time is excluded from clergy. 487
 But Clergy restored by Geo. 4. *ib.*

WRECK.

See TORN.

By 12 Ann. c. 18. and 26 Geo. 2. c. 19. plundering goods that have been saved from wreck is ousted of clergy. 489.

WORKHOUSE.

See HOUSE OF CORRECTION.

WRIT.

Whether commissions of *oyer and terminer* come under the notion of the word *writ*. 19
 In what cases an attachment lies for not executing a writ, or for doing it oppressively, or not executing it effectually, or for making a false return. ch. 22. s. 2 to 5
 Whether *process* without *writ* can be awarded into a different county from that wherein the Court sits. ch. 27. s. 1.

YEOMAN.

Yeoman and labourer are good additions of the state and degree of a man. 262. s. 111
 But if a *gentleman* be named with the addition of *yeoman*, it may be pleaded in abatement. *ib.*

